NORTH CAROLINA REPORTS

Vol. 269

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1966
SPRING TERM, 1967

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1967

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JUSTICES
OF THE
SUPREME COURT OF NORTH CAROLINA.

FALL TERM, 1966,
SPRING TERM, 1967.

CHIEF JUSTICE:

R. HUNT PARKER.

ASSOCIATE JUSTICES:

WILLIAM H. BOBBITT,
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SUSIE SHARP,
I. BEVERLY LAKE,
J. WILL PLESS, JR.,
JOSEPH BRANCH.

EMERGENCY JUSTICES:

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EMERY B. DENNY.

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RALPH MOODY,
HARRISON LEWIS,
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ANDREW H. McDANIEL,
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MILLARD R. RICH, JR.,
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ADRIAN J. NEWTON.

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RAYMOND M. TAYLOR.

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[1] 1 March 1967, succeeded Peyton B. Abbott who resigned 17 February 1967.
[2] Appointed Assistant Attorney General 1 March 1967.

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.

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HAMILTON H. HOBGOOD	Ninth	Louisburg.
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JAMES H. POU BAILEY	Tenth-B	Raleigh.
HARRY E. CANADAY	Eleventh	Smithfield.
E. MAURICE BRASWELL	Twelfth	Fayetteville.
RAYMOND B. MALLARD	Thirteenth	Tabor City.
C. W. HALL	Fourteenth	Durham.
LEO CARR	Fifteenth	Burlington.
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EUGENE G. SHAW	Eighteenth-A	Greensboro.
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B. T. FALLS, JR.	Twenty-Seventh-B	Shelby.
W. K. McLEAN	Twenty-Eighth	Asheville.
J. W. JACKSON	Twenty-Ninth	Hendersonville.
T. D. BRYSON	Thirtieth	Bryson City.

SPECIAL JUDGES.

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FRED H. HASTY	Charlotte.	JAMES F. LATHAM	Burlington.
HARRY C. MARTIN	Asheville.	EDWARD B. CLARK	Elizabethtown.
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SOLICITORS.

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Name	*District*	*Address*
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ROY R. HOLDFORD, JR.	Second	Wilson.
W. H. S. BURGWYN, JR.	Third	Woodland.
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SUPERIOR COURTS, SPRING SESSIONS, 1967.

FIRST DIVISION

First District—Judge Peel.

Camden—Apr. 3.

Chowan—Mar. 27; Apr. 24†.

Currituck—Jan. 23†; Feb. 27.

Dare—Jan. 9†(2); Mry 22.

Gates—Mar. 20; May 15†.

Pasquotank—Jan. 2†; Feb. 13*(2); Mar. 13†; May 1†(2); May 29*; June 5†.

Perquimans—Jan. 30†; Mar. 6†; Apr. 10.

Second District—Judge Bundy.

Beaufort—Jan. 16*; Jan. 23; Feb. 13†(2); Mar. 13*; Apr. 10†; May 1†(2); June 5†; June 26.

Hyde—May 15.

Martin—Jan. 2†; Mar. 6; Apr. 3†; May 29†; June 12.

Tyrrell—Apr. 17.

Washington—Jan. 9; Feb. 6†; Apr. 24.

Third District—Judge Hubbard.

Carteret—Jan. 30†(a); Mar. 6†(2); Mar. 27; Apr. 24†(a)(2); June 5.

Craven—Jan. 2(2); Jan. 30†(2); Feb. 20†(a)(2); Apr. 30; May 1†(2); May 22(2); June 12†(a).

Pamlico—Jan. 16(a); Apr. 10.

Pitt—Jan. 16†; Jan. 23; Feb. 20†(2); Mar. 20; Apr. 10†(a); Apr. 17; May 15; May 22†(a); June 26.

Fourth District—Judge Mintz.

Duplin—Jan. 16*; Feb. 27*(a); Mar. 6†(2); May 8*; May 15†(2).

Jones—Jan. 9†; Feb. 27.

Onslow—Jan. 2; Feb. 20; Mar. 20†(2); Apr. 3(a); May 15(a).

Sampson—Jan. 23(2); Feb. 20†(a); Apr. 3†(2); Apr. 24*; May 1†; May 29†(2).

Fifth Distict—Judge Parker.

New Hanover—Jan. 9*; Jan. 16†(2); Feb. 6†(2); Feb. 20*(2); Mar. 6†#(2); Mar. 27*(2); Apr. 10†(2); May 1†(2); May 15*(a)(2); May 22†(2); June 5*; June 12†; June 26†.

Pender—Jan. 2; Jan. 30†; Mar. 20(a); Apr. 24†.

Sixth District—Judge Fountain.

Bertie—Feb. 6(2); May 8(2).

Halifax—Jan. 23(2); Feb. 27†; Apr. 24; May 22†(2); June 5*.

Hertford—Feb. 20; Apr. 10(2).

Northampton—Jan. 16†; Mar. 27(2).

Seventh District—Judge Cowper.

Edgecombe—Jan. 16*; Feb. 6†(a); Feb. 20*(a); Apr. 17*; May 15†(2); June 5.

Nash—Jan. 2*(a); Jan. 23†; Jan. 30*; Feb. 27†(2); Mar. 27*; May 1†(2); May 29*.

Wilson—Jan. 2†(2); Feb. 6*(2); Mar. 13*(2); Apr. 3†(2); May 1*(a)(2); June 12†; June 26†.

Eighth District—Judge Cohoon.

Greene—Jan. 2†; Feb. 20; June 12(a).

Lenoir—Jan. 9*; Jan. 16†(a); Feb. 6†(2); Mar. 13(2); Apr. 10†(2); May 15†(2); June 12*; June 26*.

Wayne—Jan. 16*(2); Jan. 30†(a)(2); Feb. 27†(2); Mar. 27*(2); May 1†(2); May 29†(2).

SECOND DIVISION

Ninth District—Judge Bickett.

Franklin—Jan. 30*; Feb. 20†; Apr. 17†(2); May 8*.

Granville—Jan. 16; Jan. 23†(a); Apr. 3(2).

Person—Feb. 6; Feb. 13†; Mar. 20†(2); May 15; May 22†.

Vance—Jan. 9*; Feb. 27*; Mar. 13†; June 5†; June 26*.

Warren—Jan. 2*; Jan. 23†; May 1†; May 29*.

Tenth District—Wake.

Schedule "A"—Judge Canaday.

Jan. 2†(2); Jan. 16†(3); Feb. 6*(2); Feb. 20*(2); Mar. 6†(a); Mar. 13†(2); Mar. 27†(2); Apr. 10*(2); Apr. 24*(2); May 15†(2); May 29*(2); June 12*; June 26*.

Schedule "B"—Judge Braswell.

Jan. 2*(2); Jan. 9(a)(2); Jan. 16*(3); Feb. 6†(2); Feb. 13(a)(2); Feb. 20†(2); Mar. 13(a)(2); Mar. 13*(2); Mar. 27*(2); Apr. 10(a)(2); Apr. 10†(2); Apr. 24†(2); May 8(a); May 15*(2); May 29(a); May 29†(2); June 12(a); June 12†; June 26(a); June 26†.

Eleventh District—Judge Mallard.

Harnett—Jan. 2*; Jan. 9†(a); Feb. 6†(a)(2); Feb. 20†; Mar. 13*; Mar. 20†(a)(2); Apr. 17†(2); May 15*; May 22†(a)(2); June 5†(2).

Johnston—Jan. 9†(2); Jan. 23†(a); Feb. 6(2); Feb. 27†(2); Mar. 27†(2); Apr. 10*(a); May 1†(2); May 29; June 26*.

Lee—Jan. 23; Jan. 30†; Feb. 27†(a); Mar. 20*; May 1†(a); May 22.

Twelfth District—Judge Hall.

Cumberland—Jan. 2†(a)(2); Jan. 2*(2); Jan. 16†(2); Jan. 30*(2); Feb. 13*(a)(2); Feb. 13†(2); Feb. 27†(a)(2); Mar. 6*(2); Mar. 27*(a)(2); Mar. 27†(2); Apr. 10*(2); May 1†; May 8†(a)(3); May 15*(2); May 29†(2); June 12†(a); June 12*; June 26†(a); June 26*.

Hoke—Jan. 23(a); Feb. 27†; Apr. 24.

Thirteenth District—Judge Bailey.

Bladen—Feb. 13; Mar. 13†; Apr. 17; May 15†.

Brunswick—Jan. 16; Feb. 20†; Apr. 24†; May 8(a); May 29†(2).

Columbus—Jan. 2†(2); Jan. 23*(2); Feb. 6†; Feb. 27†(2); Apr. 3†(2); May 1*; May 22†; June 26.

Fourteenth District—Judge Carr.

Durham—Jan. 2†(a)(2); Jan. 2*(2); Jan. 16†; Jan. 23†(a); Jan. 23*(3); Feb. 13†(a)(2); Feb. 13*(2); Feb. 27†(2); Mar. 6*(a)(3); Mar. 20†(2); Apr. 3†(a); Apr. 3*(2); Apr. 17*(a)(2); Apr. 17†(2); May 1†(a); May 1*; May 15†(2); May 22*(a); May 29*; June 5*(a)(2); June 5†(2); June 26†.

Fifteenth District—Judge McKinnon.

Alamance—Jan. 2†(2); Jan. 16*(a); Jan. 30†(2); Feb. 27*(2); Mar. 27†(a); Apr. 10†(2); May 1*; May 15†(2); June 5*(2).

Chatham—Feb. 13; Mar. 13†; May 8; May 29†.

Orange—Jan. 16†(2); Feb. 20*; Mar. 20†(2); Apr. 24*; June 12†(a); June 26†(a).

Sixteenth District—Judge Hobgood.

Robeson—Jan. 2*(2); Jan. 16†(2); Feb. 20†(2); Mar. 6*; Mar. 20†(2); Apr. 3*(2); Apr. 17†; May 1*(2); May 15†(2); June 5*(2).

Scotland—Jan. 30†; Mar. 13; Apr. 24†(a); June 26.

THIRD DIVISION

Seventeenth District—Judge Lupton.
Caswell—Feb. 20†; Mar. 20(a).
Rockingham—Jan. 16*(2); Feb. 13†(a)(2); Mar. 6†; Mar. 27*(a); Apr. 10†(2); May 15†(2); June 5*(2).
Stokes—Jan. 30; Apr. 3; June 26(a).
Surry—Jan. 2*(2); Feb. 6†(2); Mar. 20†(2); May 1*(2); May 29†(2).

Eighteenth District.
Schedule "A"—Judge Crissman.
Greensboro Division—Jan. 16†(2); Jan. 30*(2); Feb. 13*(2); Mar. 6†(2); Mar. 20†; May 1*(2); May 15†(2); May 29†(2).
High Point Division—Jan. 2†(2); Mar. 27†(2); Apr. 10*; Apr. 17†; June 12†; June 26†.
Schedule "B"—Judge Gambill.
Greensboro Division—Jan. 2*(2); Jan. 16*; Jan. 23; Jan. 30†(2); Feb. 27*(2); Mar. 20†(3); Apr. 10*(2); Apr. 24†(2); May 29*(2); June 12†; June 26†.
High Point Division—Feb. 13†(2); May 15†(2).
Schedule "C"—Judge to be Assigned.
Greensboro Division—Jan. 2†(a)(2); Feb. 13†(a); Feb. 20*(a)(2); Mar. 13(a); Mar. 20*(a)(3); Apr. 10†(a); Apr. 17†(a)(2); Apr. 24(a); May 8†(a); May 15(a); May 22*(a); June 12*(a); June 26*(a); June 26(a).
High Point Division—Jan. 16*(a); Feb. 6*(a); Mar. 6*(a); May 8*(a); June 6*(a).

Nineteenth District—Judge McConnell.
Cabarrus—Jan. 2*; Jan. 9†; Jan. 30†(a)(2); Feb. 27†(2); Apr. 17(2); May 22(a); June 5†(2).
Montgomery—Jan. 16; Apr. 3(a); May 22†.
Randolph—Jan. 2†(a)(2); Jan. 23*; Jan. 30†(2); Feb. 27†(a)(2); Mar. 27*(a); Apr. 3†(2); May 1†(a)(3); May 29†(a)(3); June 26*.
Rowan—Jan. 23†(a); Feb. 13*(2); Mar. 13†(2); May 1(2); May 15†; May 29*(a).

Twentieth District—Judge Johnston.
Anson—Jan. 9*; Feb. 27†; Apr. 10(2); June 5*; June 12†.
Moore—Jan. 16†; Jan. 23*; Mar. 6†(a); Apr. 24*; May 15†.
Richmond—Jan. 2*; Feb. 6†; Mar. 13†(2); Apr. 3*; May 22†(2); June 26†.
Stanly—Jan. 30†; Mar. 27; May 8†.
Union—Feb. 13(2); May 1(a).

Twenty-First District—Forsyth.
Schedule "A"—Judge McLaughlin.
Jan. 2(3); Jan. 23(3); Feb. 13(2); Feb. 27(2); Mar. 20†(2); Apr. 3(2); Apr. 17†(2);; May 1(a); May 8†(3); May 29(2); June 12; June 26.
Schedule "B"—Judge Gambill.
Jan. 2(a); Jan. 2†(2); Jan. 16†(2); Jan. 30(a); Jan. 30†(2); Feb. 13†(a); Feb. 27(a); Mar. 6†(2); Mar. 20†(2); Apr. 3†(a)(2); Apr. 3; Apr. 17†(2); May 1(3); May 22†(2); May 29(a); June 5†(2); June 26(a); June 26†.

Twenty-Second District—Judge Gwyn.
Alexander—Mar. 6; Apr. 10.
Davidson—Jan. 16†(a); Jan. 23; Feb. 13†(2); Mar. 6†(a); Mar. 13; Mar. 27†(2); Apr. 24; May 8†; May 15†(a); May 29†(2); June 26.
Davie—Jan. 16*; Feb. 27†; Apr. 17(a).
Iredell—Jan. 30(2); Mar. 13†(a); Mar. 20*; May 1†; May 15(2).

Twenty-Third District—Judge Shaw.
Alleghany—Mar. 20; Apr. 17.
Ashe—Mar. 27; May 29.
Wilkes—Jan. 9†(2); Feb. 13*; Mar. 6†(2); Apr. 10; Apr. 24†(2); May 29†(2); June 12*; June 26.
Yadkin—Jan. 30(2); May 8.

FOURTH DIVISION

Twenty-Fourth District—Judge Farthing.
Avery—Apr. 24(2).
Madison—Feb. 20; Mar. 20†(2); May 22(2); June 26†.
Mitchell—Apr. 3(2).
Watauga—Jan. 16; Apr. 17; June 5†.
Yancey—Feb. 27(2).

Twenty-Fifth District—Judge Campbell.
Burke—Feb. 13; Mar. 6; Mar. 13(a); May 1†(2); May 29(2).
Caldwell—Jan. 16†(2); Feb. 20(2); Mar. 20†(2); May 15(2).
Catawba—Jan. 2†(2); Jan. 30(2); Mar. 13(a); Apr. 3(2); Apr. 17†(a); Apr. 24†; June 12†; June 26†.

Twenty-Sixth District—Mecklenburg.
Schedule "A"—Judge Clarkson.
Jan. 2*(2); Jan. 16†(2); Jan. 30*(3); Feb. 27†; Mar. 6*(2); Mar. 20†(2); Apr. 3*(2); Apr. 17†(2); May 8*(3); May 29†(2); June 12*; June 26*.
Schedule "B"—Judge Froneberger.
Jan. 2†(2); Jan. 16†(2); Jan. 30*(3); Feb. 20†; Mar. 6†(2); Mar. 20†(2); Apr. 3†(2); Apr. 17†(2); May 8*(3); May 29†(2); June 12†; June 26†.
Schedule "C"—Judge to be Assigned.
Jan. 2*(a)(2); Jan. 16†(a)(2); Jan. 30†(a)(2); Feb. 13†(a)(3); Mar. 13*(a); Mar. 20†(a)(2); Apr. 3*(a)(2); Apr. 17†(a)(2); May 1†(a)(2); May 15†(a)(2); May 29†(a)(2); June 12*(a); June 26*(a).
Schedule "D"—Judge to be Assigned.
Jan. 2†(a)(2); Jan. 16†(a)(2); Jan. 30†(a)(2); Feb. 13†(a)(3); Mar. 13†(a)(3); Apr. 3 †(a)(2); Apr. 17†(a)(2); May 1†(a)(2); May 15†(a)(2); May 29†(a)(2); June 12†(a); June 26†(a).

Twenty-Seventh District.
Schedule "A"—Judge McLean.
Cleveland—Feb. 13†.
Gaston—Jan. 2*; Jan. 9†(3); Jan. 30*(2); Feb. 20*(3); Mar. 13†(2); Mar. 27*(2); Apr. 10*(2); Apr. 24*(2); May 22*(2); June 5*(2); June 26*.
Lincoln—May 8(2).
Schedule "B"—Judge Jackson.
Cleveland—Jan 23; Mar. 20†(2); Apr. 24(2).
Gaston—Jan. 2†; Jan. 30†; Feb. 6†(2); Feb. 20†(3); Apr. 3†; Apr. 10†(2); May 1†(a); May 8†(2); May 22(a); June 5†(3); June 26†.

Twenty-Eighth District—Judge Bryson.
Buncombe—Jan. 2†(a)(2); Jan. 2*(2); Jan. 16†(3); Jan. 23†#(a); Feb. 6†(a); Feb. 6*(2); Feb. 20†(3); Mar. 6†#(a); Mar. 13†(a)(3); Mar. 13*(2); Apr. 3†; Apr. 10†(a)(2); Apr. 10*(2); Apr. 24†#(a); Apr. 24†(2); May 8†(a)(2); May 8*(2); May 22†; May 29†(a)(2); June 5*; June 12†#(a); June 12†; June 26†.

Twenty-Ninth—Judge Anglin.
Henderson—Feb. 6(2); Mar. 13†(2); May 1*; May 22†(2).
McDowell—Jan. 2*; Feb. 20†(2); Apr. 10*; June 5(2).
Polk—Jan. 23; Jan. 30†(a)(2); June 26.
Rutherford—Jan. 9†*(2); Mar. 6*†; Apr. 17†*(2); May 8*†(2).
Transylvania—Jan. 30; Mar. 27.

Thirtieth District—Judge Falls.
Cherokee—Mar. 27(2); June 26†.
Clay—Apr. 24.
Graham—Mar.13; May 29†(2).
Haywood—Jan. 2†(2); Jan. 30(2); May 1†(2).
Jackson—Feb. 13(2); May 15; June 12†.
Macon—Apr. 10(2).
Swain—Feb. 27(2).

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)
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1966

HOMER D. RABON v. ROWAN MEMORIAL HOSPITAL, INCORPORATED.

(Filed 20 January, 1967.)

1. Torts § 1—

Liability for tortious conduct is the general rule, immunity is the exception.

2. Hospitals § 3—

A nonprofit hospital is liable for negligent injury to a patient inflicted by a nurse in the discharge of her duties as an employee of the hospital. The doctrine of charitable immunity in such instance cannot be supported by logic or legal principles. However, in view of the fact that hospitals have relied upon the rule of immunity and may not have adequately protected themselves with liability insurance, the rule of liability applies only to this case and those causes arising subsequent to the rendition of this decision.

3. Appeal and Error § 61—

Our courts faithfully observe the doctrine of *stare decisis*, and especially in matters involving title to property, changes in the law may be made only by the General Assembly; nevertheless, the doctrine of *stare decisis* will not be applied to perpetuate a court-made rule which is palpably in error.

PLESS, J., dissents.

PARKER, C.J., dissenting.

LAKE, J., dissenting.

APPEAL by plaintiff from *Campbell, J.,* November-December 1965 Session of ROWAN, docketed in the Supreme Court as Case No. 606, and argued at the Spring Term 1966.

Action for damages for personal injuries.

Plaintiff alleges that, on December 21, 1959, he entered defendant Hospital as a paying patient for the treatment of an infection; that while he was there, a hospital nurse negligently injected penicillin or some other drug "into or adjacent to the radial nerve" in his left arm; and that the injection resulted in the permanent paralysis and loss of use of the arm and hand. There is no allegation that defendant failed to use due care in the selection and retention of the nurses who attended him. Defendant, answering, denies all allegations of negligence and alleges: (1) that it is a nonstock, nonprofit, charitable corporation organized and operated for the treatment of the sick and injured; (2) that it "is and always has been an institution of purely public charity for the purpose of rendering free hospital services to the sick and injured who are financially unable to pay for the same"; (3) that any profits arising from its revenues are put back into the hospital and used for the purposes for which it was incorporated; and (4) that as a charitable institution it is exempt by law from liability for injuries resulting from the negligent acts of its employees.

The parties agreed that defendant's allegations of charitable immunity should be treated as a plea in bar and determined by the judge without a jury. Judge Campbell heard the matter upon stipulations which included, *inter alia,* the following: (1) Patients are charged for services rendered on the basis of fixed schedules. (2) When bills are not paid the hospital undertakes to collect from patients, but it never undertakes to secure collections from an indigent person other than through charitable sources. (3) The hospital accepts indigent cases "indefinite in number and to the extent of available space" regardless of ability to pay — no one needing emergency treatment is denied hospitalization. (4) During the year 1959, defendant's scheduled charges for services rendered indigent patients certified by the Rowan County Welfare Department totaled $46,162.52, of which Rowan County paid only $32,505.48, the hospital absorbing the balance. Costs of services rendered to indigents who were not certified by the Welfare Department were borne by the hospital. (5) All funds received by the hospital from any source have at all times been used only to care for the sick and injured, including indigent persons.

Upon the stipulations, Judge Campbell found that Rowan Memorial Hospital has always been operated as "a nonprofit, community, voluntary hospital"; that in the year of plaintiff's alleged

injury (1959), defendant had income in excess of expenses; that the major share of its operating funds is derived from charges made for the care and treatment of paying patients; that no part of defendant Hospital's income in excess of expenses has ever been diverted to private gain, but all such funds are put back into the Hospital's resources. From these facts the court concluded that, "under and by authority of the case of *Williams v. Union County Hospital Association,* 234 N.C. 536, 67 S.E. 2d 662", defendant corporation is a charitable organization which cannot be held liable for injuries resulting to patients from the negligence of its employees. He thereupon dismissed the action, and plaintiff appealed.

George L. Burke, Jr. and Archibald C. Rufty for plaintiff appellant.

Shuford, Kluttz and Hamlin for defendant appellee.

SHARP, J. This appeal presents only one question. Is defendant Hospital's plea of charitable immunity a valid defense to plaintiff's action? This Court has held that it is. In *Williams v. Hospital,* 237 N.C. 387, 389, 75 S.E. 2d 303, 304, it is said:

> "It is settled law in this jurisdiction that a charitable institution may not be held liable to a beneficiary of the charity for the negligence of its servants or employees if it has exercised due care in their selection and retention. *Barden v. R. R.,* 152 N.C. 318, 67 S.E. 971; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807; *Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914; *Johnson v. Hospital,* 196 N.C. 610, 146 S.E. 573; *Smith v. Duke University,* 219 N.C. 628, 14 S.E. 2d 643."

The specific question which *Williams* decided was that, under the above rule, both paying and nonpaying patients are "beneficiaries of the charity," a question left open in *Williams v. Hospital Asso.,* 234 N.C. 536, 67 S.E. 2d 662.

Decided cases indicate that the present state of the law in North Carolina is as follows: A patient, paying or nonpaying, who is injured by the negligence of an employee of a charitable hospital may recover damages from it only if it was negligent in the selection or retention of such employee, *Williams v. Hospital, supra, Williams v. Hospital Asso., supra,* or perhaps if it provided defective equipment or supplies. *Payne v. Garvey,* 264 N.C. 593, 142 S.E. 2d 159. A stranger (anyone who is not a beneficiary of the charity, *i. e.,* one other than a patient) who is injured by the negligence of *any* employee, however, may collect damages from the hospital. *Cowans v. Hospitals,* 197 N.C. 41, 147 S.E. 672. Nor does the fact

that a charitable institution has procured liability insurance affect its immunity. *Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914.

The decision in this case depends upon whether we shall continue to adhere to the rule so flatly enunciated in *Williams v. Hospital, supra.* Plaintiff, as have others before him, appeals for the specific purpose of requesting this Court to re-examine our rule in the light of current conditions, the tide of judicial decision elsewhere, and the general agreement among legal scholars that charitable immunity is insupportable. See Prosser, Torts § 127, n. 26 (3rd Ed. 1964) and *President and Directors of Georgetown College v. Hughes,* 130 F. 2d 810 (D. C. Cir.), note 2, where citations to such treatises are collected. We have, therefore, decided to review our position with reference to hospitals. In so doing we begin with the exhaustively documented opinion of Justice Wiley Rutledge (then a member of the United States Court of Appeals for the District of Columbia, later a member of the Supreme Court of the United States) in *President and Directors of Georgetown College v. Hughes, supra.* Although the plaintiff in *College v. Hughes* was a special nurse (stranger), the opinion encompassed the law of charitable immunity. Opinions written since this 1942 case have, with few exceptions, paid tribute to its penetrating analysis of the various theories upon which courts have upheld the doctrine of charitable immunity as applied to hospitals. So completely has this question been discussed and analyzed in that and succeeding cases that we recognize the futility of attempting "to gild refined gold, to paint the lily."

We commence, as did Justice Rutledge, by noting that liability for tortious conduct is the general rule; immunity is the exception, and charity is no common-law defense to tort. The grant of immunity from liability for the negligent acts of its servants to any charitable institution is an exception to the general principle of liability. *Noel v. Menninger Foundation,* 175 Kan. 751, 267 P. 2d 934; *Parker v. Port Huron Hospital,* 361 Mich. 1, 105 N.W. 2d 1; *Mississippi Baptist Hosp. v. Holmes,* 214 Miss. 906, 55 So. 2d 142; *Collopy v. Newark Eye & Ear Infirmary,* 27 N.J. 29, 241 A. 2d 276; *Pierce v. Yakima Valley Memorial Hospital Ass'n,* 43 Wash. 2d 162, 260 P. 2d 765; *Adkins v. St. Francis Hosp. of Charleston,* 143 S.E. 2d 154 (W. Va. Ct. App.); Harper, Torts § 81 (1933); 2 Restatement, Torts §§ 323-325 (1934). Private corporations are responsible for the actionable negligence of their agents as are individuals who are also responsible for their own negligence. The physician who undertakes to treat a charity patient and neglects him must respond in damages for his malpractice; a motorist whose negligence has caused injury to his guest passenger must likewise pay. "Whether the good Samaritan rides an ass, a Cadillac, or picks up hitchhikers in a

Model T, he must ride with forethought and caution. . . . Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing." *College v. Hughes, supra* at 813. A privately-owned hospital, operated by individual doctors who hope to make a profit but who render charitable service when necessary, must answer to a charity patient who has been injured by an employee. Yet today in North Carolina a laboratory technician employed by a public hospital may kill a patient with mismatched blood and the institution goes free. See *Davis v. Wilson,* 265 N.C. 139, 143 S.E. 2d 107. Such an anomaly, in the opinion of Justice Rutledge, could have arisen only fortuitously, for surely "the basis of the distinction cannot be charity." *College v. Hughes, supra* at 814.

The doctrine was first declared in this country in 1876, when the Supreme Court of Massachusetts held that a charity patient, negligently injured by a student doctor, could not hold the hospital responsible if due care had been used by its trustees "in the selection of their inferior agents." *McDonald v. Massachusetts General Hospital,* 120 Mass. 432, 21 Am. Rep. 529. The rationale of the decision was that the public and private donations which supported the charitable hospital constituted a trust fund which could not be diverted to damages. As its sole authority, the Massachusetts court relied upon the English case of *Holliday v. St. Leonard's, Shoreditch* (1861), 11 C.B. (ns) 192, 142 Eng. Rep. 769, which had denied recovery against the vestry of a parish for injury caused by a defect in a highway under its control. This ruling was in turn based on a dictum by Lord Cottenham in *Duncan v. Findlater* (1839), 6 Clark & Fin. 894, 7 Eng. Rep. 934 (a case involving the liability of highway trustees under a public road act *for negligence of third persons)* and his similar dictum in *Feoffees of Heriot's Hospital v. Ross* (1846), 12 Clark & Fin. 507, 513, 8 Eng. Rep. 1508, 1510: "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." The *Heriot's Hospital* case did not involve personal injury but a wrongful exclusion from the benefits of the defendant charity. Soon after they were made, these rulings and Lord Cottenham's dicta were repudiated in England by the case of *Mersey Docks Trustees v. Gibbs* (1866) L.R. 1 H.L. 93, 11 Eng. Rep. 1500 and by *Foreman v. Mayor of Canterbury* (1871) L.R. 6 Q.B. 214. Thus, in holding a hospital not liable to a negligently injured charity patient, the Massachusetts court relied upon reasoning which had already been discredited. *College v. Hughes, supra* at 815-16. See *Noel v. Menninger Foundation, supra;*

Parker v. Port Huron Hosp., supra; Bing v. Thunig, 2 N.Y. 2d 656, 143 N.E. 2d 3, 163 N.Y.S. 2d 3; *Andrews v. Youngstown Osteopathic Hosp. Ass'n,* 77 Ohio L. Abs. 35, 147 N.E. 2d 645 (Ohio App.); *Avellone v. St. John's Hosp.,* 165 Ohio St. 467, 135 N.E. 2d 410; *Pierce v. Yakima Valley Memorial Hosp. Ass'n, supra;* Annot., Charity — Tort Liability — Immunity, 25 A.L.R. 2d 29, 38 (1952).

The rule in England today is that a hospital authority is liable for the negligence of its employees, including its doctors and nurses, without the necessity of alleging that any of them was not fully competent. *Cassidy v. Ministry of Health* (1951) 2 K.B. 343; 1 All E.R. 574 (see Comments on this case in 14 Mod. L. Rev. 504 (1951) and 17 Mod. L. Rev. 547 (1954); see also *College v. Hughes, supra* at 819). In 1885, Maryland, relying upon Massachusetts, adopted the rule of charitable immunity in *Perry v. House of Refuge,* 63 Md. 20, 52 Am. Rep. 495. Both courts apparently acted in ignorance of the English reversals. Thus "they resurrected in America a rule already dead in England, and thereby gave Lord Cottenham's dictum a new lease on life in the New World." *College v. Hughes, supra* at 816. *Accord, Noel v. Menninger Foundation, supra; Mississippi Baptist Hosp. v. Holmes, supra; Collopy v. Newark Eye & Ear Infirmary, supra; Bing v. Thunig, supra; Avellone v. St. John's Hosp., supra; Flagiello v. Pennsylvania Hosp.,* 417 Pa. 486, 208 A. 2d 193; *Pierce v. Yakima Valley Hosp., supra.*

In the meantime, Rhode Island, following the decision in *Mersey Docks v. Gibbs, supra,* had held a charitable hospital liable for negligent injuries inflicted upon a patient. *Glavin v. Rhode Island Hosp.,* 12 R.I. 411, 34 Am. Rep. 675. *Glavin* was the first decision in this country holding that a charitable hospital had the same liability for negligence as a private corporation. See *Durney v. St. Francis Hosp.,* 46 Del. 350, 83 A. 2d 753 (Del. Super. Ct.). In 1888, Pensylvania, also relying upon Lord Cottenham's repudiated pronouncements, and upon *McDonald v. Massachusetts Gen. Hosp., supra,* applied the charitable immunity doctrine to hospitals in the case of *Fire Ins. Patrol v. Boyd,* 120 Pa. 624, 15 Atl. 552, 1 L.R.A. 417. *Flagiello v. Pennsylvania Hosp., supra.* With reference to the origin of the doctrine of immunity, the Washington court said, in abandoning it:

> "Ordinarily when a court decides to modify or abandon a court-made rule of long standing, it starts out by saying that 'the reason for the rule no longer exists.' In this case, it is correct to say that the 'reason' originally given for the rule of immunity never did exist." *Pierce v. Yakima Valley Memorial Hosp., supra* at 167, 260 P. 2d at 768.

Ignoring Rhode Island and choosing to follow Massachusetts, Maryland, and Pennsylvania (then the weight of authority!), other courts adopted immunity, but not all of them based their decisions on the trust fund theory. In addition to (1) the trust fund theory, other rationales were: (2) one who enters a charitable hospital for treatment impliedly consents to assume the risk of negligent injuries by carefully selected servants and is deemed to have waived any claim for damages which he might otherwise have had against the institution; (3) the principle of *respondeat superior* is not applicable to charitable hospitals, for that (a) doctors and nurses, because of their skill, are independent contractors; (b) when the hospital tenders to a beneficiary a *competent* employee, he becomes the servant of the patient; (c) its employees bring it no profit; and (4) charitable institutions perform a vital public service and the public policy is to encourage donations and to protect them from tort claims which might cripple the charity. See Prosser, *op. cit. supra* § 127; *Mullikin v. Jewish Hospital Assn. of Louisville,* 348 S.W. 2d 930 (Ky. Ct. App.); *College v. Hughes, supra.*

In *Williams v. Hospital, supra* at 390, 75 S.E. 2d at 305, Johnson, J., summarized these theories with the comment that each "seems to be subject to some measure of meritorious criticism." We will review them in the order of our enumeration.

(1) *Trust fund theory.* This rationale is that charitable liability would misappropriate a donor's funds to purposes and to persons whom he did not intend to benefit, thereby dissipating the fund in damages. This approach assumes the donor's intent and supports only *total* immunity, but it has not been abandoned when courts have gone from total to qualified immunity. *College v. Hughes, supra* at 823. Can it logically be held that there would be a dissipation of funds when a patient is compensated for injuries negligently inflicted upon him by a carefully selected employee, but that there is no diversion when compensation is awarded a stranger or a patient negligently injured by an employee who was not selected with due care? Yet the North Carolina rule permits recovery in the second situation but denies it in the first. Damage suits by strangers to the charity's beneficence can be quite as serious and costly as those by patients. See *Avellone v. St. John's Hosp., supra; Mississippi Baptist Hosp. v. Holmes, supra.* The injustice of making a distinction between a charitable beneficiary and a stranger who has been negligently injured was pointed out in *College v. Hughes, supra* at 825:

> "To give it (compensation) to a stranger but not to a beneficiary makes the latter accept succor at the risk of greater

harm. When it occurs he bears a burden which should fall on all alike, not on him alone. On the other hand, no one has the right to have cure or care at the cost of harm inflicted upon another. To allow recovery to the beneficiary, but deny it to the stranger, would unload on the latter in some part not only the cost of care and cure, but the cost of injury to the former.

* * *

". . . If the matter is regarded as 'diverting the fund to persons not within the class intended for aid,' it is impossible to assume that the donor intends everyone except the special object of his bounty to have reparation. If any assumption were justified, it would be exactly the contrary one."

It is a paradoxical argument that by refusing recovery to the victim of a hospital's negligence one is somehow serving charity. *Flagiello v. Pennsylvania Hosp., supra.* Indeed, if compensation is denied him, he or his family may well become dependent on some other charitable organization. Nor has experience justified the apprehension that if immunity is abolished, hospital funds will be dissipated in damages. Other courts have joined Justice Rutledge in discounting this fear:

"No statistical evidence has been presented to show that the mortality or crippling of charities has been greater in states which impose full or partial liability than where complete or substantially full immunity is given. Nor is there evidence that deterrence of donation has been greater in the former. Charities seem to survive and increase in both, with little apparent heed to whether they are liable for torts or difference in survival capacity.

"Further, if there is danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. . . . What is at stake, so far as the charity is concerned, is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding over in damages of its entire assets.

"Against this, we weigh the cost to the victim of bearing the full burden of his injury. . . . Also, as some of the more recent cases point out, much of modern charity or philanthropy is 'big business' in its field. It therefore has a capacity for absorption of loss which did not exist in the typical nineteenth century small hospital or college." *College v. Hughes, supra* at 823-24.

Accord, Noel v. Menninger Foundation, supra; Myers v. Drozda, 141 N.W. 2d 852 (Nebr.); *Avellone v. St. John's Hosp., supra; Adkins v. St. Francis Hospital of Charleston, supra.*

In their treatise on torts, Harper and James say:

> "There is not the slightest indication that donations are discouraged or charities crippled in states which deny immunity. Contributors today assume that part of their gifts will go to defray administrative expenses and overhead. Liability insurance is available on reasonable terms to spread the risk and protect against financial disaster. Premiums represent a calculable and regular expense which is typically met by enterprises operating on the scale of today's hospital. . . ." 2 Harper and James, Torts § 29.16 (1956).

The most recent pronouncement discounting the danger of diversion comes from the Supreme Court of Pennsylvania:

> "If havoc and financial chaos were inevitably to follow the abrogation of the immunity doctrine, as the advocates for its retention insist, this would certainly have become apparent in the states where that doctrine is no longer a defense. But neither the defendant hospital nor the Hospital Association of Pennsylvania *(amicus curiæ)* has submitted any evidence of catastrophe in the states where charitable hospitals are tortiously liable." *Flagiello v. Pennsylvania Hosp., supra* at 503, 208 A. 2d at 201.

Charitable hospitals carry liability insurance to protect their endowments and earnings against the consequences of their "corporate or administrative negligence" in employing incompetent servants, and against suits by strangers. It is equally available to protect them from the consequences of suits by patients for employee negligence. "(P)remiums for such insurance can be paid as an item of the cost of operation without unduly impairing their earnings for use in the operation of their business." *Mississippi Baptist Hosp. v. Holmes, supra* at 934, 55 So. 2d at 153.

(2) *Waiver.* The suggestion that a patient who enters a nonprofit hospital for treatment impliedly agrees that he will not seek damages for any injuries suffered through the negligence of his benefactor's servants is a patent fiction which does violence to the facts. To demonstrate its fallacy, one need only ask how an unconscious, minor, irrational, or very ill patient could make a binding contract, or be deemed to know "by intuition the legal principle of law that the courts after years of travail have at last produced." *Ad-*

kins v. Hospital, supra; Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220; *Myers v. Drozda, supra.* See *Mississippi Baptist Hospital v. Holmes, supra.* A patient goes to the hospital expecting expert care. If he were to be greeted with a request that he sign a waiver of his right to damages in the event of his negligent injury, the implication in that request would most certainly cause him to refuse, if he were in any condition to do so. Furthermore, the paying patient (whose "contributions" in many of the cited cases admittedly exceeded the cost of his hospital care) is certainly not an object of charity in the original concept of that term; yet the waiver theory has been applied to him as well as to the indigent patient. *Wheat v. Idaho Falls Latter Day Saints Hospital,* 78 Idaho 60, 297 P. 2d 1041. See also the dissenting opinion in *Williams v. Hospital, supra.*

(3) *Non-applicability of the rule of respondeat superior.* The theory that the principle of *respondeat superior* should not be applied to a charitable hospital if it has used due care in the selection of its doctors, nurses, attendants and other employees was the one adopted by the North Carolina court, *Barden v. R. R.,* 152 N.C. 318, 67 S.E. 971, *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807. It has never been suggested, however, that locomotive engineers, airplane pilots, electricians, and other skilled specialists are not agents of the corporation which employs them, or that their employer is relieved of liability for their negligence because their particular skills gave them the status of independent contractors. Furthermore, regularly employed hospital personnel are entitled to workmen's compensation when they are injured on the job. In no other context would it be suggested that salaried employees should be treated as independent contractors or as servants of those who contract with their employer, and there is no justification for such an anomaly here.

The Arizona court neatly disposed of the theory of non-applicability of *respondeat superior* as follows:

> "The question of whether the doctrine of *respondeat superior* applies in any given case depends upon whether the relation of master and servant exists at the time the tort was committed, not upon the relation of the injured person to the master. This being true, if a stranger may invoke the doctrine of *respondeat superior* it irresistibly follows that a so-called beneficiary, whether he be a paying or nonpaying patient, may likewise invoke it." *Ray v. Tucson Medical Center, supra* at 33, 230 P. 2d at 228.

Accord, Durney v. St. Francis Hospital, supra.

As the New York Court of Appeals so clearly pointed out, the

same considerations which brought *respondeat superior* into being apply to this situation:

> "Liability is the rule, immunity the exception. It is not too much to expect that those who serve and minister to members of the public should do so, as do all others, subject to that principle and within the obligation not to injure through carelessness. It is not alone good morals but sound law that individuals and organizations should be just before they are generous, and there is no reason why that should not apply to charitable hospitals. . . . Insistence upon *respondeat superior* and damages for negligent injury serves a two-fold purpose, for it both assures payment of an obligation to the person injured and gives warning that justice and law demand the exercise of care.
>
> "The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.
>
> "Hospitals should, in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of *respondeat superior*. The test should be, for these institutions, whether charitable or profit-making, as it is for every other employer, was the person who committed the negligent injury-producing act one of its employees and, if he was, was he acting within the scope of his employment." *Bing v. Thunig, supra* at 666-67, 143 N.E. 2d at 8, 163 N.Y.S. 2d at 10-11.

Another suggestion, that the rule of *respondeat superior* does not apply because a hospital derives no gain from what its servant does, is untenable even if we assume its premise. Gain or profit has no rational relation to the doctrine of *respondeat superior,* which "rests upon the employment of the servant by the master and the master's right to exercise direction and control over his work in the conduct

of his business." *Ray v. Tucson Medical Center, supra* at 33, 230 P. 2d at 227.

There is a palpable and fundamental inconsistency in a rule such as ours which says that, if due care is exercised in the selection of an employee whose negligence has caused damage to a patient, the doctrine of *respondeat superior* does not apply and no liability attaches to the hospital, but that if due care has not been exercised in the selection, the doctrine of *respondeat superior* does apply and liability results. The actual tort-feasor is either an employee of the hospital acting within the scope of his employment, or he is not.

(4) *Public Policy.* The contention that charitable immunity serves public policy today was convincingly refuted by the Michigan court in *Parker v. Port Huron Hospital, supra:*

> "The immunity rule arose at a period in our society's development when charity typically operated on a small scale. Most gifts to charity were private, not corporate. Charitable needs were always poorly satisfied. It made sense in that period to hold that all gifts to charity should go to the purposes for which they were given, and not to outsiders who were by accident injured in the administration of the charity. This was a deliberate choice, designed to encourage gifts to charity by assuring the giver that his gift would be used as he intended.
>
> "Today charity is big business. It often is corporate both in the identity of the donor and in the identity of the donee who administers the charity. Tax deductions sometimes make it actually profitable for donors to give to charity. Organized corporate charity takes over large areas of social activity which otherwise would have to be handled by government, or even by private business. Charity today is a large-scale operation with salaries, costs and other expenses similar to business generally. It makes sense to say that this kind of charity should pay its own way, not only as to its office expenses but as to the expense of insurance to pay for torts as well.
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> "The old rule of charitable immunity was justified in its time, on its own facts. Today we have a new set of facts.
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> . . .
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> "It is our conclusion that there is today no factual justification for immunity in a case such as this, and that principles of law, logic and intrinsic justice demand that the mantle of immunity be withdrawn. The almost unanimous view expressed in the recent decisions of our sister States is that insofar as the rule of immunity was ever justified, changed conditions have rendered the rule no longer necessary." 361 Mich. at 24-25, 105 N.W. 2d at 12-13.

Accord, Myers v. Drozda, supra; Collopy v. Newark Eye & Ear Infirmary, supra; Pierce v. Yakima Valley Memorial Hospital Assn., supra; Kojis v. Doctors Hospital, 12 Wisc. 2d 367, 107 N.W. 2d 131.

There can be little doubt that immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution. *College v. Hughes, supra; Noel v. Menninger Foundation, supra; Mississippi Baptist Hosp. v. Holmes, supra; Sheehan v. North Country Hosp.,* 273 N.Y. 163, 7 N.E. 2d 29; 2 Harper and James, *op. cit. supra.* "Requiring hospitals to respond in damages for the carelessness of their employees provides the penalty which will insure the installation of safety methods and the enforcement of strict supervision over hospital personnel." *Flagiello v. Hospital, supra* at 496, 208 A. 2d at 198. Any member of the public may become a patient in a hospital at any moment; at some time in his life every person will probably require hospitalization. The public, therefore, is interested in having any hospital open to it safely equipped and properly conducted by carefully selected employees who perform their duties with due care. No court which has abolished charitable immunity as applied to hospitals has failed to acknowledge society's debt to the nonprofit, public hospital and to recognize its right to every benefit and assistance which the law can justly allow. When, however, a hospital tragedy results from the carelessness of an employee, the injustice of depriving the injured patient or his family of compensation in order to promote the impersonal cause of charity is apparent.

> "Neither the encouragement of charity and philanthropy nor the doctrine of immunity on the ground of public policy can dispel the fact that the primary interest and welfare of the public requires that one person should not suffer an injury to his or her life or limb without recompense merely in order that all of the earnings of a charitable hospital should be devoted to the purpose of providing charity for others." *Mississippi Baptist Hosp. v. Holmes, supra* at 939, 55 So. 2d at 156.

Accord, Haynes v. Presbyterian Hosp. Assn., 241 Iowa 1269, 45 N.W. 2d 151; *Adkins v. Hosp., supra.*

In *Williams v. Hospital, supra,* this Court concluded that, no matter what the merits and demerits of charitable immunity as applied to hospitals, the doctrine was so deeply embedded in our common law that the court's withdrawal of it would constitute an act of judicial legislation in the field of public policy; that whether to change the rule was "a question of broad public policy to be pondered and resolved by the legislature." In support of this statement,

the court cited cases from Maryland, Michigan, New York, Oregon, Pennsylvania, Washington, and Massachusetts in which the courts of those states had expressed similar views and proclaimed fealty to the doctrine of *stare decisis* with fervor equal to, if not greater than, that of this Court. "At lovers' perjuries, they say Jove laughs," — of these seven states, only Maryland and Massachusetts now retain charitable immunity. The other five have, *by judicial decision,* abandoned it. The Maryland court has said that its legislature, by Md. Code Ann. § 48A-480, has accepted the doctrine announced in *Perry v. House of Refuge, supra.* This section provides that an insurer issuing a policy covering the liability of any charitable institution for tort is estopped from asserting the institution's defense of immunity. See *Howard v. South Baltimore General Hospital,* 191 Md. 617, 62 A. 2d 574. Thus, even Maryland does not follow our rule of *Herndon v. Massey, supra,* that procuring liability insurance does not affect immunity.

The first to abandon us was the Supreme Court of Washington which reversed its previous decisions upholding immunity only five months after *Williams v. Hospital* was decided. Said the court:

> "(H)aving now concluded that our court-declared policy is no longer valid, there seems to be no compelling reason why we must wait for legislative action. We closed our courtroom doors without legislative help, and we can likewise open them. It is not necessary that courts be slow to exercise a judicial function simply because they have been fast to exercise a legislative one.
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> * * *
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> "Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." *Pierce v. Yakima Valley Memorial Hosp. Assn., supra* at 178-79, 260 P. 2d 765, 774 (1953).

When the Court of Appeals of New York abandoned charitable immunity, it had a ready answer to the argument that *stare decisis* compelled it to perpetuate charitable immunity until the legislature acted:

> "It *(stare decisis)* was intended, not to effect a 'petrifying rigidity' but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive and no principle constrains us to follow it. On the contrary . . . we would be abdicating 'our own function, in a field peculiarly nonstatutory' were we to insist on leg-

> islation and 'refuse to reconsider an old and unsatisfactory court-made rule.'" *Bing v. Thunig, supra* at 667, 143 N.E. 2d at 9, 163 N.Y.S. 2d at 11.

Accord, Mississippi Baptist Hosp. v. Holmes, supra; Myers v. Drozda, supra; Adkins v. Hosp., supra; Kojis v. Doctors Hosp., supra.

Oregon, noting that the doctrine of charitable immunity was in general retreat elsewhere, its obsolescence well documented by judicial decision and by textwriters, abandoned the rule in 1963 in an opinion which dealt only with the issue of *stare decisis.*

> "(I)t is neither realistic nor consistent with the common law tradition to wait upon the legislature to correct an outmoded rule of case law. . . . Negligence law is common law. . . . The fact that a rule has been followed for fifty years is not a convincing reason why it must be followed for another fifty years if the reasons for the rule have ceased to exist. . . . Tort law in 1963 differs from tort law in 1863 for the most part because of the work of the courts. When courts have recognized the need for remedies for new injuries, the remedies have been found." *Hungerford v. Portland Sanatorium & Benev. Ass'n,* 235 Ore. 412, 414-15, 384 P. 2d 1009, 1010-11.

Accord, Collopy v. Newark Eye & Ear Infirmary, supra.

West Virginia, which formerly had the same rule of qualified immunity as stated in our case of *Williams v. Hospital, supra,* repudiated it in 1965 on the basis of *College v. Hughes, supra,* and the "deluge of decisions" which followed it. *"Stare decisis,"* it said, "is not a rule of law but is a matter of judicial policy. . . . In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted. . . . It is better to be right than to be consistent with the errors of a hundred years." *Adkins v. Hosp., supra,* 143 S.E. 2d at 162. *Accord, Flagiello v. Penna. Hospital, supra,* the case in which Pennsylvania abandoned immunity.

The Michigan court, after paying tribute to the doctrine of *stare decisis* as one giving continuity to the rules by which men regulate their lives and conduct their business, abolished the charitable immunity of hospitals in 1960. *Parker v. Port Huron Hosp., supra.* In doing so it relied heavily upon *College v. Hughes,* and noted that seventeen jurisdictions had "abandoned whatever immunity they previously had" since that decision. The following year, relying upon *Parker v. Port Huron Hosp., supra,* Kentucky abandoned immunity

for unqualified liability. *Mullikin v. Jewish Hosp. Ass'n of Louisville, supra.*

Michigan's answer to the charge that a reversal of the rule of nonliability would be judicial legislation was:

> "(W)e can only say that the exception to the common law rule of *respondeat superior* was not, in this State, placed in our law by the legislature but by this Court. If we were to hold this exception to the rule in previous cases erroneous, we would only be determining what the law should have been in this State, except for the erroneous conclusion reached in the line of cases relied upon by defendant hospital." *Parker v. Port Huron Hosp., supra* at 11, 105 N.W. 2d at 6.

To protect any nonprofit hospital corporations which might "have failed to protect themselves by the purchase of available insurance," the Michigan court gave the new rule of liability no retroactive effect but limited it to that particular case and to causes of action arising after the date on which the opinion was filed. In adopting this method it said:

> "There can be no question of the right of this Court to make the application of the new doctrine prospective or retroactive. See discussion in opinion of Justice Cardozo in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364-366, 53 S. Ct. 145, 148, 77 L. Ed. 360, 366." *Id.* at 26, 105 N.W. 2d at 13.

See also the concurring opinion of Mr. Justice Frankfurter in *Griffin v. People of State of Illinois,* 351 U.S. 12, 25, 26, 76 S. Ct. 585, 593, 100 L. Ed. 891, 900; Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960). The Illinois court likewise gave only prospective effect to its decision holding that a charitable corporation may not limit its liability for tort to the amount of its liability insurance. *Darling v. Charleston Community Memorial Hospital,* 33 Ill. 2d 326, 211 N.E. 2d 253 (1965). The Nebraska court also followed this procedure when it changed its rule in *Myers v. Drozda, supra.* In *Kojis v. Doctors Hosp., supra,* the Supreme Court of Wisconsin overruled its prior decisions to hold that a charitable hospital was not immune from liability to a paying patient injured by the negligence of its employees. Twenty-four days later, on February 2, 1961, for the reasons stated in *Parker v. Port Huron Hosp., supra,* it limited the new rule to the *Kojis* case and to cases arising thereafter.

So far as our research has revealed, all but three jurisdictions in the United States (Hawaii, New Mexico and South Dakota) have

considered the question whether a hospital which is not operated for private gain is liable for injuries caused a patient by the negligence of its employees. Attempts have been made from time to time to catalogue the results of the decisions, which in 1942, ran the gamut "from full immunity, through varied but inconsistent qualifications, to general responsibility," according to Justice Rutledge. Since then, "the general retreat" from immunity has quickly outdated any tabulation.

Our research indicates that, at the present time, the states and territories are grouped as follows on the question of liability:

(1) *States retaining the rule of full immunity:* ARKANSAS, *Helton v. Sisters of Mercy of St. Joseph Hosp.*, 234 Ark. 76, 351 S.W. 2d 129 (and see Ark. Stat. Ann. § 66-4913); MAINE, *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 Atl. 898; MARYLAND, *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Cornelius v. Sinai Hosp.*, 219 Md. 116, 148 A. 2d 567 (but see Md. Code Ann. § 48A-480, which provides that insurers of such associations are estopped to assert the defense); MISSOURI, *Schulte v. Missionaries of La-Salette Corp.*, 352 S.W. 2d 636 (Mo. Sup. Ct.); *Dille v. St. Luke's Hosp.*, 355 Mo. 436, 196 S.W. 2d 615; MASSACHUSETTS, *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432, 21 Am. Rep. 529; *Mastrangelo v. Maverick Dispensery*, 330 Mass. 708, 115 N.E. 2d 455; RHODE ISLAND, R. I. Gen. Laws § 7-1-22; SOUTH CAROLINA, *Lindler v. Columbia Hosp.*, 98 S.C. 25, 81 S.E. 512.

(2) *Jurisdictions in which immunity is qualified, as indicated:* COLORADO, *St. Luke's Hosp. Ass'n v. Long*, 125 Colo. 25, 240 P. 2d 917; *O'Connor v. Boulder Sanitarium Ass'n*, 105 Colo. 259, 96 P. 2d 835 (charity is substantively liable, but charitable assets exempt from execution); CONNECTICUT, *Cohen v. General Hosp. Soc'y*, 113 Conn. 188, 154 Atl. 435; *Hearns v. Waterbury Hosp.*, 66 Conn. 98, 33 Atl. 595 (liable to strangers, but liable to patients only for "corporate negligence," *i. e.*, in the selection or retention of employees); DISTRICT OF COLUMBIA, *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (D.C. Cir.) (stranger); *White v. Providence Hosp.*, 80 F. Supp. 76 (D.D.C.) (paying patient's action dismissed for failure to allege corporate negligence,); GEORGIA, *Morton v. Savannah Hosp.*, 148 Ga. 438, 96 S.E. 887; *Cox v. DeJarnett*, 104 Ga. App. 664, 123 S.E. 2d 16; *Executive Comm. of the Baptist Convention v. Ferguson*, 95 Ga. App. 393, 98 S.E. 2d 50 (immunity in all cases waived to extent of liability insurance coverage. Beyond this, hospital is liable to strangers, employees, and all patients for corporate negligence; liable further to *paying* patients for *employee* negligence, but charitable assets exempt from execution); INDIANA, *St. Vincent's Hosp. v. Stine*, 195 Ind. 350, 144 N.E. 537 (liable to

strangers, but to patients only for corporate negligence). But see *Ball Memorial Hosp. v. Freeman,* 196 N.E. 2d 274 (Ind. Sup. Ct.), a 1964 case containing dicta suggesting that Indiana may be about to depart from its immunity rule as applied to charitable hospitals; LOUISIANA, *D'Antoni v. Sara Mayo Hosp.,* 144 So. 2d 643 (La. Ct. App.); *Bougon v. Volunteers of America,* 151 So. 797 (La. Ct. App.); *Jordan v. Touro Infirmary,* 123 So. 726 (La. Ct. App.) (liable to strangers, but to patient only for "corporate negligence." But see La. Rev. Stat. Ann. § 22:655, authorizing direct action against charity's insurer, who cannot claim the defense); NEW JERSEY, N. J. Stat. Ann. §§ 2A:53A-7 and -8 (charitable hospitals liable to patients for employee negligence to extent of $10,000.00; other charities liable only to non-beneficiaries of the charity); NORTH CAROLINA, *Williams v. Hosp.,* 237 N.C. 387, 75 S.E. 2d 303; *Cowans v. Hosp.,* 197 N.C. 41, 147 S.E. 672 (liable to patients only for "corporate negligence," but rule assumes full liability to non-patients); TENNESSEE, *Baptist Memorial Hosp. v. Couillens,* 176 Tenn. 300, 140 S.W. 2d 1088; *McLeod v. St. Thomas Hosp.,* 170 Tenn. 423, 95 S.W. 2d 917 (hospitals substantively liable, but charitable assets exempt from execution); TEXAS, *Baptist Memorial Hosp. v. McTighe,* 303 S.W. 2d 446 (Tex. Civ. App.); *Medical & Surgical Memorial Hosp. v. Cauthorn,* 229 S.W. 2d 932 (Tex. Civ. App.) (immune to any plaintiff absent "corporate negligence" in selection or retention of employees or in supplying defective equipment. See, however, the recent case of *Watkins v. Southcrest Baptist Church,* 399 S.W. 2d 530 (Texas, 1966), where 5 of the 9 justices expressed their dissatisfaction with the present Texas rule and served unmistakable warning that they will soon adopt the rule of total liability.); VIRGINIA, *Norfolk Protestant Hosp. v. Plunckett,* 162 Va. 151, 173 S.E. 363; *Memorial Hosp. v. Oakes,* 200 Va. 878, 108 S.E. 388; *Hospital of St. Vincent of Paul v. Thompson,* 116 Va. 101, 81 S.E. 13 (liable to strangers, but to patients only for "corporate negligence"); WYOMING, *Bishop Randall Hosp. v. Hartley,* 24 Wyo. 408, 160 Pac. 385 (liable to patients only for "corporate negligence").

(3) *Jurisdictions in which rule of immunity appears to have been rejected altogether:* ALABAMA, *Alabama Baptist Hosp. Bd. v. Carter,* 226 Ala. 109, 145 So. 443; *Tucker v. Mobile Infirmary Ass'n,* 191 Ala. 572, 68 So. 4 (liability to charity patient not discussed); ALASKA, *Moats v. Sisters of Charity of Providence,* 13 Alaska 546; *Tuengel v. Sitka,* 118 F. Supp. 399 (D. C. Alaska); ARIZONA, *Ray v. Tucson Medical Center,* 72 Ariz. 22, 230 P. 2d 220; CALIFORNIA, *Malloy v. Fong,* 37 Cal. 2d 356, 232 P. 2d 241; DELAWARE, *Durney v. St. Francis Hosp.,* 46 Dela. 350, 83 A. 2d 753 (Dela. Super. Ct.); FLORIDA, *Nicholson v. Good Samaritan Hosp.,*

145 Fla. 360, 199 So. 344; IDAHO, *Wheat v. Idaho Falls Latter Day Saints Hosp.*, 78 Idaho 60, 297 P. 2d 1041 (involving paying patient; liability to charity patient not discussed); ILLINOIS, *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E. 2d 253; IOWA, *Haynes v. Presbyterian Hosp.*, 241 Iowa 1269, 45 N.W. 2d 151; KANSAS, *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (later statute restoring immunity by exempting charitable assets from execution, Kansas Gen. Stat. Ann. § 17-1725, held unconstitutional in *Neely v. St. Francis Hosp. & School of Nursing*, 192 Kan. 716, 391 P. 2d 155); KENTUCKY, *Mullikin v. Jewish Hosp. Ass'n*, 348 S.W. 2d 930 (Ky. Ct. App.); MICHIGAN, *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W. 2d 1; MINNESOTA, *Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 175 N.W. 699; MISSISSIPPI, *Mississippi Baptist Hosp. v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (involved paying patient, but opinion suggests that liability will be rule in all cases); MONTANA, *Howard v. Sisters of Charity*, 193 F. Supp. 191 (D. Mont.) (no state court cases, but Federal Court purported to apply Montana law.); NEBRASKA, *Myers v. Drozda*, 141 N.W. 2d 852 (Nebr. Sup. Ct.); NEVADA, Nev. Rev. Stat. § 41.480; NEW HAMPSHIRE, *Welch v. Fisbie Memorial Hosp.*, 90 N.H. 337, 9 A. 2d 761; NEW YORK, *Bing v. Thunig*, 2 N.Y. 2d 656, 143 N.E. 2d 3, 163 N.Y.S. 2d 3; NORTH DAKOTA, *Rickbeil v. Grafton Deaconess Hosp.*, 74 N.D. 525, 23 N.W. 2d 247; OHIO, *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 135 N.E. 2d 410 (immunity totally rejected only as to hospitals; other charities retain qualified immunity); *Tomasello v. Hoban*, 6 Ohio Ops. 2d 508, 155 N.E. 2d 82); OKLAHOMA, *Sisters of the Sorrowful Mother v. Zeidler*, 183 Okla. 454, 82 P. 2d 996 (involved paying patient; liability to charity patient not discussed); OREGON, *Hungerford v. Portland Sanitarium & Benevolent Ass'n*, 235 Ore. 412, 384 P. 2d 1009; PENNSYLVANIA, *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A. 2d 193 (involved paying patient, but opinions suggest liability will be rule in all cases); UTAH, *Sessions v. Thomas D. Dee Memorial Hosp.*, 94 Utah 460, 78 P. 2d 645 (involving paying patient); VERMONT, *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230, 25 A.L.R. 2d 1; WASHINGTON, *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 260 P. 2d 765 (involved paying patient, but opinion suggests that liability will be rule in all cases); WEST VIRGINIA, *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 143 S.E. 2d 154 (W. Va. Ct. App.); WISCONSIN, *Kojis v. Doctors Hosp.*, 12 Wis. 2d 367, 107 N.W. 2d 131 (involving paying patient); PUERTO RICO, *Tavarez v. San Juan Lodge*, 68 P.R. 681.

It thus appears that seven states retain the rule of immunity sub-

stantially unqualified. Twelve jurisdictions recognize the rule with varying qualifications, whereas thirty others either have rejected it outright or have applied the rule of liability for injuries to paying patients in language which justifies the conclusion that the hospital would likewise be held liable to *any* negligently injured patient. No clear authority has been found from the states of Hawaii, New Mexico, or South Dakota. See, however, *Ulvig v. McKennan Hosp.*, 56 S.D. 509, 229 N.W. 383, where an action in tort against a "general" hospital was recognized. The opinion does not reveal whether or not the defendant was a *charitable* hospital, and the doctrine of immunity was not discussed. See Note, 3 S. Dak. L. Rev. 182. The question must also be regarded as undecided in New Mexico. A federal court sitting in that state held, in *Deming Ladies' Hosp. Ass'n v. Price*, 276 Fed. 668 (8th Cir.), that the charity was immune, absent corporate negligence. This case was decided prior to *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 118, 58 S. Ct. 817, 114 A.L.R. 1487, however, and is thus no longer controlling even in the court which decided it.

Our research indicates that of the thirty jurisdictions apparently imposing full liability upon charitable hospitals for the actionable negligence of their employees, eighteen abandoned immunity by overruling their prior decisions. Only one state — Nevada — has repudiated the rule by statute. "The overwhelming numerical weight of authority" which bolstered this Court's decisions in the *Williams* cases has shifted to the other side.

This Court has never overruled its decisions lightly. No court has been more faithful to *stare decisis*. In matters involving title to property, its policy has been to leave changes in the law to the legislature. And always it has recognized "the gravity of the proposition that we shall reverse a decision of this court" as Connor, J., said in *Mial v. Ellington*, 134 N.C. 131, 139, 46 S.E. 961, 963-64, reversing *Hoke v. Henderson*, 15 N.C. 1. Nevertheless, when the duty has seemed clear, it has done so, recognizing that the membership of succeeding courts may well regard its membership as no less fallible. A majority of the Court had no hesitancy in abandoning a ruling which it had made in a 1925 criminal case when, in 1963, it became convinced that the ruling was erroneous and that injustices were resulting from it. See *State v. Blackmon*, 260 N.C. 352, 132 S.E. 2d 880, *overruling State v. Swindell*, 189 N.C. 151, 126 S.E. 417 and *State v. Cain*, 209 N.C. 275, 183 S.E. 300. We should be no less willing to overturn, for the same reason, a decision in a civil case. As Stacy, J. (later C.J.), said in *Spitzer v. Comrs.*, 188 N.C. 30, 32, 123 S.E. 636, 638: "There is no virtue in sinning against light or in

persisting in palpable error, for nothing is settled until it is settled right." Almost a quarter of a century later, Ervin, J., said: "The doctrine of *stare decisis* will not be applied in any event to preserve and perpetuate error and grievous wrong." *State v. Ballance,* 229 N.C. 764, 767, 51 S.E. 2d 731.

To hold that defendant Hospital can be held liable to plaintiff here, it is not necessary to discard the doctrine of charitable immunity as applied to churches, orphanages, rescue missions, transient homes for the indigent, and other similar institutions which remain charitable institutions in fact, for Rowan Memorial Hospital is not a charitable institution. The court's conclusion of law that it is a charitable organization is not supported by the stipulations nor the facts found. Even though public hospitals are not operated for private gain, every effort is made to operate them at a profit, which is put back into the facility. Nor are such hospitals principally supported by donations. Paying patients contribute largely to their support and maintenance — they provide the major share of defendant's operating funds. Furthermore, large payments in behalf of charity patients are made by governmental agencies from public funds. In short, to-day, some person or agency *pays* for the services a hospital renders. The hospital has lost its status as a charitable institution; a true charity requires no *quid pro quo* from its beneficiaries.

Convinced that the rule of charitable immunity can no longer properly be applied to hospitals, we hereby overrule *Williams v. Hospital,* 237 N.C. 387, 75 S.E. 2d 303, *Williams v. Hospital Asso.,* 234 N.C. 536, 67 S.E. 2d 662, and other cases of similar import. We hold that defendant Hospital is liable for the negligence of its employees acting within the scope and course of their employment just as is any other corporate employer. Recognizing, however, that hospitals have relied upon the old rule of immunity and that they may not have adequately protected themselves with liability insurance, we follow the procedure of Michigan, Illinois, Nebraska, and Wisconsin, as detailed in the decisions previously noted. The rule of liability herein announced applies only to this case and to those causes of action arising after January 20, 1967, the filing date of this opinion.

With reference to this case, we point out that it is now only in the pleading stage. Whether plaintiff can ultimately recover remains to be seen.

Reversed.

PLESS, J., dissents.

PARKER, C.J., dissenting: It has been settled law in this jurisdiction by a uniform line of decisions for more than fifty-five years that a charitable institution may not be held liable to a beneficiary of the charity for the negligence of its servants or employees if it has exercised due care in their selection and retention. *Williams v. Hospital,* 237 N.C. 387, 75 S.E. 2d 303; *Williams v. Hospital Asso.,* 234 N.C. 536, 67 S.E. 2d 662; *Smith v. Duke University,* 219 N.C. 628, 14 S.E. 2d 643; *Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914; *Cowans v. Hospitals,* 197 N.C. 41, 147 S.E. 672; *Johnson v. Hospital,* 196 N.C. 610, 146 S.E. 573; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807; *Barden v. R. R.,* 152 N.C. 318, 67 S.E. 971, 49 L.R.A. N.S. 801; Anno: 109 A.L.R. 1199. Today, by a divided vote of four to three this Court abolishes the doctrine of charitable immunity.

There are strong arguments in favor of the retention of the doctrine of charitable immunity; there are also strong arguments in favor of its extinction. See Dickinson Law Review, Vol. 66-67, 1961-63, p. 226 *et seq.*

Justice Sharp in the majority opinion has very forcibly set forth arguments in favor of the extinction of the doctrine of charitable immunity.

In *Flagiello v. Pennsylvania Hospital,* 417 Pa. 486, 208 A. 2d 193 (1965), the Supreme Court of Pennsylvania, by a vote of five to two, abolished the doctrine of charitable immunity in Pennsylvania. Chief Justice Bell in his dissenting opinion set forth strong arguments in favor of the retention of the doctrine of charitable immunity. He said:

> "(1) Hospitals and public charities are, next to the Church, the greatest benefactors known to mankind. They are in reality a Trust for Humanity. The majority Opinion would bring so much harm to nonprofit hospitals and so greatly increase hospital expenses, and likewise the already colossal cost to patients, as to (a) harm all patients for the benefit of an injured few, and (b) jeopardize the existence of a number of hospitals, or (c) require them to reduce or greatly curtail or eliminate a number of their essential services and their functions, facilities, research and other activities and benevolences. Most hospitals in metropolitan areas operate in the red when their costs and expenses include depreciation, amortization and interest. For the benefit of a few really injured and many imaginatively-injured people . . . the lame, the halt and the blind, the poor, the sick, the ill, the needy, and the general public will be deprived of the best services which a hospital can and should provide. Moreover, new buildings, modern equipment, more and

better qualified personnel and increased wages will become more and more difficult if not impossible for most charities.

"(2) By eliminating charitable immunity for nonprofit, charitable hospitals, the majority Opinion likewise abolishes it for Churches, schools and universities, homes for the blind, homes for the aged, homes for crippled or retarded or homeless children, Catholic Home Shelter and five other Catholic child-care institutions in Philadelphia, convents, religious organizations of many denominations, the Salvation Army, the Y.M.C.A., and in short for every other charity — small as well as large — and will undoubtedly jeopardize, especially in small communities, the very existence of many of them which today, in spite of State and City aid and large charitable gifts, are barely able to make both ends meet.

"(3) The majority Opinion places the interests of a few individuals above the vital interests of the needy and ill public.

"(4) The majority Opinion changes, without any legal or even social justification and with tremendous resulting harm to the public, the public policy of this Commonwealth which has existed for three-quarters of a century and which has been repeatedly and recently reiterated by our Courts."

The majority opinion in this case cites with approval the majority opinion in the *Flagiello* case.

It may well be that the time has come to re-examine the reasons which caused the creation of the doctrine of charitable immunity, and to determine, under present day conditions, whether this doctrine should be retained or abolished. Mr. Justice Jones said in a dissenting opinion in the *Flagiello* case: "However, although fully cognizant that this doctrine is 'judge made' law created by judicial, not legislative, fiat, in my opinion, this doctrine has become part of the public policy of this Commonwealth, a public policy which, if it is to be changed, should be effected by legislative action." I agree with that statement.

I do not agree with the statement in the majority opinion that the trial court's conclusion of law that Rowan Memorial Hospital, Inc., is a charitable institution is not supported by the stipulations nor the facts found. The majority opinion states in effect that the tide of judicial decisions is in favor of the extinction of charitable immunity. In some of the courts extinguishing the doctrine of charitable immunity it seems to me that the tide is also flowing in favor of the extinction in a large measure of the doctrine of *stare decisis*. Chief Justice Bell, in his dissenting opinion in the *Flagiello* case,

states in effect that it would appear in Pennsylvania that the principle of *stare decisis* "is not dying, but dead."

Public policy considerations will necessarily come to bear on the ultimate fate of charitable immunity. There is no class of institutions more favored and encouraged by our people as a whole than those devoted to religious or charitable causes. Quoting again from Chief Justice Bell's dissenting opinion: "Public-minded benefactors are not likely to have their generous impulses encouraged if advised that some janitor, watchman or other employe of a charitable organization who carelessly fails to note the displacement of a brick or stone in a pavement may thereby bring about the loss of all the property and funds which the donors had sought to devote to the common good." It may be that the extinction of the charitable immunity doctrine may affect adversely and seriously all hospitals and charitable institutions throughout the State, and the impact of such extinction is a matter of grave concern.

This article from the Associated Press was carried in some of the daily papers of the State on Sunday, 7 October 1966.

> "CHARLOTTE (AP) — The North Carolina Hospital Association will ask the 1967 General Assembly to pay hospitals the full cost of caring for charity patients, association officials said Friday.
>
> "But the request will not result in any dramatic increase in the State's bill for charity hospitalization, insisted John Ketner, the association's assistant executive director.
>
> "Because Medicare is paying the hospital bills of more than half the State's charity patients, the association figures that increased costs under the plan will total $483,881 for the two-year period, Ketner said.
>
> "If the increase is approved, Ketner said it would eliminate the need for county supplements to help hospitals meet the costs of caring for charity patients."

The General Assembly is the ultimate tribunal to determine public policy. Members of the General Assembly coming from all parts of the State are in a better position than we are to hear evidence and to determine what effect the extinction of charitable immunity would have upon the charitable institutions of this State, and to decide whether charitable immunity should be retained or abolished, than a bare majority of this Court. I believe that the General Assembly and not this Court should determine whether the doctrine of charitable immunity should be retained or extinguished.

The majority opinion states: "The rule of liability herein an-

nounced applies only to this case and to those causes of action arising after January 20, 1967, the filing date of this opinion." In my opinion, this prospective judicial action is outright legislation by the Court.

Mr. Justice Frankfurter, in his concurring opinion in *Green v. United States,* 356 U.S. 165, 192 (1958) said: "To be sure, it is never too late for this Court to correct *a misconception in an occasional decision, even on a rare occasion* to change a rule of law that may have long persisted but also have long been questioned *and only fluctuatingly applied.* To say that everybody on the Court has been wrong for 150 years and that that which has been deemed part of the bone and sinew of the law should now be extirpated is quite another thing. . . . *The admonition of Mr. Justice Brandeis that we are not a third branch of the Legislature should never be disregarded.*" (Italics mine.)

LAKE, J., dissenting: If this were a case of first impression in this Court, I should be inclined, except as noted below, to concur in the result in the exceedingly well reasoned opinion of the majority. If I were a member of the Legislature, I should find it most persuasive upon the question of the adoption of a bill to make such a change in the law of this State. Since neither of those conditions prevails, I dissent.

If the majority opinion is otherwise sound, I find no basis in its reasoning, or in the authorities which it cites, for making a distinction between a nonprofit, charitable hospital corporation and any other nonprofit, charitable corporation with respect to the liability of such corporation for injury to a recipient of its services caused by the negligence of its employee in the course of that employee's duties. However, the basis for my dissent concerns an aspect of the majority opinion which is of much more far reaching importance to the people of this State than the mere determination of the right of a patient in such a hospital to recover damages for an injury caused by the negligence of such an employee. I shall, therefore, briefly state the reason I cannot concur in this decision.

Clearly, the availability at this time of liability insurance is immaterial upon the question of whether liability shall be decreed by us to exist from this date forward. The existence or nonexistence of a legal duty, and of liability to damages caused by the breach of that duty, surely cannot turn upon whether hospitals in general, or this defendant in particular, may now elect between paying for such losses as they occur or paying for them (plus a profit to an insurance company) in advance through insurance premiums.

The gist of the decision now reached by the majority is:

> "Decided cases indicate that the *present* state of the law in North Carolina is as follows: A patient, paying or nonpaying, who is injured by the negligence of an employee of a charitable hospital may recover damages from it only if it was negligent in the selection or retention of such employee. * * * Convinced that the rule of charitable immunity *should no longer* be applied to hospitals, we hereby overrule *Williams v. Hospital* * * * and our other cases of similar import * * * The rule of liability herein announced applies only to this case and to those causes of action arising *after* * * * the filing date of this opinion." (Emphasis mine.)

In support of this decision, the majority quote with approval the opinion of the Supreme Court of Michigan in *Parker v. Hospital,* 361 Mich. 1, 105 N.W. 2d 1, as follows:

> "The old rule of charitable immunity was justified in its time, on its own facts. Today we have a new set of facts. * * * [C]hanged conditions have rendered the rule no longer necessary."

The Constitution of North Carolina contains these important provisions:

> "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." (Article I, § 29.)
>
> "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other." (Article I, § 8.)
>
> "The legislative authority shall be vested in two distinct branches, both dependent on the people, to wit: A Senate and a House of Representatives." (Article II, § 1.)

It cannot be doubted that the authority to determine that, by reason of changed conditions, that which was the law yesterday ought not to be the law tomorrow is "legislative authority." So, a declaration that in future litigation the courts shall hold that one who does a certain act tomorrow morning shall be liable in damages, but that one who did the same act last night shall not be liable in damages is an exercise of "legislative authority." The Constitution of this State expressly declares that "*the* legislative authority" shall be vested in the Legislature. (Emphasis mine.) This provision, taken together with Article I, § 8, *supra,* means that this Court has no legislative authority. It is for the people of North Carolina to

determine which of their agencies shall exercise which of their governmental powers. They have done so in language which seems to me inescapably clear.

The majority opinion, via a quotation from the Supreme Court of Michigan in *Parker v. Hospital, supra,* appears to cite Mr. Justice Cardozo in support of its view that this Court may properly declare that tomorrow morning the substantive law of North Carolina shall be the opposite of what it was last night. A reading of the opinion of that great jurist and legal philosopher in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 53 S. Ct. 145, 77 L. ed. 360 (the case cited by the Michigan Court) discloses that the Michigan Court, and hence the majority of this Court, misconstrued Judge Cardozo's views there expressed. In that case, the Supreme Court of the United States was passing upon the single contention that the United States Constitution had been violated by a decision of the Supreme Court of Montana refusing to give retroactive effect to the overruling of its former decision. What Mr. Justice Cardozo there said was:

> "This is a case where a court has refused to make its ruling retroactive and the novel stand is taken that the Constitution of the United States is infringed by the refusal. We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."

I agree completely with this declaration by this wise interpreter of the Constitution of the United States that a decree of the Supreme Court of North Carolina, in a case like the present, to the effect that the law of North Carolina tomorrow shall be different from what it was yesterday violates no provision of the United States Constitution, and so is not properly a matter of concern to the Supreme Court of the United States. That, however, is a far cry from holding that the Constitution of North Carolina permits us to render such a decision.

The construction of our Constitution by this Court cannot be foreclosed by decisions of the Supreme Courts of Michigan, Illinois, Nebraska and Wisconsin, concerning their own authority under the constitutions of those states. Nor can it be foreclosed by a determination by the Supreme Court of the United States that it has a like power in its construction of the United States Constitution. See *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694.

Again, the majority opinion quotes, with approval, this state-

ment from the opinion of the Supreme Court of Oregon in *Hungerford v. Benevolent Association,* 235 Ore. 412, 414-15, 384 P. 2d 1009, 1010-11:

> "Negligence law is common law. * * * The fact that a rule has been followed for fifty years is not a convincing reason why it must be followed for another fifty years if the reasons for the rule have ceased to exist. * * * When courts have recognized the need for remedies for *new* injuries, the remedies have been found." (Emphasis mine.)

In the first place, the present decision is not an allowance of a remedy for a new type of injury. The injury of which the present plaintiff complains is exactly the same kind of injury suffered by the plaintiffs in the cases before this Court when it was determined that the law of North Carolina provided no remedy because there had been no violation of a legal duty; that is, the plaintiffs had sustained no *legal* injury. Those plaintiffs were denied liability upon the application of the maxim *damnum absque injuria.* The present decision is, therefore, not an invention of a new remedy for a new kind of damage or for a new kind of act or omission. It is simply a holding that a set of facts which yesterday gave rise to no legal right in anyone, except Henry Rabon, will tomorrow give a legal right to anyone so damaged. Under this decision, of all the persons injured heretofore in hospitals by the negligence of a nurse, carefully selected by her employer, not one can recover, with the sole exception of Henry Rabon. This is not only an exercise of "legislative authority" to change the law. It is discriminatory legislation which, if enacted by the General Assembly, would be open to serious question as to its constitutionality.

The relationship which Henry Rabon had to the hospital which he sues is not a new relationship previously unknown to the law. The hospital is not a type of creature previously unknown to the law. The events upon which he bases his alleged right to recover damages are not events previously unknown to the law. To be sure, much which was reasonable care in hospitals of 1863 would be gross carelessness in a hospital of 1963, to paraphrase the Oregon Court's opinion, but that is not the question before us. The question is whether we should now hold that the same relationship and precisely similar events which yesterday imposed no liability upon the hospital will, if repeated tomorrow, impose liability upon it tomorrow morning. To so determine is of the essence of the legislative process. It is not an exercise of the judicial power, which is the only governmental power that the people of this State have seen fit to

authorize us to exercise in their name. Of course, "the fact that a rule has been followed for fifty years is not a convincing reason why it must be followed for another fifty years if the reasons for the rule have ceased to exist," but it may well be a reason why this Court should follow it until the Legislature decides to change it.

Again, the majority opinion, quoting the Supreme Court of West Virginia, says, "*Stare decisis* is not a rule of law but is a matter of judicial policy." I do not so understand it. Of course, this Court has in the past overruled, and will in the future overrule, its former decisions in the proper exercise of the judicial function of government. However, a proper exercise of that power by a court is the result of its determination that its former decision was an erroneous statement of the law *when the decision was rendered* and, therefore, the law never has been as stated in the former opinion and the correction is retroactive. To change the existing law *for the future* because a different rule would be a wiser policy for the State of North Carolina to follow *in the future* is, in my opinion, a violation by this Court of the Constitution of North Carolina and a usurpation of a power which has not been granted to us by the people. That is, it is the violation, for a good purpose, of a rule of law by which we are bound rather than a mere casting aside of a judicial policy which we are at liberty to discard or retain at our pleasure.

There is much to be said in support of the view that a change in this rule stated in the former decisions of this Court should not be given retroactive effect. It may be that those decisions induced some hospitals not to carry liability insurance they otherwise would have procured. It may even be thought that those decisions have encouraged hospitals to be less concerned about negligence in the care of patients than they would otherwise have been. I doubt that those decisions have resulted in more injuries to patients than would otherwise have occurred. Nevertheless, there is a risk of injustice and hardship in a retroactive reversal of those decisions.

Assuming, as I do, that a change of the law, effective only as to the future, is desirable, the Legislature clearly has the authority to make it. This Court does not. Our authority is not enlarged by a possibility that the Legislature may see fit to leave the law where our predecessors declared it to be. The reluctance, if any, of the Legislature to exercise its power as we believe desirable does not shift that power to us.

BILL EDWARDS v. LOUISE G. JOHNSON.

(Filed 20 January, 1967.)

1. Trial § 21—

On motion for involuntary nonsuit, the evidence must be taken most strongly against defendant.

2. Assault and Battery § 8—

While a person is entitled to defend his home against forcible entry by an intruder, he may not shoot even a trespasser until the trespasser attempts to force an entry in a manner sufficient to lead a reasonably prudent person to believe that the trespasser intends to commit a felony or to inflict some serious injury.

3. Weapons and Firearms § 2; Negligence § 4—

A firearm is a dangerous instrumentality, and a person handling a firearm is required to exercise care commensurate with the dangerous character of the article.

4. Same; Negligence § 5—

When a firearm is discharged and inflicts injury while in the possession and control of a person, there is a presumption that the firing is intentional or the result of carelessness or inadvertence on the part of such person, which presumption is sufficient to take the issue of negligence to the jury in the absence of evidence in explanation.

5. Weapons and Firearms § 2— Evidence held for jury upon issue of negligence in accidental discharge of gun, and not to show contributory negligence as a matter of law on part of victim.

The evidence tended to show that plaintiff customarily visited the home of defendant and her husband at nighttime in the transaction of business and on such occasions went to the back door, that on the morning of the occasion in suit he had telephoned that he would stop by when he was in the vicinity, that on the occasion in suit he knew the husband was not home and that defendant was uneasy on such occasions, that he stopped by defendant's home at 9:30 at night and knocked on the back door, that defendant came to the door carrying a loaded and cocked shotgun with her right hand and arm, turned on the porch light, and as she was pushing back the curtain from the door, the barrel of the gun hit the door and the gun fired, injuring plaintiff seriously and permanently. The evidence further tended to show that on a previous occasion plaintiff had seen the gun on the kitchen table when he had knocked at the back door, that the gun belonged to defendant and that she knew how to load it and was accustomed to handling it. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence and not to show contributory negligence as a matter of law on the part of plaintiff.

LAKE, J., dissenting.

PARKER, C.J., joining in the dissent in part.

BRANCH, J., joins in the dissent of PARKER, C.J.

EDWARDS *v.* JOHNSON.

APPEAL by plaintiff from *Hasty, S.J.*, July Civil Session of FORSYTH.

Plaintiff sues for personal injuries sustained on September 28, 1964, when defendant accidentally discharged a shotgun. Plaintiff's evidence tends to show:

Plaintiff, a loan officer for an industrial bank in Winston-Salem, moonlights as a general insurance salesman. Defendant, Mrs. Louise G. Johnson, lives with her husband and three small children about 6 miles from the center of Winston-Salem and about three-quarters of a mile inside the city limits. Since June 1962, plaintiff has handled the insurance business of defendant and her husband. All his transactions with them have been at their home, usually between 7:00 and 11:00 at night. Defendant had told him that it was not necessary to telephone before stopping by because they were usually up until 11:30 or 12:00 at night. In consequence, plaintiff did not do business with them on an appointment basis. On each occasion when he had visited the Johnson home, plaintiff had gone to the rear door.

On September 28, 1964, Mr. Johnson was in Florida on business, a fact which plaintiff knew. About 11:00 a.m. on that day, defendant called plaintiff with reference to some complications which had arisen in connection with the insurance and loan on the automobile she and her husband had purchased a few weeks earlier. Plaintiff told her he would stop by her home the next time he was in the neighborhood. As a result of that conversation in the morning, plaintiff went to the Johnson home that night about 9:30. He parked his car in the Y-shaped parking area to the left of the driveway about 20 feet from the kitchen window and proceeded to the rear entrance of the house, which was just in front of his automobile to the left. The only light he could see was one in the kitchen. He found the door to the screened back porch standing wide open. A light shone through the curtains over the door between the kitchen and the porch. Plaintiff knocked on the door, waited 20-30 seconds and knocked again before he heard footsteps coming to the door. Then there was a loud explosion and he felt pain. A discharge from a shotgun had fractured his right leg, damaged the nerves, and injured the soft tissues. Defendant cracked the door and screamed when she saw plaintiff. He told her that she had shot him and asked her to call an ambulance. At his request, she procured a cloth, which they applied as a tourniquet while waiting for the ambulance. Defendant remained in the hospital for a month. He was first in a cast, then in a brace for about a year, and it was not until May 1965 that he was able to return to work. He has a permanent, partial injury to his leg.

Plaintiff's version of defendant's explanation to him of the shooting was: "She told me that she knew nothing about them (firearms). . . . She told me that she heard a noise. When I knocked, she picked up the gun, loaded it, pulled the hammer back and went to the door. She said as she was reaching to turn on the light switch, the gun went off." Defendant told plaintiff that the accident was her fault.

On prior occasions, plaintiff had seen the gun, a single barrel 16 gauge shotgun, in Mrs. Johnson's possession. One night about three weeks earlier when he had stopped by between 9:45 and 10:00, defendant came to the back door, turned on the light, pulled back the curtain, and then opened the door for him. When he walked in, he saw the gun on the kitchen table. Defendant told him she kept the gun for her protection.

Defendant gave the following explanation to L. C. Masencup, the police officer who investigated the shooting immediately after it occurred:

> "[S]he (defendant) stated that she was getting ready for bed. . . . when she heard some dogs barking in the back yard and heard someone on her back porch or something on her back porch. She said she took her 16 gauge shotgun and loaded it and went to the back door and turned on the back porch light and saw a shadow on the back porch. She stated as she reached to push the curtains back from the back door — with the 16 gauge shotgun holding it in her hand and under her arm — and as she reached for the curtain, that the gun hit the door and went off. She said she was holding the gun in her right hand. She told and described to us how she had the gun in her arm — down at an angle. I don't recall her showing us whether she had her hand on the trigger. I asked if the gun was cocked at the time, and she said she could not remember — she didn't remember cocking the shotgun. . . . She had contacted him on this date requesting that she see him in regard to a loan and some insurance. . . . She was not expecting him this late at night. She said after she saw who it was, she said she didn't have any intention of shooting him. She stated at that time that there had been some prowlers in the neighborhood, and this was the reason she got the gun, and she looked nervous and upset. She said that she did not do it intentionally, and said she had known him for quite sometime."

Defendant also told the officer that the gun belonged to her and not to her husband. Masencup found a small amount of white paint on the end of the barrel where it apparently had hit the door.

Defendant's motion for judgment of nonsuit made at the conclusion of plaintiff's evidence was denied. Defendant, without offering any evidence, rested and renewed her motion. At the conclusion of all the evidence, the motion was allowed. From a judgment dismissing the action, plaintiff appeals.

White, Crumpler, Powell and Pfefferkorn for plaintiff appellant.

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

SHARP, J. Plaintiff alleges that the injuries for which he seeks compensation were caused by the negligent manner in which defendant handled a loaded shotgun. Defendant denies negligence and pleads contributory negligence.

In evaluating a motion for nonsuit, the evidence must be considered in the light most favorable to the plaintiff, who is entitled to every reasonable inference therefrom. "The rule is sometimes stated conversely, with perhaps more pointed significance. Upon demurrer, the evidence must be taken most strongly against the defendant." *Fox v. Army Store,* 215 N.C. 187, 190, 1 S.E. 2d 550, 551.

Plaintiff's evidence is sufficient to justify the jury in making these findings: Plaintiff handled all insurance matters for defendant and her husband, transacting business with them at night at their home. He always came to the back door, and defendant had told him it was not necessary to telephone before coming. On the morning of September 28, 1964, defendant had telephoned plaintiff about an insurance problem, and he had agreed to stop by when he was in the vicinity. As a result of her call, plaintiff went to defendant's home that night at 9:30 — as usual, without first telephoning. Plaintiff knew defendant's husband was away and that she was uneasy when she was alone in the house. When plaintiff knocked at the kitchen door, according to his custom, defendant came to the door carrying a loaded and cocked shotgun with her right hand and arm. She turned on the back porch light and, as she was pushing back the curtains from the door, the barrel of the gun hit the door and went off, injuring plaintiff seriously and permanently. Although she told plaintiff she knew nothing about firearms, defendant was not unfamiliar with the shotgun. It belonged to her individually. She knew how to load it; she had loaded it when she heard plaintiff's knock at the door. With the hammer down, the gun would not fire; it had to be cocked first. Defendant was accustomed to handling the gun. She had told plaintiff that she kept it for her protection. He had seen it in her possession on prior occasions. Three weeks earlier, he

had seen it on the kitchen table when he had knocked at the back door between 9:45 and 10:00 p.m. On that occasion, defendant had turned on the porch light, pulled back the curtain, and had then opened the door for him.

Upon this evidence, defendant contends that she is equally entitled to a judgment of nonsuit on the grounds (1) that the evidence fails to disclose any negligence on her part and (2) that it affirmatively discloses plaintiff's contributory negligence. Defendant argues in her brief that she, "as most women under similar circumstances would be, was frightened and uneasy when at home alone at night in a neighborhood troubled with prowlers"; that plaintiff knew she kept a shotgun for her protection and that her husband was away; and that plaintiff's conduct "in prowling around the back of the defendant's home in the middle of the night . . . and making noises at the kitchen door without any forewarning . . . constituted an emergency situation" which made defendant's response thereto foreseeable, reasonable, and prudent. She further asserts that "fundamental in our law is the sanctity of one's home and the right to protect it."

The right to defend one's home against forcible entry by an intruder is well settled in this State. A householder, however, may not intentionally shoot even a trespasser until he attempts to force an entry in a manner sufficient to lead a reasonably prudent person to believe that he intended to commit a felony or to inflict some serious personal injury upon the occupants of the house. *State v. Miller,* 267 N.C. 409, 148 S.E. 2d 279. In other words, one may not shoot first and investigate later. "There must be actual or apparent necessity to shoot; otherwise, shooting at a human being is unlawful." *State v. Phillips,* 262 N.C. 723, 726, 138 S.E. 2d 626, 628.

The evidence in this case does not invoke the right of a householder to defend his habitation for the reason that defendant did not intentionally shoot to repel an invasion of her home or an assault upon her person. She discharged the gun accidentally. Even if this had not been the case, however, she would not have been justified in shooting intentionally, for the person at the door had neither threatened nor attempted any violence. Until he had done so, she was not entitled to assume the worst — certainly not before she had inquired, "Who's there?" Under the circumstances disclosed here, this simple inquiry usually would have been the first act of the average woman of ordinary firmness. Had defendant merely inquired who was at the door before she cocked the gun (an operation performed by the thumb in one second), and before she had turned on the porch light and at-

tempted to pull back the curtain, this tragedy would have been averted.

In appraising both plaintiff's and defendant's actions, it must be remembered that this was not the first time plaintiff had come to defendant's back door at night, albeit her husband usually had been at home when he came. Plaintiff always did business with defendant and her husband in their home, usually at night and sometimes as late as 11:00. Furthermore, plaintiff always came to the back door — presumably because of the design of the driveway and parking area. On previous occasions, defendant had told him that it was not necessary to telephone before coming. In addition, she had called plaintiff that very day about an insurance matter, and he had told her that he would come by the first time he was in the vicinity. When the knock came that night at 9:30, she might reasonably have anticipated that it was plaintiff. It might also have been a neighbor, a visiting relative or friend, the paper boy collecting, or a distressed motorist seeking a telephone. It might have been any one of a number of persons on a lawful mission. The unknown person outside could, of course, have been a marauder, but until he had made some threat or attempt at a forcible entry, she was not justified in convicting him, nor was she relieved of her duty to exercise the utmost care to prevent the unintentional discharge of the gun.

It is settled law with us that the highest degree of care is exacted of those handling firearms. "The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article." *Brittingham v. Stadiem*, 151 N.C. 299, 302, 66 S.E. 128, 130. See *Belk v. Boyce*, 263 N.C. 24, 138 S.E. 2d 789. "The same degree of care is, no doubt, expressed by saying that the care which persons using firearms are bound to take in order to avoid injury to others is a care proportionate to the probability of injuries to others. . . ." 56 Am. Jur., Weapons and Firearms § 23 (1947). One who handles a loaded gun is charged with the knowledge that it is a dangerous instrumentality which, if accidentally discharged, might cause injury to others. *Naegele v. Dollen*, 158 Neb. 373, 63 N.W. 2d 165, 42 A.L.R. 2d 1099. If one is injured from the discharge of firearms negligently used or handled by another, the person causing the injury is civilly liable even though the discharge was not intended. *Skinner v. Ochiltree*, 148 Fla. 705, 5 So. 2d 605, 140 A.L.R. 410.

> "Any loaded firearm . . . is a highly dangerous instrumentality and, since its possession or use is attended by extraordinary danger, any person having it in his possession or using

it is bound to exercise extraordinary care. A person handling or carrying a loaded firearm in the immediate vicinity of others is liable for its discharge, even though the discharge is accidental and unintentional, provided it is not unavoidable." *Kuhns v. Brugger,* 390 Pa. 331, 338, 135 A. 2d 395, 400, 68 A.L.R. 2d 761, 769.

As the Illinois court pointed out in *Atchison v. Dullam,* 16 Ill. App. 42, 46 (1884), "Firearms are not usually discharged without the intervention of some human agency. A presumption, therefore . . . is raised that when such weapons are discharged while in the possession and control of another, the firing is caused either by design, carelessness, or inadvertence upon his part." The opinion in *Atchison* quotes from *Tally v. Ayres,* 35 Tenn. 677, a case in which plaintiff's horse was killed when a gun discharged as defendant placed it upon his shoulder:

> "[T]he very fact that the gun *'went off',* under the circumstances detailed in the proof, implies, of necessity, some inadvertent act, or want of proper caution on the part of the defendant. The *lock* must either have been defective, or some agency must have been exerted, unintentionally and perhaps unconsciously, by the defendant, otherwise the discharge of the gun could not have happened." *Id.* at 681.

Certainly, we cannot say, as a matter of law, that an ordinary knock at the door at 9:30 p.m., without more, is calculated to create in a woman, situated as defendant, such a reasonable apprehension of serious and immediate danger that she might be expected to forget all the safety rules for handling a loaded gun, and that she may not, therefore, be held responsible if she permits the gun to discharge as she peers through the curtains to ascertain the identity of her caller. On the contrary, in the absence of any evidence of a mechanical defect in the gun, we think the fact that it did discharge under these circumstances is sufficient evidence to take the case to the jury on the issue of defendant's negligence. She had the sole control and custody of the weapon; no other person was present; no superior agency or outside force intervened. There is no suggestion in the pleadings or evidence that the gun was defective in any way. See *Crump v. Browning,* 110 A. 2d 695 (D. C. Munic. Ct. App.), 46 A.L.R. 2d 1212; Annot. *Res Ipsa Loquitur*-Firearms, 46 A.L.R. 2d 1216; 94 C.J.S., Weapons § 29(d) (1956); 56 Am. Jur., Weapons and Firearms § 22 (Cum. Supp. 1966); 3 Strong, N. C. Index, Negligence § 5 (1960). For the reasons implicit in the preceding dis-

cussion, it likewise cannot be said that plaintiff's evidence discloses his contributory negligence as a matter of law.

The nonsuit was improvidently granted, and the judgment dismissing the action is

Reversed.

LAKE, J., dissenting: The defendant offered no evidence. There is no significant conflict in the testimony of the plaintiff and the investigating officer as to how the shooting occurred. The motion for judgment of nonsuit must be determined upon the facts related by them and inferences, favorable to the plaintiff, which may reasonably be drawn therefrom. The questions to be resolved are: (1) Are these facts and inferences sufficient to support a finding that the defendant was negligent in her handling of the shotgun? (2) If so, do these facts and inferences lead necessarily to the conclusion that the plaintiff was negligent in going to the defendant's home as he did, in view of the hour and the circumstances known to him, and was this conduct on his part one of the proximate causes of the injury? In my opinion the first question should be answered "No," and the second should be answered "Yes." Either answer requires the affirmance of the judgment of nonsuit since the basis of liability for injury resulting from the accidental discharge of a firearm is negligence and the injured party cannot recover where his own negligence contributed to his injury. *Belk v. Boyce,* 263 N.C. 24, 138 S.E. 2d 789; *Rudd v. Byrnes,* 156 Cal. 636, 105 P. 957; *Bahel v. Manning,* 112 Mich. 24, 70 N.W. 327; *McLaughlin v. Marlett* (Mo. App.), 228 S.W. 873, affirmed 296 Mo. 656, 246 S.W. 548; *Webster v. Seavey,* 83 N.H. 60, 138 Atl. 541, 53 A.L.R. 1202; *Magar v. Hammond,* 171 N.Y. 377, 64 N.E. 150; 56 Am. Jur., Weapons and Firearms, § 31.

These facts are undisputed: The plaintiff went to the defendant's back door at or after 9:30 p.m. The house was dark except for a light in the kitchen. The defendant was at home alone except for her three little children, the eldest being six years of age. Her husband was out of the city, as the plaintiff knew. The defendant was preparing to retire for the night. She had not been informed that the plaintiff was coming to her house that evening. When he came he did not identify himself but merely went upon the darkened back porch and knocked at the kitchen door. The city police had received numerous calls about prowlers in this neighborhood prior to this occasion. The defendant knew that there had been prowlers in the neighborhood. Hearing the knock, the defendant loaded her shotgun, cocked it, went to the back door, turned on the back porch

light, observed a shadow through or upon the curtain over the glass portion of the door, reached with her left hand to pull aside the curtain to see who was on the porch and accidentally struck the end of the barrel of the gun against the door. Thereupon the gun discharged.

The plaintiff testified:

> "I did not know that Mrs. Johnson was *frightened* when she was there when her husband was away. I did not know that she was *terrified* when she was there by herself. I had seen her before with a shotgun in the house, and she told me she kept that for protecting herself. That was before this accident which happened on September 28, 1964. I actually saw the gun. * * * I knew that Mrs. Johnson was *uneasy* when she was alone in the house when her husband was away." (Emphasis added.)

To say that he did not know she was "frightened" but did know she was "uneasy" when her husband was away is a mere play upon words. He testified that he knew she had been sufficiently "uneasy" under the same circumstances only three weeks before, and at the same hour of the evening, to have her shotgun lying on the table of the very room, on the door of which he knocked, and that her purpose in having the gun there three weeks earlier was for her "protection."

Upon the question of the sufficiency of this evidence to support a finding that the defendant was negligent, I divide the inquiry into two parts:

> (1) When a woman, living in an area recently disturbed by prowlers, is alone in her home save for three tiny children, her husband being out of the city, is preparing to retire for the night, her home being darkened except for a single light in the kitchen, and hears an unidentified person come upon her darkened back porch and knock at the door, is she negligent in carrying with her to the door a loaded and cocked gun?
>
> (2) Assuming it is not negligence to carry the loaded and cocked gun to the door, may negligence be inferred from the fact that, as she reached with one hand for the door curtain, the barrel of the gun, held in the other hand, accidentally struck the door and the gun was thereby discharged?

The majority opinion does not make clear in which of these respects the majority finds the defendant to have been negligent, but it would appear to be the majority view that it was negligence for

her to carry a cocked gun to the door. If the defendant was negligent in either respect, such negligence would, of course, support the majority's conclusion upon the issue of negligence.

The right of a householder to keep in his or her home a firearm, loaded and ready for instant use in the protection of the householder and other members of the family against the danger of assault by an intruder is established. Constitution of the United States, Amendment II; Constitution of North Carolina, Article I, Section 24. As the Pennsylvania Court said in *Kuhns v. Brugger,* 390 Pa. 331, 135 A. 2d 395, "No one can question the right or the prudence of (the homeowner) being armed against possible midnight prowlers and intruders." As this Court said in *State v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142, "The right of a person to defend his home from attack is a substantive right."

It has been repeatedly held by this Court that one in his own home and under reasonable apprehension of an attack, likely to result in death or great bodily harm to himself or a member of his family, may shoot to prevent such invasion of his home, the reasonableness of such apprehension being judged by the circumstances as they appear to the defendant. *State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756; *State v. Sally,* 233 N.C. 225, 63 S.E. 2d 151; *State v. Baker,* 222 N.C. 428, 23 S.E. 2d 340. Thus, if the defendant had intentionally fired her gun and wounded the plaintiff, she would not be liable in damages if she believed and had reasonable grounds for the belief that he was a prowler seeking to invade her home in order to do violence to herself or to her little children asleep in their cribs. In such case, it would be immaterial that, in fact, as here, the person so shot had no improper motive in coming to the house. *State v. Francis, supra; Patterson v. Kuntz,* La. App., 28 So. 2d 278.

As Chief Justice Pearson said in *State v. Floyd,* 51 N.C. 392, "One cannot be expected to encounter a lion as he would a lamb." In the nighttime, the tread and tap of a "lamb" at an unlighted back door may easily be mistaken for those of a "lion," especially by a woman alone save for three infants, and "uneasy."

It is a matter of common knowledge that there has been, and continues to be, an alarming increase in serious crimes throughout our country. In the October, 1966, issue of "Trial Judges' Journal," John Edgar Hoover, Director of the Federal Bureau of Investigation, said:

> "Last year, an estimated 2,780,000 serious crimes — murders, forcible rapes, aggravated assaults, robberies, burglaries, automobile thefts and larcenies involving $50.00 or more — were

committed in the United States. This is the highest total in the history of recorded crime statistics. It reflects a six per cent rise over the number of serious offenses reported in 1964, and an alarming 46 per cent increase over 1960."

It is also a matter of common knowledge that the lone woman in her home at night is an inviting target for vicious criminals, stimulated by judicial assurance that the police and the prosecuting attorney must work under handicaps which, until recently, neither they nor anyone else suspected were imposed by the Constitution of the United States. These well known facts must be taken into account in judging the reasonableness of precautions taken by a woman, summoned in the nighttime to her back door by the knock of an unexpected visitor who does not announce his identity. Under these circumstances, I cannot consider it negligence for such a woman to carry a loaded gun with her as she goes to determine whether the visitor is a "lamb" or a "lion." Nor is it negligence for her to have the gun ready for instant use. It is not unreasonable for her to apprehend that the charge of the "lion" may be sudden and ferocious.

That which may be unreasonable apprehension in a man, alone in his residence at night, is not necessarily so in the case of a woman similarly situated. In *State v. Miller,* 221 N.C. 356, 20 S.E. 2d 274, this Court recognized that the age and physical weakness of the defendant are matters to be considered in determining the reasonableness of his preparation for defense against an apprehended assault. The sex of the defendant is also material upon this question.

We come then to the question of whether the defendant, upon arrival at the door, failed to use due care to prevent the unintended discharge of the gun.

Care which is "due care" in the handling of a club, or even of a boy's air rifle, is not "due care" in handling a shotgun. A loaded and cocked shotgun is such an extremely dangerous instrumentality, when carried in the vicinity of another person, that the possessor must use a high degree of care to prevent an unintentional firing of it. *Jensen v. Minard,* 44 Cal. 2d 325, 282 P. 2d 7; *Rudd v. Byrnes, supra; Crump v. Browning* (Mun. Ct. App. D. C.), 110 A. 2d 695, 46 A.L.R. 2d 1212; *Skinner v. Ochiltree,* 148 Fla. 705, 5 So. 2d 605, 140 A.L.R. 410; *Bahel v. Manning, supra; Naegle v. Dollen,* 158 Neb. 373, 63 N.W. 2d 165, 42 A.L.R. 2d 1099; *Kuhns v. Brugger, supra;* 56 Am. Jur., Weapons and Firearms, § 23. In *Brittingham v. Stadiem,* 151 N.C. 299, 66 S.E. 128, this Court said:

"In *Mattson v. R. R.,* 95 Minn. 477; 70 L.R.A. 503, it is held: 'The degree of care required of persons having the pos-

session and control of dangerous explosive, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article.' The same doctrine is held by this Court."

This rule was also approved in *Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412, and in *Belk v. Boyce, supra*, Moore, J., speaking for the Court, said:

"Persons having possession and control over dangerous instrumentalities are under duty to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others. This rule applies to firearms."

It must, nevertheless, be borne in mind that the basis of liability for injury caused by the unintentional discharge of a firearm is negligence; that is, the failure to act as a reasonable person would act under the same circumstances. The possessor of a gun is not an insurer against injury due to its accidental discharge. *Kuhns v. Brugger, supra.* The danger inherent in the loaded, cocked gun is one of the circumstances, but only one. The time, place and imminence or absence of danger to the bearer of the gun are other circumstances to be considered in determining whether due care — *i. e.*, the highest practicable care — has been used in the handling of this dangerous implement. The circumstances surrounding this "uneasy" defendant, as she turned on the porch light and reached for the door curtain with an unknown person outside the door, are not the same circumstances as those surrounding a man who picks up an automatic pistol in the home of his host to gratify his curiosity as to its mechanical condition *(Crump v. Browning, supra)*, or one who undertakes to drive an unruly cow by striking her with the barrel of a cocked shotgun *(Morgan v. Cox*, 22 Mo. 373), or who experiments with the cocking and snapping of a gun in a store *(Brittingham v. Stadiem, supra; Naegle v. Dollen, supra)*, or who hands a cocked gun over a gate to a hunting companion *(Gibson v. Payne*, 79 Or. 101, 154 P. 422), or who, while sitting in his living room entertaining a guest, undertakes to make an adjustment in the firing mechanism of his gun and then, while it is pointed at the guest, cocks it *(Bahel v. Manning, supra)*, or who fires a rifle at a sparrow when children have just walked past the sparrow's perch *(Jensen v. Minard, supra)*, or who, with his gun pointed at his hunting companion, undertakes to uncock it knowing that the hammer is defective *(Annear v. Swartz*, 46 Okla. 98, 148 P. 706).

It is well settled that one confronted with an emergency, which gives rise to a reasonable apprehension of danger of serious and immediate injury, is not held to the standard of care required of one acting in an atmosphere of calm detachment. Strong, N. C. Index, Negligence, § 3, and cases there cited. Fright, which is both genuine and reasonable, is a circumstance to be considered in determining whether the bearer of a gun handled it with a degree of care commensurate with the nature of the instrumentality. The sex, age and physical strength of the defendant have a direct relationship to the reasonableness of her anxiety and to her inability to handle expertly her gun in one hand and the door curtain in the other. See *State v. Miller, supra.* Under such circumstances, she is not shown to have been negligent by proof that, as she reached for the curtain, the end of her gun barrel struck against the door and the jar caused the gun to fire.

There is much authority to the effect that, in the absence of an explanation of how the gun was fired, proof that the plaintiff was injured by the firing of a gun in the hands of the defendant who knew, or had reason to know, that someone was nearby and in the direction toward which the gun was pointed, is sufficient evidence of negligence to carry this issue to the jury. In *Crump v. Browning, supra,* the Municipal Court of Appeals of the District of Columbia said:

> "Nothing is better settled than the general principle that when the cause of an injury is (1) known, (2) in the defendant's control, and (3) unlikely to do harm unless the person in control is negligent, the defendant's negligence may be inferred without additional evidence. [Citations omitted.] It would be hard to imagine a situation more uniquely in the realm of *res ipsa loquitur* than this one. A man holds an automatic pistol in his hands, the pistol is discharged and wounds a friend. To say that *res ipsa* does not apply is to cast on the person shot the anomalous, if not impossible, burden of explaining how it happened."

As was said in *Atchison v. Dullam,* 16 Ill. App. 42:

> "Firearms are not usually discharged without the intervention of some human agent. A presumption, therefore, * * * is raised, that when such weapons are discharged while in the possession and control of another, the firing is caused either by design, carelessness or inadvertence upon his part."

In the excellent annotation in 46 A.L.R. 2d 1216, entitled *"Res Ipsa Loquitur* — Firearms," it is said:

"The conclusion drawn from the cases as to what constitutes the rule of *res ipsa loquitur* is that proof that the thing that caused the injury to the plaintiff was under the control and management of defendant, and that the occurrence was such as in the ordinary course of things would not happen if those who had its control and management used proper care, affords sufficient evidence, or, as sometimes stated by the courts, reasonable evidence, *in the absence of explanation by defendant,* that the injury arose or was caused by defendant's want of care. Thus, the occurrence of an injury under the circumstances as set forth permits an inference, or, in the terminology of some courts, raises a presumption, that defendant is guilty of negligence. * * * The doctrine of *res ipsa loquitur* has been held or recognized as applicable in cases of injuries inflicted by the accidental discharge of firearms where it is shown that defendant had the sole or exclusive control and management of the firearm at the time it was so discharged." (Emphasis added.)

However, the doctrine of *res ipsa loquitur* does not apply where the evidence shows how the occurrence in question came about. In Stansbury, North Carolina Evidence, § 227, it is said:

"The mere fact of injury, standing alone, will not 'speak for itself.' If the *thing that caused the injury* is not known, or if the known facts are such that conflicting inferences can be drawn from them with equal ease and the whole matter rests in conjecture and surmise, a finding of negligence cannot be supported. So too, if all the facts are known or conceded, a finding of negligence *vel non* must rest on those facts, and there is either no occasion or no room for *res ipsa loquitur.*"

The fact of injury by gunshot does not require the defendant to offer evidence to explain the shooting where, as here, the plaintiff, himself, does so. There is in this case no dispute as to what happened. The picture is clearly drawn by the plaintiff's own evidence and is not sufficient to support an inference that, upon arriving at the door, the defendant handled her gun in any manner not reasonable for a woman in her situation.

The evidence is, therefore, not sufficient to show negligence by the defendant in the unfortunate shooting of the plaintiff. But if it were sufficient to carry the plaintiff over that hurdle, he should, in my opinion, be held to have fallen on the barrier of contributory negligence.

The plaintiff's own evidence shows: He knew the defendant kept a shotgun handy when her husband was not at home, that on this

occasion her husband was out of the city, that the defendant had no knowledge of his intent to come to her house that evening, that upon his arrival the entire house was dark except for a single light in the kitchen, and that it was after the usual hours for visiting. Under those circumstances, he went to the back door of the house and knocked, without any effort to identify himself to the defendant before or as he heard her approaching the door. Even if it could be assumed from his telephone conversation with the defendant several hours before, as the majority opinion seems to do, that the plaintiff reasonably thought the defendant was expecting him to call at some time during that evening, it was not reasonable for him to suppose that she would know that this particular person at her back door was the plaintiff rather than a prowler. He had given the defendant no reason whatever to expect him at that particular time. It is my view that any reasonable man coming to the house, knowing the defendant's husband was out of the city and also knowing that under exactly the same circumstances, only three weeks earlier, the defendant had had a shotgun lying on the kitchen table for her protection, would have identified himself to the defendant by calling out as he approached the door, or by telephoning in advance of his visit. A normal interest in self preservation would seem to so dictate even if consideration for the lady's peace of mind did not.

In *Webster v. Seavey, supra,* the New Hampshire Court held that one, who goes upon a deer hunt without wearing a red cap or coat, may be found guilty of contributory negligence when shot by a companion who mistakes him for a deer. In *Rudd v. Byrnes, supra,* the California Court held that a deer hunter, leaving his assigned station and walking through the brush toward the station of his hunting companion, who mistook him for a deer and shot him, may be found guilty of contributory negligence.

In *McLaughlin v. Marlatt, supra,* the Missouri Court of Appeals had before it the case of a plaintiff shot when, for a prank, he crawled toward the defendant through tall grass in such a way that the defendant, seeing the grass moving, thought it was a fox and shot into the area of movement. The Court said:

> "He was in his sixteenth year, and if he did hide in the grass and produce the impression that a fox was there, ought he, as a boy of that age, in the exercise of ordinary care, to have apprehended that danger was likely to flow from such conduct? If he knowingly created, in the minds of the persons he was approaching, a reasonable belief that a fox was hiding in the grass, should he, in the exercise of reasonable care, have apprehended that it was likely to result in his being subjected to the treat-

ment a fox or a wild animal usually receives? * * * For aught he knew, the boys might have a firearm along. It would not be wholly unreasonable for them to have one."

If a hunter is contributorily negligent in making noises like a deer as he approaches a stand of another hunter, and a farm boy is contributorily negligent when he moves through a meadow like a fox, surely it is contributory negligence for a man to make the approach of a prowler to the back door of the home of a lady whose husband he knows to be out of the city, and whom he knows to be so "uneasy" under those circumstances that she keeps a shotgun lying on the kitchen table.

While in the above cited cases the question of contributory negligence was held to be for the jury, in the present case the plaintiff's own evidence leads irresistibly to that conclusion.

The defendant's statement that the shooting was her fault was the mere conclusion of one not aware of the principles on which legal liability rests and moved by sorrow for the plaintiff's injury. It is not ground for denial of the motion for nonsuit. *Jones v. Hodge,* 250 N.C. 227, 108 S.E. 2d 436.

PARKER, C.J. I join in the excellent and scholarly dissenting opinion written by Justice Lake to this effect, that considering the plaintiff's evidence in the light most favorable to him and giving him the benefit of every legitimate inference to be drawn therefrom, there is not a scintilla of evidence tending to show that the defendant was guilty of actionable negligence. Being firmly convinced of this, I see no reason for a discussion of whether or not plaintiff is guilty of legal contributory negligence such as to bar his cause of action, and I think it is supererogatory to discuss the question of legal contributory negligence on the part of plaintiff.

I am authorized to state that JUSTICE BRANCH joins in this opinion.

ROSALIND HAYMAN SWAIN v. ELIZABETH H. TILLETT, ADMINISTRATRIX OF THE ESTATE OF HERMAN A. TILLETT; ELIZABETH H. TILLETT, INDIVIDUALLY, AND RADFORD TILLETT.

(Filed 20 January, 1967.)

1. Animals § 2—

Deer are subject to domestication to such degree that the owner or keeper of a tame deer is liable in damages for personal injury inflicted by the animal to the same extent as the owner or keeper of a domestic animal.

2. Same—

The owner or keeper of a domestic or domesticated animal may be held liable for injury inflicted by such animal if it is proven that the animal was dangerous, vicious, mischievous, or ferocious, and that the owner or keeper knew or should have known of the animal's vicious propensity.

3. Same—

The keeper of an animal is one who undertakes to manage, control, or care for the animal in the manner of an owner. If he has knowledge of the animal's vicious propensity, he is liable for injuries inflicted by it even though he is not its owner.

4. Same—

After the death of intestate, the owner of a domestic deer, his widow continued to keep the animal. *Held:* The widow, in her individual capacity, is liable for injuries inflicted by the animal upon a proper showing, since, if the administration had not been complete at the time of the injury, she was still the keeper of the animal.

5. Same—

After the death of his father, the son went every day to the home and frequently aided his mother in tending and looking after a deer which his father had owned, and exercised control over the animal. *Held:* The son was a joint keeper of the animal within the rule of liability for damages inflicted by the animal.

6. Same—

The evidence tended to show that the widow and her son were joint keepers of a tame deer at the widow's home. *Held:* Notice to the son of the vicious propensity of the deer is notice to the widow.

7. Same—

The evidence tended to show that the widow and her son kept a tame deer on the widow's premises, that the deer attacked plaintiff on plaintiff's own premises and plaintiff gave notice to the son of the attack, and that about a week later the deer again attacked plaintiff on her own premises, inflicting the injury in suit. *Held:* Nonsuit was correctly denied in plaintiff's action against the son and the widow in her individual capacity.

8. Same; Executors and Administrators § 22—

The evidence tended to show that after the death of the owner of a tame deer, the widow of the owner continued to keep the deer on the premises, that the widow was charged with knowledge of the vicious

propensity of the deer, and that the deer thereafter inflicted personal injury upon plaintiff. *Held:* The widow in her representative capacity is not liable for the injury, since ordinarily the estate of a decedent cannot be held liable for torts committed by the administrator.

9. Animals § 2; Evidence § 15—

In this action to recover for personal injury inflicted by a deer, plaintiff testified to the effect that she knew that the animal which attacked her was the one kept by defendants because she knew the deer and because a wild deer would not attack a person. Defendants contended that the deer kept by them was never out of his pound. *Held:* Testimony of a witness that on an occasion when she attempted to run a wild buck and several does out of her yard, the buck had attacked her, was competent upon the question, and the exclusion of the testimony was prejudicial error.

10. Animals § 2; Evidence § 35—

While a State wildlife protector may testify from his observation of deer for a period of five years as to whether a wild buck is likely to attack a human being during the fall season, the court may properly exclude his testimony when the question intended to elicit such testimony is ambiguous in asking whether only a tame deer would, under given circumstances (which were not explained) attack or attempt to attack a human being.

11. Animals § 2; Evidence § 51—

Where a wildlife protector of some five years' experience has not been offered as an expert, the exclusion of his opinion testimony requiring expertise in the physiology of deer will not be disturbed, since it will be presumed that the court excluded the testimony on the ground that the witness had not been sufficiently qualified.

PLESS, J., dissenting.

APPEAL by defendants from *Hubbard, J.*, January 1966 Session of DARE.

Plaintiff instituted this action to recover damages for personal injuries inflicted upon her by an animal. She alleges that the animal was a buck deer kept by defendants, who negligently permitted it to roam at large after notice of its vicious propensities. Both plaintiff and defendants offered evidence. Taken in the light most favorable to plaintiff, the evidence tends to show:

Defendant Elizabeth H. Tillett is the widow and administratrix of Herman A. Tillett, who died intestate on January 10, 1962. Defendant Radford Tillett is their only child. At the time of his death, Herman A. Tillett owned a five- or six-year-old buck deer, which he acquired when it was less than a year old. The Tillett property adjoined the lot on which plaintiff lived with her daughter. Plaintiff had seen the deer "off and on" every day for about five years, and had watched him grow up.

During his lifetime, Mr. Tillett had kept the deer in a pound surrounded by a 9-foot fence. The deer pound was inside a larger pas-

ture in which ponies were kept. After Mr. Tillett's death, defendants turned the deer into the pasture with the ponies. The pasture was surrounded by a "ragged fence" 4½ feet high; it was "not much of a fence, mostly wood and old wire." The deer walked in and out, "right through it." Nearly every day he would follow the same well-worn path from the fence, over a ditch and through the vines and myrtles, into plaintiff's yard. While Mr. Tillett lived, plaintiff had never seen the deer out of the pound. After his death, his widow continued to live on the property and to keep the deer. She and her son Radford, who lived with his wife and two children less than half a mile away, fed and looked after the deer. It was a tame deer, and prior to the week preceding November 7, 1962, it had never molested plaintiff. On Monday of that week, however, he chased her when she went out to feed her livestock. She retreated inside the gate, and the deer walked back and forth knocking his horns against the fence. Later, thinking he had gone, plaintiff started for the house. The deer came out of the shrubs and chased her into the house. From inside, she watched him go down the path and into his pasture. The next day when she went out to feed, the deer came from behind the fig bushes and chased her back into the house. Again she watched him return to his own pound.

After the second attack, plaintiff called one Billy Gray and asked him to tell Mrs. Tillett to take the deer up because he had chased her twice and she was afraid of him. Notwithstanding, on Thursday of the same week, the deer was back in her yard when plaintiff came out of the house. He chased her again and hit her on the hip before she could get the door open. Once more she watched the deer leave by the same path to enter his pound. She called Billy Gray again and told him to tell Mrs. Tillett that the deer was out; that it had butted her; and that if she did not keep it up, plaintiff would "report her to the State or County." Instead of communicating with Mrs. Tillett, Billy Gray saw Radford Tillett at his home and told him that the deer was out and had butted plaintiff. Gray offered to help him get the deer in, but Radford said he did not need any help.

About 4:45 on the afternoon of November 7, 1962, plaintiff went out to the garage (one side of which was used for storage) to get some plants. While thus engaged, she saw the deer coming directly toward the garage on the path underneath the grapevines. As she attempted to climb a ladder into the loft to escape the deer, he entered the garage, jumped straight up and down, hit her in the stomach, and knocked her down. At the same time, he overturned a big oil stove onto her. She pulled herself up by a post and stood still. The deer also stood still for a little while. Then, while his mouth frothed, he began the stiff-leg jumping which was one of his charac-

teristics. Plaintiff made another attempt to get to the ladder. When she did, the deer hit her in the stomach again. She grabbed his horns; "they were slick, and the knobs were not big enough to hold him." She fell over the lawn mower and into a box in a wheelbarrow, and the deer backed out of the garage. Once more she attempted to reach the ladder, but the deer returned to charge her again. This time he broke her leg, her kneecap, and her wrist, and inflicted multiple contusions and abrasions upon her. Hearing plaintiff's screams, one Frank Richlie (a kinsman of both plaintiff and defendants) came into the garage. He threw a jug at the deer and chased him away with a stick. Plaintiff saw the deer disappear under the grapevine down the path over which he had come. As a result of the attack, plaintiff sustained serious and permanent injuries.

The night after plaintiff was injured, defendants and Mrs. Radford Tillett called on plaintiff's daughter. When she inquired of them how the deer got out of the pound, Mrs. Radford Tillett said, "We turned him out." Defendants made no denial. Radford said, "I will have the game warden come and get him in the morning."

The evidence for both plaintiff and defendants tended to show that there were wild deer in the vicinity. Plaintiff, however, testified positively that it was not a wild deer which attacked her:

> "It was Lizzie's and Herman's and Radford's deer. I know it. I watched it grow up. He had a way he would straighten his legs stiff, and he would jump up and down like that (demonstrating with hands), and a wild deer won't run you besides, and won't do that. A wild deer won't run you and won't straighten his legs stiff and jump up and down. A wild deer won't go in a house. A wild deer will run the minute he smells you. It was a tame deer."

Defendants' evidence tended to show: The Tillett fences were in good repair. Their deer had antlers five or six inches long on both sides of his head, and they were large enough to grasp. (There was no evidence as to the length of the prongs or "knobs.") He was about three feet high and weighed approximately 80 pounds.

Mrs. Tillett testified that she and her grandchildren — 2½ and 8 years old — were frequently in the pasture with the deer and ponies; that they sometimes fed "the pet deer" together; and that they had never experienced any trouble. Radford Tillett testified that he saw the deer "on an average most every day throughout the years." He said:

> "After Mrs. Swain was hurt, I called Mr. Forbes (State Wildlife Protector for Dare County) and told him I had been

notified that it was my deer in the accident, and he told me to shut him up and that he would be over later on. . . . I went down to my mother's, and the deer was in the pasture and I led him over and put him in the higher pen. His appearance and actions were no different from other times; he was calm, gentle and showed no signs of being frightened or hurt. There were no signs of any injury on him, he was perfect, no scratches, no bruises or anything.

". . . (A)bout a week before the accident he (Billy Gray) came to my house and told me that Mrs. Swain had notified him that my deer was over to her house and that the dogs were chasing him around, and for me to come down and get him. Billy offered to help and I told him I could handle it. I told Billy I would go right down, which I did, and went out in the pasture and there was my deer. So I turned around and went on back home and never thought any more about it.

* * *

". . . By reason of my interest in that deer, I felt a little responsibility for the deer. I went to my mother's house every day after my father died. I saw the deer there every day. I fed the deer occasionally, and my mother fed him. In the feeding and caring for the deer, you might say that my mother and I sort of jointly looked after him."

On the night of December 14, 1962, some unknown person killed the deer, which had been put inside the inner pound.

Defendants offered the testimony of Mrs. Tom Beacham, who, had she been permitted to do so, would have testified that on one occasion in Kitty Hawk, when she had attempted to chase three or four wild does and a big buck from her yard, the does ran but the buck deer shook his head, pawed at the ground, and chased her into her house. Upon plaintiff's objection, this evidence was excluded.

Each defendant's motions for judgment of nonsuit were overruled. The jury, in answer to issues, to which there were no objections, found both defendants guilty of negligence and awarded plaintiff damages. From judgment entered upon the verdict, defendants appeal.

Aydlett & White and Frank B. Aycock, Jr., for plaintiff.
Russell E. Twiford and John H. Hall for defendants.

SHARP, J. Defendants assign as error the failure of the court to sustain their respective motions for nonsuit. Radford Tillett contends that he has no responsibility for the deer's actions because he

was not its owner. Mrs. Tillett contends that she has no liability since there is no evidence tending to show that she had any knowledge that the deer had developed any dangerous propensities. These contentions must be assayed against the following applicable principles of law:

"Certain animals *ferœ naturœ* may be domesticated to such an extent as to be classed, in respect of the liability of the owner for injuries they commit, with tame or domestic animals. . . . Thus, deer are subject to such substantial domestication as to come within this principle." 4 Am. Jur. 2d, Animals § 83 (1962); 2 Kent, Commentaries 349 (1884). (The case was tried upon the theory that the Tillett deer was a tame deer, a domesticated animal.) To recover for injuries inflicted by a domestic animal, *domitœ naturœ*, plaintiff must allege and prove: "(1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the *owner* or *keeper* knew or should have known of the animal's vicious propensity, character, and habits." (Emphasis added.) *Sellers v. Morris,* 233 N.C. 560, 561, 64 S.E. 2d 662, 663; *Plumidies v. Smith,* 222 N.C. 326, 22 S.E. 2d 713; *Hill v. Moseley,* 220 N.C. 485, 17 S.E. 2d 676. See also *Sink v. Moore and Hall v. Moore,* 267 N.C. 344, 148 S.E. 2d 265. "The gravamen of the cause of action in this event is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness; and thus both viciousness and scienter are indispensible elements to be averred and proved." *Barber v. Hochstrasser,* 136 N.J.L. 76, 79, 54 A. 2d 458, 460; 2 Strong, N. C. Index, Animals § 2 (1959).

The owner of an animal is the person to whom it belongs. The keeper is one who, either with or without the owner's permission, undertakes to manage, control, or care for the animal as owners in general are accustomed to do. 4 Am. Jur. 2d, Animals § 92 (1962); 3 C.J.S., Animals § 165(b) (1936). It is apparent that a keeper may or may not be its owner. *Janssen v. Voss,* 189 Wis. 222, 207 N.W. 279. "The word 'keep,' as applied to animals, has a peculiar signification. It means 'to tend; to feed; to pasture; to board; to maintain; to supply with necessaries of life.'" *Allen v. Ham,* 63 Me. 532, 536. *To keep* implies "the exercise of a substantial number of the incidents of ownership by one who, though not the owner, assumes to act in his stead." *Raymond v. Bujold,* 89 N.H. 380, 382, 199 Atl. 91, 92. *Accord, Lanna v. Konen,* 119 Conn. 646, 178 Atl. 425.

At the time plaintiff was injured, Herman Tillett had been dead ten months, lacking three days. Although the record is silent as to the status of his estate, we assume that its administration had not then been completed. Pending the administration, title to the deer

was in his administratrix, Mrs. Tillett. *Spivey v. Godfrey,* 258 N.C. 676, 129 S.E. 2d 253. Plaintiff sued her both in her representative and individual capacity. Had the administration been completed, nothing else appearing, defendants would have owned the deer jointly. G.S. 29-14(1). However, liability for injuries inflicted by animals, *ferœ naturœ* or *domitœ naturœ,* does not depend upon the ownership of the animal. " 'The essence of the action is not ownership, but the keeping and harboring of an animal, knowing it to be vicious.' . . . Thus the responsibility to respond in damages depends not upon who has legal title to the (animal) but rather upon the possessor of the animal." *Hunt v. Hazen,* 197 Ore. 637, 639, 254 P. 2d 210, 211. The *keeper* of an animal with known vicious propensities, nothing else appearing, is liable for injuries inflicted by it upon another. 3 C.J.S., Animals § 165 (1936).

The testimony of Radford Tillett (quoted in the statement of facts) is sufficient to establish that he and his mother were joint keepers of the deer. As the only child of a deceased father, he dutifully went every day to the old home to do for his widowed mother those things which needed to be done. *Inter alia,* he kept a watchful eye on the deer and the ponies. Sometimes he fed the deer; sometimes his children and Mrs. Tillett fed it. It was "a family appendage," cherished all the more because it had belonged to the deceased husband and father. Indubitably, it gave his grandchildren much pleasure and was of great interest to them. Radford spoke of it either as "our deer" or "my deer." He said, "We permitted the deer to live in the pasture as a whole after my father's death. . . ." When Billy Gray gave Radford plaintiff's message about a week before she was injured, he went immediately to investigate without mentioning the matter to his mother. He testified that when he found the deer where it was supposed to be, he "turned around and went on back home and never thought any more about it." After plaintiff was hurt, it was Radford who reported the matter to the Wildlife Protector. He said, "I called Mr. Forbes and told him that I had been notified that it was my deer" in the accident. It was Radford who put the deer in the inner stockade upon Mr. Forbes' instructions. In short, Radford assumed responsibility for the deer. He was, in both the ordinary and legal sense of the words, one of its two joint keepers. He and his mother exercised joint control over it. See *Lanna v. Konen, supra.*

Plaintiff's evidence was sufficient to establish that, a week before the accident, Radford had been notified that the deer had attacked her. "The rule is that as soon as the owner knows or has good reason to believe that the animal is likely to do mischief, he must take care

of him; it makes no difference whether this ground of suspicion arises from one act or from repeated acts." *Cockerham v. Nixon,* 33 N.C. 269, 270. This rule is equally applicable to a keeper. The motion for nonsuit as to Radford, therefore, was properly overruled.

As to Mrs. Tillett, there is no evidence that she herself ever received any notice that the family's "tame deer" had developed vicious propensities. The ruling upon her individual motion for nonsuit depends upon whether notice to Radford was notice to her. The general rule is that notice of an animal's vicious propensities "to one joint keeper is notice to all such keepers." 4 Am. Jur. 2d, Animals § 91 (1962). *Accord,* 3 C.J.S., Animals § 148(d)(2) (1936). In *Barber v. Hochstrasser, supra,* the defendants, husband and wife, jointly kept a dog which, to the *wife's* knowledge, had vicious propensities. The court held both liable, saying: "The custody of a vicious animal . . . is the custody of all joint keepers; and they are all jointly liable for the damage done by it. And, by the same reasoning, notice to one joint keeper is notice to all such." *Id.* at 461. In *Hayes et al v. Smith,* 15 Ohio Cir. Ct. 300, in holding the defendants liable to the plaintiff for injuries inflicted by a vicious dog, the court said:

> "(W)e are of opinion that notice to one of the joint owners of the vicious propensities of an animal which is being kept and harbored jointly by them is notice to all, and, coming to consider the verdict upon the evidence, we do so with this rule in mind and giving it effect." *Id.* at 324.

It is generally held that notice to the wife of the vicious propensities of a dog which she and her husband kept jointly at their home is notice to the husband. *Perazzo v. Ortega,* 32 Ariz. 154, 256 Pac. 503; *Smith v. Royer,* 181 Calif. 165, 183 Pac. 660; *Ayers v. Macoughtry,* 29 Okl. 399, 117 Pac. 1088; *Benke v. Stepp,* 199 Okl. 119, 184 P. 2d 615; *Halm v. Madison,* 65 Wash. 588, 118 Pac. 755.

The knowledge required to hold the owner of an animal, possessed of vicious characteristics, responsible for injuries inflicted on another, need not be intimate personal knowledge. "Scienter may be sufficiently established by proof of knowledge on the part of those to whose care and management animals are intrusted, as such knowledge is in law imputable to the owner." *Benke v. Stepp, supra* at 123, 184 P. 2d at 619. Furthermore, notice to an agent, within the scope of his employment, is notice to the principal.

> "Knowledge of the agent in reference to the matters of his agency, is the knowledge of his principal. This is a general principle in law, and applies to the owner of a vicious animal which

> he has committed to the care, control and agency of another, as well as to other matters in which an agent is employed." *Corliss v. Smith,* 53 Vt. 532, 535.

Accord, Gooding v. Chutes Co., 155 Calif. 620, 102 Pac. 819 (defendant's camel, known to its employee to be vicious, bit plaintiff; defendant held liable.); *Barber v. Hochstrasser, supra; Liberman v. Drill,* 94 N.J.L. 387, 110 Atl. 694 (notice to son, who drove father's wagon, that horse was vicious; held, notice to the father); *Benke v. Stepp, supra; Harris v. Carstens Packing Co.,* 43 Wash. 647, 86 Pac. 1125 (knowledge of driver of a vicious range steer imputed to defendant-owner).

In *Stapleton v. Butensky,* 188 App. Div. 237, 177 N.Y. Supp. 18, defendant was held liable for injuries inflicted by his horse, since "the jury was warranted in inferring that a horse thus manifesting this vicious propensity would also manifest it about the stable and on the occasions when he was under the observation of the owners or their servants, and that in the exercise of proper care they would have discovered it." In *Brice v. Bauer,* 108 N.Y. 428, 15 N.E. 695, the owner of a dog was held liable to the plaintiff, who was bitten by it. The dog had previously bitten one of the servants to whose care the dog was entrusted. The court said, "It is not material that the fact was not communicated to the master." *Id.* at 697. In *Clowdis v. Fresno Flume & Irrigation Co.,* 118 Calif. 315, 50 Pac. 373, the defendant's bull injured the plaintiff while its employees were driving it along a county road. The court said that knowledge of its ferocious disposition by the servant to whom an animal is entrusted is knowledge of the master and is sufficient to render the latter liable.

Radford was not only a joint keeper of the deer with Mrs. Tillett, he was also an agent to whose care she entrusted the deer. His knowledge of the deer's vicious propensities was, therefore, imputed to her. Her individual motion for nonsuit was properly overruled. The motion made in her representative capacity as administratrix, however, should have been allowed. The applicable law was succinctly stated, and authorities collected, by Ervin, J., in *Brown v. Estates Corp.,* 239 N.C. 595, 602-3, 80 S.E. 2d 645, 651-2:

> "As a general rule, the estate of a decedent cannot be held liable for torts which an administrator or an executor commits in administering the estate. In consequence, an action will not ordinarily lie against an administrator or an executor in his representative capacity for such torts . . . (citations omitted) . . . The rule is subject to this exception: Where the estate of a decedent actually receives assets acquired by an administrator or an executor by a tortious act, the party wronged

thereby and entitled to such assets may hold the estate responsible to the extent of the value of such assets. . . . An administrator or an executor is personally liable for his own torts even though they are committed in the administration of the estate."

See Annot., Liability of estate for torts of executor, administrator, or trustee, 44 A.L.R. 637 (1926); 127 A.L.R. 687 (1940).

If not entitled to a nonsuit, defendants contend that they are entitled to a new trial for the exclusion of their proffered evidence relating to the habits or propensities of wild deer. Defendants' theory — and their defense — is that the animal which injured plaintiff, if a deer, was a wild deer; that their deer could not have been the culprit because he was never out of his pound. In order to contradict plaintiff's statements that "a wild deer won't run you," "won't go in a house," and "will run the minute he smells you," defendants offered the testimony of Mrs. Tom Beacham that she had been chased by a big wild buck when she attempted to run him and several does out of her front yard. Plaintiff's statements with reference to the habits of wild deer were made on cross-examination in an attempt to refute defendant's suggestion to her that the deer which had attacked her was not the Tillett deer but a wild buck. Obviously, if wild deer *never* attack humans, it was not a wild deer which had injured plaintiff. We hold, therefore, that it was material and competent for defendants to show that wild deer do, on occasions, attack people. How better to do this than by the evidence of one who herself had been attacked by a wild deer? The exclusion of Mrs. Beacham's proffered testimony was prejudicial error.

The State Wildlife Protector for Dare County, Foster Forbes, who had observed deer, both tame and wild, in Dare County for five years, was sworn as a witness for defendants, who propounded the following questions to him:

1. "Q. Have you an opinion satisfactory to yourself as to whether or not only a tame deer will, under given circumstances, attack or attempt to attack a human being?
   "A. Yes.
2. "Q. Will you please express that opinion?
   Objection — Sustained — EXCEPTION #10.
   (If permitted, witness would have answered: 'I will say under given circumstances one is as apt to attack as the other.')
3. "Q. Based on your training, knowledge, observation and

experience of deer, have you an opinion satisfactory to yourself as to what would be indicated if a deer were frothing at the mouth?

"A. Yes.

4. "Q. Please give us that opinion?

Objection — Sustained — EXCEPTION #11.

(If permitted, the witness would have answered: 'Probably it would be from being chased by dogs and extensive running or overheating, and probably rabies or something like that.')"

A witness qualified to speak on the subject may testify as to the habits of animals whether *ferœ naturæ* or *domitæ naturæ*. *Congress and Empire Spring Co. v. Edgar*, 99 U.S. 645, 25 L. Ed. 487. In that case, expert witnesses, called by the plaintiff, gave it as their opinion that the male deer in the fall of the year is a dangerous animal. On appeal, it was contended that the plaintiff's "experts" had not been properly qualified. To this the court said, "Even if the witnesses are not properly to be regarded as experts, the court is of the opinion that the testimony was properly admitted as a matter of common knowledge."

In 7 Encyclopaedia Britannica, Deer, p. 165 (1965), we find the following:

> "Most deer are shy and furtive although the larger species are dangerous opponents and should not be approached closely even when tamed.
>
> "Especially in the rutting season deer are likely to be unpredictable. . . . Deer attack with either antlers or hooves, impaling with the former and slashing with the latter."

Although we are not prepared to take judicial notice of the habits of deer, we think any person having this special knowledge may testify concerning their characteristics and reactions just as to any other fact within his knowledge. In *Forsythe v. Kluckhohn*, 161 Iowa 267, 142 N.W. 225, the court approved the admission of testimony by "witnesses claiming experience or expert knowledge" of bull terriers as to the effect a muzzle was likely to have upon dogs of that breed and also as to their disposition and characteristics. See *Shelby Iron Co. v. Morrow*, 209 Ala. 116, 95 So. 370; *Clinton v. Howard*, 42 Conn. 294; *Roman v. St. Louis and S. F. Railway Co.*, 120 Kan. 585, 245 Pac. 115. See also *Jeffords v. Waterworks Co.*, 157 N.C. 10, 72 S.E. 624.

> "The conduct or habits of animals, and the conditions or emotions of which they are in whole or in part a reaction may

be stated in a shorthand way, by one who has observed them, although they were not observed under the same conditions as existed at the time in question." 32 C.J.S., Evidence § 546(8) (1964).

The grounds for plaintiff's objection to the excluded questions and answers of Mr. Forbes do not appear in the record. The second question, as well as the answer to it, was based upon an assumption of "given circumstances," which were not explained. The ambiguity of the question justified the court's ruling. The fourth question called for an opinion requiring expertise in the physiology of deer and was therefore "the exclusive province of the expert." Stansbury, N. C. Evidence § 132 (2d Ed. 1963). Mr. Forbes was not tendered as an expert and apparently his Honor thought that he had not been sufficiently qualified. The exclusion of this opinion, therefore, was not error. Its admission, however, likewise would not have been error. *Teague v. Power Co.*, 258 N.C. 759, 764, 129 S.E. 2d 507, 511.

Because of the exclusion of the testimony of Mrs. Beacham, there must be a

New trial.

PLESS, J., dissenting: The evidence upon which the son of a recently widowed mother is held to be a "keeper" of the deer is (1) he visited her daily (2) he helped her with her chores, including sometimes feeding the deer (3) so did his children (4) he spoke of it as "my" or "our" deer.

He lived a half mile from his mother and had never kept the deer at his home.

I believe the result penalizes a son who does nothing more than a dutiful child should do for his bereaved mother.

I dissent.

STATE v. HAYWOOD LEMUEL TEMPLE.

(Filed 20 January, 1967.)

1. Searches and Seizures § 1; Criminal Law § 79—

Testimony on the *voir dire* that defendant stated he had nothing to hide and that the officer could search his automobile, *held* to support the court's finding that defendant consented to the search of his car, and motion to suppress the evidence disclosed by the search was properly overruled.

2. Criminal Law § 71— Evidence held to support finding that incriminating statement was freely and voluntarily made.

Testimony on the *voir dire* to the effect that defendant was advised that he was suspected of raping a named female child, that defendant did not have to make a statement, that any statement made by him could be used against him in court, that he could telephone a lawyer or anyone he wanted to, that defendant then denied being with prosecutrix on the day in question, but that some days later, after defendant had been again advised of his constitutional rights in the same manner, and was told that a witness had seen the girl with him in his car on the day in question, defendant stated that prosecutrix had insisted on getting into his car with him and had voluntarily submitted to his advances, *held* to support the court's finding that the second statement was freely and voluntarily made, without threats or promises, after defendant had been advised of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, having been announced subsequent to the trial, has no application.

3. Criminal Law § 53—

A witness qualified as a medical expert may testify that the presence of acid phosphatase in a specified concentration in the vagina indicated the presence of male seminal fluid.

4. Criminal Law § 162—

In a prosecution for carnal knowledge of a female child under the age of twelve years, the admission of testimony of a medical expert that the female organ of prosecutrix was penetrated full depth by a man's male organ, even though such testimony is based in part on information not acquired by the witness's personal examination, can not be held for prejudicial error when there is an overwhelming mass of other competent testimony tending to show that the prosecutrix' female sexual organ was penetrated by the male sexual organ, penetration to any extent being sufficient to constitute the offense.

5. Rape § 8—

Consent of prosecutrix is no defense in a prosecution for carnal knowledge of a female child under the age of twelve years. G.S. 14-21.

6. Rape § 11—

The evidence in this prosecution of defendant for carnal knowledge of a female child under twelve years of age *is held* amply sufficient to overrule defendant's motions to nonsuit.

APPEAL by defendant from *Hall, J.*, Second Week February 1966 Regular Criminal Session of WAKE.

Criminal prosecution on an indictment charging defendant on 5 June 1965 with unlawfully, feloniously, and carnally knowing and abusing Libby Gray Beasley, a female child under the age of twelve years, to wit, of the age of ten years. G.S. 14-21.

Defendant, who is an indigent, was represented by his court-appointed counsel, R. L. McMillan, Jr. Plea: Not guilty. Verdict: "Guilty of rape with the recommendation of life imprisonment."

From a judgment of imprisonment for life, defendant appeals.

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

Robert L. McMillan, Jr., for defendant appellant.

PARKER, C.J. The State's evidence shows these facts: On 5 June 1965 Ann Stanley Beasley and her daughter Libby Gray Beasley and her little son were living downstairs in a two-story apartment at 21 North Harrington Street in Raleigh. At the time Libby Gray Beasley was ten years old. She is mentally retarded, but is considered trainable and attended a special class at Fred Olds School. Defendant with his wife and three children lived in the upstairs apartment.

About 4:30 p.m. on that same day Libby's mother had her to go to the bathroom and wash her face. At that time Libby was wearing a white blouse and a shift and had on shoes, socks, pants, and a slip. About 5 p.m. on this same day defendant and Libby Gray Beasley were seen by Mrs. Martha Raper, who operates a store at 201 North Harrington Street in Raleigh, sitting in defendant's automobile about half way down the block on Jones Street.

After 5 p.m. of this same day Martha Raper told Libby's mother that she had seen Libby sitting in defendant's car. Libby's mother started looking for defendant, and could not find him or Libby. She was walking the floor crying. She saw defendant's car coming from down towards North Street. She hollered at him, but he did not stop. She did not see anyone in the car with him. After that she looked down the street, and saw Libby coming up to her home from towards North Street, the same way defendant's car had come. At this time Libby had her head hung down and her finger in her mouth. Her dress was bloody. There were smears on the front of her dress, and she had hand prints on her face and the side of her neck. She had some leaves in the back of her hair, mixed with dirt. Her mother took her in the bathroom, and examined her by pulling her dress up, and noticed that she did not have any pants on. She saw smears of blood on her legs and thighs and between her legs and all around her. There were smears of blood on her private parts, and she was very upset. Earlier that day when she had her to go to the bathroom to wash her face, she did not have any blood smears on her and she did not have any leaves in her hair or any hand prints on her neck and face. Earlier that day, about lunch time, she had noticed that Libby was wearing pants. Libby's mother testified: "On this date, I imagine that Libby Gray acted like a child between three to four years of age and she had not been able to tell me what happened." The State offered in evidence Libby's pants, blouse, shift, and slip.

Before Libby came home, her mother called the police. Sergeant

Stoudenmire was at her home when Libby came in, and afterwards Lieutenant Duke arrived. Both were police officers. Libby was carried to Rex Hospital. About 9:45 p.m. on 5 June 1965 Libby was examined in the emergency room of Rex Hospital by Dr. G. Howard Satterfield, a graduate of Duke University School of Medicine, Class of 1957, and licensed to practice medicine in North Carolina as a specialist in obstetrics and gynecology. The trial court found as a fact that Dr. Satterfield is an expert in the field of medicine, specializing in obstetrics and gynecology.

Dr. Satterfield made a general and a pelvic examination of Libby. His general examination revealed an area of "petechial hemorrhages" in the shape of a hand print on the left side of her cheek and in her ear. Such hemorrhages usually come from a blow of some type. His pelvic examination disclosed the following: On the right hand side of the lip beside the birth canal, there was a skinned place where the superficial skin had been knocked off, about an inch and a half in length and half an inch in width. She had tears through the entire length of the hymenal ring. These tears were relatively fresh, and there was no evidence of any healing and no scab formation over the soft tissues of the skin. Along the vaginal canal there were more of these tiny "petechial hemorrhages" throughout the vagina and up into the area of the mouth of the womb. He obtained from right back of the mouth of the womb material for a test to be run in the laboratory of Rex Hospital to determine whether a male organ had been in this area. He placed this material obtained from Libby into a tube and put it into a box which he locked, and he then placed the box in the refrigerator in the laboratory of Rex Hospital and left it there for Dr. Arthur Davis, who had the only other key to it, to examine the next day.

Dr. Arthur Davis is a medical doctor licensed to practice in the State of North Carolina since 1962. Since 1962 he has been associate pathologist at Rex Hospital. After he had testified further in respect to his professional qualifications, the court found that he was an expert in medicine, specializing in pathology. On the morning of 6 June 1965 he received the locked box left for him by Dr. Satterfield, which he opened with a key and removed the test tube. The test tube contained a cotton swab which he gave to Mrs. Jackson to perform a chemical test. The test that she was to perform was an acid phosphatase test, and the matter was taken from a test tube labeled "Libby Gray Beasley."

Mrs. Jacquelyn Moore Jackson is a medical technologist at Rex Hospital, and for eight years has been a clinical chemist. She was certified as a medical technologist in 1949 and supervises the chemistry department at Rex Hospital. On 6 June 1965 she received the

test tube from Dr. Davis with the name "Libby Gray Beasley" thereon. In the test tube there was a swab with a cotton tip which she subjected to an acid phosphatase test and found 6.8 Bodansky units of acid phosphatase. She reported the result of this test to Dr. Davis.

Dr. Davis was recalled by the State and asked this question: "Do you have an opinion satisfactory to yourself as to the probable or likely source of acid phosphatase in the concentration of 6.8 Bodansky units in the area of the mouth of the womb of a female?" The defendant objected to the question, which the court overruled, and the defendant excepted and assigned this as error. He answered: "The presence of acid phosphatase in the concentration of 6.8 Bodansky units found in the vagina indicates the presence of male seminal fluid."

Dr. Satterfield testified he had a report from the laboratory indicating the amount or level of phosphatase concentration from the material that he obtained from Libby Gray Beasley. He was asked this question: "Dr. Satterfield, from your total examination and the information you have, do you have an opinion satisfactory to yourself as to whether or not the female organ of Libby Gray Beasley had been penetrated?" The defendant's objection to the question was overruled, and he excepted and assigned this as error. The doctor replied: "Yes, I do have an opinion and I feel that it was penetrated, yes." He was then asked this question: "Do you have an opinion satisfactory to yourself as to what the female organ of Libby Gray Beasley was penetrated by?" The defendant's objection to the question was overruled, and he excepted and assigned this as error. The doctor answered: "Yes, in my opinion from the findings, the laboratory findings, the female organs of Libby Gray Beasley were penetrated by the male penis." He was then asked: "Do you have an opinion satisfactory to yourself as to how much penetration, that is, in inches, of the female organs of Libby Gray Beasley there was?" He replied in substance: Full depth by a foreign object, being a male organ. Defendant's motion to strike the answer was overruled and he excepted and assigned this as error. Then he was asked this question by the State: "From your findings do you have an opinion satisfactory to yourself as to whether or not the female organs of Libby Gray Beasley had previously been penetrated in this fashion by a foreign object?" There was no objection to the question, and his answer was as follows: "I would say that they had not prior to the time in question. In other words, the tears of the hymenal ring or maidenhead had been placed back in position and put back so that they were not tears any longer, then the size of the opening of

the hymenal ring would have been approximately a centimeter in diameter."

About 6:30 p.m. on 5 June 1965 detective sergeant Stoudenmire talked to Libby and her mother at their home. He testified in substance: Libby was dressed in a "shift dress" and a blouse, and on this "shift dress" there were streaks of blood on the front and back, and in her hair there were dirt, grime, and "specs" of leaves. She was in a very upset condition. About 8 p.m. the same night Stoudenmire in company with two officers saw defendant asleep at David White's home at Route 2, Poole Road. Defendant was wearing a blue shirt and blue pants, and there were blood stains on his shirttail and on the right side of the fly of his pants. Stoudenmire took defendant's shirt and pants, and turned them over to Glenn Glesne of the State Bureau of Investigation. He asked defendant if he could search his automobile. At this point defendant's counsel moved to suppress any and all evidence obtained by Stoudenmire in any conversation with defendant on the ground that any statement by defendant was involuntary, and requested permission to interrogate Stoudenmire as to the circumstances attending any statements made by defendant. The judge directed the jury to go to their room, and stated to defendant's counsel he could proceed and also offer any evidence he desired to offer.

In the absence of the jury from the courtroom, Stoudenmire, in answer to questions asked him by the solicitor and defendant's counsel, testified in substance: He told defendant he was a suspect in a rape case and he wanted to talk to him in Raleigh. Defendant agreed to go. He asked defendant if he could search his automobile in the back yard; he was looking for a girl's panties. Defendant replied that he had nothing to hide and he could search his automobile. He found a pair of girl's panties in the back of defendant's car on the floor.

He took defendant to the detective bureau and talked to him. He told defendant again he was a suspect in a rape case, and the girl's name was Libby Beasley; that defendant did not have to make any statement to him, and if he (defendant) made any statement it could be used for or against him in court. He asked defendant if he wanted to make any telephone calls. He could call anybody he wanted to, and he could call a lawyer. Defendant denied being with Libby the day of 5 June 1965.

About 1:30 p.m. on 8 June 1965 Stoudenmire went to the county jail, brought defendant to the detective bureau, and talked with him again. He again advised defendant of his constitutional rights as he had previously done. When he told him he had a right to call a

lawyer, defendant stopped him, and told him a lawyer had been to see him at the county jail and had advised him not to make any statement whatever. He told defendant: "You told me Saturday night that the girl was not in your car and I have learned of a witness that saw you with this girl and the girl was in your car." Then the record shows the following: "At this point he stopped me again, said he wanted to set this thing straight, stated that he did not exactly tell me that the girl was not in his car, he said that what he did tell me, that he did not force this girl to get into his car, he stated that he thought it was about 3:30 p.m. on the 5th that he talked to this girl on the corner of Harrington and Jones and that she insisted on going with him, got into his automobile and he told her to get out, said she would not get out, said he started to ride and the girl took off her panties in the automobile. He told her to put them back on and he said that she would not and he said that he continued to ride, rode out Rhamkatte Road to a point out there on the Rhamkatte Road. I asked him was it Yates Pond, said he thought it was; said the girl got out of the car and pulled her dress up over her head. He said he got out of the car and he took and put his finger into the girl's vagina; he then stated that the girl laid down and wilfully submitted to him, said he attempted to get his penis into her vagina but could not get it in good and that he ceased. He said he then brought the girl back to town and let her out on North Harrington Street in front of a tire place which is Allen's Tire Company located at the corner of North and Harrington Streets; stated he then went into the place on Poole Road where we found him." He used no force, he did not threaten defendant, and he made no promise to defendant to induce him to make a statement.

On cross-examination Stoudenmire testified in substance: When he first saw defendant at David White's house, he appeared as if he had been drinking very heavily. He interrogated him at the detective bureau at intervals for about three hours. Defendant then at all times denied seeing Libby on 5 June 1965. After talking with defendant that night he swore out a warrant against defendant charging him with the rape of Libby. When he talked with defendant on 8 June 1965, defendant was sober, and he read the warrant to him. He again explained to defendant his constitutional rights, and asked him if he knew what his rights were. Defendant said he did; he had consulted a lawyer.

After the examination and cross-examination of Stoudenmire on the *voir dire* were finished, the court asked defendant if he had any evidence to offer. Defendant's counsel replied, "None for the defendant."

The court then found as a fact that defendant freely and consciously consented for Stoudenmire to search his automobile, and the motion to suppress the evidence found as a result of such search is denied. Defendant excepted, and assigned this as error. The court further found as facts that the incriminatory statement by defendant to Stoudenmire was made freely and voluntarily without any threat or promise, and after defendant had been fully advised of his rights, and that such statements were voluntary statements and are competent evidence. Defendant excepted, and assigned this as error.

The jury was then called back into the courtroom, and Stoudenmire in their presence testified substantially as he did on the *voir dire* examination in respect to defendant's consenting to the search of his automobile, and finding a girl's panties therein, and as to defendant's denial of seeing Libby on 5 June 1965, and defendant's incriminatory statements made to him on the afternoon of 8 June 1965.

Glenn Glesne is a college graduate and majored in biology and minored in chemistry. He is employed by the State Bureau of Investigation as a laboratory analyst in the field of chemistry, blood, and body fluids. On 7 June 1965 detective sergeant Stoudenmire delivered to him two plastic bags, one containing clothing Stoudenmire obtained from Libby and one containing clothing obtained from defendant. He examined each of the items in these plastic bags, and found some reddish brown stains which he subjected to chemical analyses. He took a sample from the lining of defendant's trousers on the right fly where there was a stain, and this stained portion showed blood of human origin. He made a test of a stained portion midway on the front of Libby's dress, and found this to be blood of human origin. He ran a test from the back lower part of Libby's slip where there was a stain, and found blood of human origin.

Defendant's assignment of error to the denial of his motion to suppress the evidence of Stoudenmire's finding of a girl's panties in the back of defendant's car is overruled, for the reason that defendant voluntarily consented to the search. *S. v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501; *S. v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506.

Defendant's assignment of error to the admission in evidence of defendant's confession is overruled. The evidence is ample to support the finding of fact by the trial judge that the confession was made freely and voluntarily without any threats or promises and after the defendant had been fully advised of his constitutional rights. This finding is, therefore, conclusive on appeal. *S. v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d

344; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *S. v. Roberts,* 12 N.C. 259.

The trial of the instant case having occurred prior to the announcement of the decision by the Supreme Court of the United States in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, that decision has no application to this appeal. *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882.

Mrs. Jacquelyn Moore Jackson, medical technologist at Rex Hospital, testified, without objection, that she received from Dr. Arthur Davis, associate pathologist at Rex Hospital, a test tube containing a swab with a cotton tip with Libby Beasley's name thereon, that she subjected it to an acid phosphatase test, found 6.8 Bodansky units of acid phosphatase, and reported the result of this test to Dr. Arthur Davis.

Dr. Arthur Davis, associate pathologist at Rex Hospital, and found by the trial court to be an expert in medicine, specializing in pathology, was asked this question by the State: "Do you have an opinion satisfactory to yourself as to the probable or likely source of acid phosphatase in the concentration of 6.8 Bodansky units in the area of the mouth of the womb of a female?" Over defendant's objection and exception, he was permitted by the trial court to answer as follows: "The presence of acid phosphatase in the concentration of 6.8 Bodansky units found in the vagina indicates the presence of male seminal fluid." Defendant assigns this as error. This assignment of error is overruled, for the particular matter as to the question asked Dr. Davis was one on which Dr. Davis could be helpful to the jury because of his superior knowledge, and his answer was competent in evidence. Stansbury, N. C. Evidence, 2d Ed., §§ 134 and 135, and cases cited under these sections; McCormick on Evidence, § 13 (1954), citing authorities.

Defendant assigns as error that Dr. Satterfield, over his objections and exceptions, was permitted to answer questions to the effect if he had an opinion satisfactory to himself from his examination of Libby and the information he had as to whether Libby's female organ was penetrated, and, if so, what it was penetrated by and as to the depth of the penetration. He replied in substance that in his opinion from the laboratory findings her female organ was penetrated full depth by a man's male organ.

Defendant contends that this challenged testimony of Dr. Satterfield is incompetent because he was permitted to give his opinion based upon his personal examination, and *the information he had,* which would permit him to rely upon rumor, defendant's purported confession, and other things. It is manifest that Dr. Satterfield was

asked to give a direct (not hypothetical) opinion on the basis of the report furnished him by Dr. Davis and Mrs. Jackson, supplemented by his general and pelvic examination of Libby Beasley, and the answers to the questions asked were based upon the report furnished him by Dr. Davis and Mrs. Jackson and his own personal examination. On the precise question raised by defendant's assignment of error to this testimony of Dr. Satterfield, counsel for the State and counsel for the defendant have not favored us with any citation of authority.

It is thoroughly established in our decisions that the admission of evidence which is not prejudicial to a defendant does not entitle him to a new trial. To warrant a new trial it should be made to appear by defendant that the admission of the evidence complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued if the evidence had been excluded. *S. v. King,* 225 N.C. 236, 34 S.E. 2d 3; 1 Strong's N. C. Index, Appeal and Error, §§ 40 and 41.

Even if we concede that the challenged evidence of Dr. Satterfield was incompetent, McCormick on Evidence, § 15 (1954); 3 Wigmore on Evidence, 3d Ed., § 688(4); 1966 pocket part to Conrad's Modern Trial Evidence, § 692; 2 Jones on Evidence, 5th Ed., § 421; *Summerlin v. R. R.,* 133 N.C. 550, 45 S.E. 898; *S. v. David,* 222 N.C. 242, 22 S.E. 2d 633; *Service Co. v. Sales Co.,* 259 N.C. 400, 413, 131 S.E. 2d 9, 20; *Branch v. Dempsey,* 265 N.C. 733, 747-48, 145 S.E. 2d 395, 405; *Keith v. Gas Co.,* 266 N.C. 119, 146 S.E. 2d 7; *Apel v. Coach Co.,* 267 N.C. 25, 147 S.E. 2d 566, we think, and so hold, that its admission in evidence was not prejudicial, and that it is likely a different result would not have been reached if this challenged evidence had been excluded, and we base our opinion and holding upon the following facts, which the State's evidence shows: (1) Dr. Satterfield testified that he obtained from right back of the mouth of the womb of Libby Beasley material for a test to be run in the laboratory of Rex Hospital to determine whether a male organ had been in this area; that Mrs. Jacquelyn Moore Jackson, a medical technologist at Rex Hospital and for eight years a clinical chemist there, testified without objection that she subjected this material obtained by Dr. Satterfield from Libby Beasley to an acid phosphatase test and found 6.8 Bodansky units of acid phosphatase. (2) Dr. Arthur Davis, associate pathologist at Rex Hospital, who received this material taken from the body of Libby Beasley by Dr. Satterfield, gave this material to Mrs. Jackson to test in the laboratory of Rex Hospital. Dr. Davis was asked this question: "Do you have an opinion satisfactory to yourself as to the probable or likely source of acid phosphatase in the concentration of 6.8 Bodansky

units in the area of the mouth of the womb of a female?" His answer, which we have held to be competent, was as follows: "The presence of acid phosphatase in the concentration of 6.8 Bodansky units found in the vagina indicates the presence of male seminal fluid." (3) Dr. Satterfield testified without objection in substance: His pelvic examination of Libby Beasley about 9:45 on 5 June 1965 disclosed the following: On the right hand side of the lip beside the birth canal, there was a skinned place where the superficial skin had been knocked off, about an inch and a half in length and half an inch in width. She had tears through the entire length of the hymenal ring. These tears were relatively fresh, and there was no evidence of any healing and no scab formation over the soft tissues of the skin. Along the vaginal canal there were more of these tiny "petechial hemorrhages" throughout the vagina and up into the area of the mouth of the womb. (4) Dr. Satterfield was asked this question: "From your findings do you have an opinion satisfactory to yourself as to whether or not the female organs of Libby Gray Beasley had previously been penetrated in this fashion by a foreign object?" There was no objection to this question and no motion to strike it out, and his answer was as follows: "I would say that they had not prior to the time in question." (5) G.S. 14-23 provides: "It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under twelve years old . . . to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only." This Court stated in *S. v. Jones,* 249 N.C. 134, 105 S.E. 2d 513: "The terms 'carnal knowledge' and 'sexual intercourse' are synonymous. There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient." (6) Defendant on 8 June 1965 made a statement to detective sergeant Stoudenmire, which statement we have held to be competent in evidence, as follows: "(H)e attempted to get his penis into her vagina but could not get it in good and that he ceased." (7) The admission of Dr. Satterfield's challenged and incompetent testimony to the effect that Libby's female organ was penetrated by a man's male organ was rendered harmless by the admission of an overwhelming mass of other competent evidence offered by the State tending to show penetration of Libby's female organ by a man's male organ. This is said in 1 Strong's N. C. Index, Appeal and Error, § 41, p. 123: "Nor will the admission of incompetent evidence be held prejudicial when its import is abundantly established by competent testimony."

(Citing authority.) (8) Dr. Satterfield's challenged and incompetent testimony to the effect that there had been full penetration was not prejudicial because the State offered an overwhelming mass of other competent evidence tending to show full penetration, and because of the fact that by the provisions of G.S. 14-23 the offense charged in the bill of indictment shall be completed upon proof of penetration only. *S. v. Monds,* 130 N.C. 697, 41 S.E. 789.

The indictment here is drawn under the provisions of G.S. 14-21 and charges defendant with feloniously and carnally knowing and abusing Libby Gray Beasley, a female child under the age of twelve years, to wit, of the age of ten years. Consent is no defense, and this is true by virtue of the language of the statute. The court properly overruled defendant's motion for judgment of compulsory nonsuit and correctly submitted the case to the jury. *S. v. Wade,* 224 N.C. 760, 32 S.E. 2d 314.

We have carefully examined defendant's other assignments of error, some of which have no citation of authority to support his contentions. Such assignments of error merit no discussion and are overruled. The charge of the court is full, accurate, and impartial. All defendant's assignments of error have been examined and overruled. Nothing is shown in the record before us and defendant's brief which would justify disturbing the verdict and judgment below.

No error.

IN THE MATTER OF REVEREND FRANK WILLIAMS.

(Filed 20 January, 1967.)

1. Contempt of Court § 2—

A person who wilfully refuses to be sworn as a witness is equally guilty of contempt of court with one who, having been personally sworn as a witness, refuses to answer a proper question, and such contumacious refusal is direct contempt and comes within the meaning of the statute even though the contemner believes it to be his moral duty to refuse to testify. G.S. 5-5.

2. Contempt of Court § 7—

The maximum punishment for direct contempt in refusing to be sworn as a witness is a fine not to exceed $250 or imprisonment not to exceed 30 days, or both, in the discretion of the court. G.S. 5-4.

3. Contempt of Court § 2—

The motives of a person which impel him to act in direct contempt of

court do not excuse such contempt, even though his motives arise out of religious convictions.

4. Contempt of Court § 6—

Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt must be represented by counsel, and therefore sentence for contempt does not deprive the contemner of his liberty without due process of law.

5. Criminal Law § 77—

G.S. 8-35.1 does not authorize a minister to refuse to be sworn or to testify when the person against whom such testimony is directed does not invoke the privilege.

6. Same—

Fear of loss of esteem or apprehension of decrease in ability to render service in the community does not justify a witness in refusing to testify when the matter does not come within the purview of privileged communications.

7. Constitutional Law § 22—

Religious freedoms protected from congressional action by the First Amendment of the Federal Constitution are protected against State action by the Fourteenth Amendment; however, religious freedoms are equally protected by the provisions of Article I, § 26, of the Constitution of this State.

8. Same—

Religious freedoms protected by constitutional provisions are not limited to ministers or members of organized religious bodies but extend to all citizens.

9. Same—

The constitutional protection of religious freedom is not absolute but must give way to the interest of the State in the exercise of constitutional regulations necessitated by compelling State interests.

10. Same; Contempt of Court § 2—

The State has a compelling interest that a person called as a witness should be sworn and should testify in the administration of justice between the State and one charged with a serious offense, and therefore a minister called as a witness in such prosecution may be held in contempt of court upon his refusal to be sworn as a witness, notwithstanding he asserts that his refusal is a matter of religious conscience.

ON *certiorari* to review the judgment of *Brock, S.J.*, at the 23 May 1966 Criminal Session of GUILFORD, Greensboro Division, adjudging the petitioner to be in contempt of court and imposing punishment therefor.

At the trial of a criminal action, entitled *State v. Sylvester Smith*, in which the defendant was indicted for rape, the Reverend Frank Williams, hereinafter called the contemner, was subpoenæd as a wit-

ness both by the State and by the defendant. When called as a witness for the State, he refused to be sworn or to take the stand as a witness.

Thereupon the judge asked, "Do you care to state any reason why you refuse?" The contemner having indicated that he did so desire, the judge sent the jury in the case then on trial from the courtroom and the following dialogue occurred:

"THE COURT: All right. Proceed.

"REVEREND WILLIAMS: My members are involved in this case here in this courtroom.

"THE COURT: Your members? What do you mean by that?

"REVEREND WILLIAMS: Members of the church that I am pastor of. There are four of them involved in this case. Two on my left and two on my right, and it seems to me that I'm being asked to take sides in this matter which I cannot do.

"THE COURT: You don't mean to indicate that anyone has asked you to say anything but to testify as to the facts as you knew them, do you?

"REVEREND WILLIAMS: Well, I cannot testify under any circumstances because my members are involved. I have been summoned here by the defense. I've spoken to the Solicitor and I made myself clear to them my position as a pastor of a church and as my members being involved. I made it clear to the lawyer. I made it clear to the sheriff of my position but I am still being summonsed here when I cannot take any position at all for they have both discussed this matter with me. They have both confided in me and it would be against the position that I hold to take the stand at all in this case.

"THE COURT: Do you understand that if there is any privileged communications between you and the defendant, or the defendant's wife, or the child that's involved that that is a question for them to raise and not for you?

"REVEREND WILLIAMS: Well, they came to me as their pastor. They confided in me as their pastor, and I think I would be less than their pastor to take the stand in defense of one of these persons.

"THE COURT: You take the position then that regardless of what the merits of the case might be, that even though these people who have talked to you have now called you as a witness that you are justified in refusing?

"REVEREND WILLIAMS: I have discussed this matter with both of them, both Mrs. Smith and Mr. Smith, and they understand my position. It's not them that don't understand my posi-

tion. It seems as though it's the lawyer and the Solicitor who doesn't understand."

The court thereupon inquired of the counsel for Smith, the defendant then on trial, as to his client's wishes in the matter. This attorney advised the court that though he, as well as the solicitor, had subpœnaed the contemner, he had not been able to elicit any satisfactory information from him. The following exchange then occurred:

"THE COURT: Does the defendant [*i. e.*, Sylvester Smith] object to his testimony on the ground that anything that he might have discussed with him constitutes a privileged communication?

"MR. FRANKS [counsel for Sylvester Smith]: May I confer with my client, Your Honor. He has talked with him more than I have [conference between attorney and Smith]. My client does not care to call him as a witness and would object, does wish to object to any privileged communication.

"THE COURT: You then would object to any testimony from this witness concerning any conversation he might have had with the defendant?

"MR. FRANKS: That is my client's wishes, Your Honor. He knows more what was said than I, I do not know.

"THE COURT: All right. Well, that would be a valid objection if entered on behalf of the defendant.

"MR. FRANKS: Yes, sir.

"THE COURT: I think, if there has been some confidential communication between him and his pastor that I would recognize it in this court as a privileged communication. However, that doesn't make objectionable any communication between the defendant's step-child and the pastor. It would as to the wife because that would be the same as her testifying.

"MR. FRANKS: Yes, sir.

"THE COURT: But as to the child, the communication between the child and the pastor. Mr. Solicitor, would there be any objection —

"MR. LOWE [the Solicitor]: Your Honor, that's exactly what I wanted to know. I wanted to know if he did visit the home of the Smiths on or near the weekend of the 4th of July, 1965 and if there he saw Cheryl Parks. I want to know if he visited that home and what time he visited that home.

"THE COURT: You are not asking for any communication —

"MR. LOWE: I am not asking for anything he said to them or that they might have said to him.

"MR. FRANKS: That's perfectly all right with the defendant."

The court then addressed the contemner and the following exchange occurred:

"THE COURT: All right. Now the Court will address itself again to the witness. Do you understand that as a matter of constitutional rights, that these people have a right to call a witness who might testify?

"REVEREND WILLIAMS: Yes, sir. I understand that.

"THE COURT: And do you understand that as a matter of law those rights may be enforced?

"REVEREND WILLIAMS: I understand that also.

"THE COURT: And now are you ready to take the stand and testify?

"REVEREND WILLIAMS: I will not testify in this case under any circumstances."

Thereupon the court pronounced the following judgment:

"THE COURT: Let the record show upon the questions and answers and explanation given by the prospective witness and from the explanation by the Solicitor of the general inquiry that he wishes to make of this witness concerning whether or not he went to the home of the defendant on this particular day and saw the child and the explanation on the part of the Solicitor that he did not intend to ask the witness to divulge any communication that he may have received from anyone; and after the Court having explained to the witness that it is his obligation under the subpœna to testify and the witness flatly refused to do so, the Court adjudges that the witness, Reverend Frank Williams, is in contempt of court and he is ordered in custody for a period of ten (10) days, I am sorry but you brought it on yourself."

To the foregoing judgment the contemner responded, "God Bless you, Your Honor," and was thereupon taken in custody by the sheriff.

On the following day the contemner, being then represented by two of his present counsel, filed a motion that he be released from the foregoing judgment of the court upon the following grounds:

(1) He is a duly ordained minister, pastor of the Mount Zion Baptist Church in Greensboro, and in his professional capacity received confidential information from members of his church and that to compel him to divulge this information would be in violation of his professional ethics and duty as a minister;

(2) Had he not been a minister, he would not have received "the above information";

(3) To require him to testify under these circumstances violates his constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States;

(4) To so require him to testify would violate his rights under the Constitution of North Carolina;

(5) The failure of the court properly to inform him of his constitutional right to counsel, the failure of the court to inform him of the nature of the charge or that he would be in contempt of court, and the failure of the court to appoint counsel to represent him violated his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States and under the Constitution of North Carolina.

In support of this motion, the contemner filed his affidavit stating that he is an ordained minister and the pastor of such church; and that in his professional capacity he received confidential information from Sylvester Smith, and from "the other parties who serve as prosecuting witnesses"; that had he not held such position as minister, "none of the information sought would have been known to him"; to require him to divulge this "confidential information" would require him to breach the confidence of the persons involved, ruin his reputation in the church and community, and prevent him from properly carrying out his religious duties as a minister; that "the testimony sought was obtained through this confidential means and though it appears harmless, if divulged, would prohibit him from receiving further information."

This motion was heard on the day it was filed by the same judge who had on the previous day adjudged the contemner in contempt. At such hearing the contemner was represented by his said counsel. The court denied the motion, considering it both as an allegation of right, and as an appeal to the discretion of the court to modify the former order.

The contemner was thereupon released on bond pending his petition for *certiorari*, which was allowed, and a writ of *supersedeas* pending the decision of this Court upon such review was issued.

The contemner assigns as error both the original judgment and the order denying his motion for release.

Attorney General Bruton and Staff Attorney Vanore for the State.

Major S. High, Herman L. Taylor and Mitchell & Murphy for appellant.

James Mattocks and Charles F. Lambeth, Jr., Attorneys for the North Carolina Civil Liberties Union, Inc., Amicus Curiæ.

Daniel H. Pollitt of counsel.

LAKE, J. G.S. 5-1 provides:

"Any person guilty of any of the following acts may be punished for contempt:

"* * * 6. The contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory."

Webster's New International Dictionary, Second Edition, says:

"Contumacious implies stubbornness or perversity, esp. as manifested in willful contempt of any lawful summons or orders, as of a court; as a contumacious witness."

Black's Law Dictionary defines contumacy as "The refusal or intentional omission of a person who has been duly cited before a court to appear and defend the charge laid against him, or, if he is duly before the court, to obey some lawful order or direction made in the cause." To the same effect is Ballentine's Law Dictionary.

In Re Hayes, 200 N.C. 133, 156 S.E. 791, 73 A.L.R. 1179, affirmed a punishment summarily imposed by the Industrial Commission upon a witness who refused to answer a question properly propounded to him in a hearing. Connor, J., speaking for the Court, said:

"It has been uniformly held by this Court and by courts of other jurisdictions that the power to punish for contempt committed in the presence of the court, is inherent in the court, and not dependent upon statutory authority. [Citations omitted.] Without such power the court cannot perform its judicial function. This principle is especially applicable when the contempt consists in the refusal of the witness in attendance upon the court, after having been duly sworn, to answer a question propounded to him for the purpose of eliciting evidence material to the issue to be decided by the court."

The statute makes no distinction between one who, in the presence of the court, pursuant to its lawful subpœna, refuses to be sworn as a witness and one who, having been sworn, refuses to answer a proper question. In *Lamm v. Lamm,* 229 N.C. 248, 49 S.E. 2d 403, Ervin, J., speaking for the Court, with reference to punishment for contempt, said, "One acts wilfully when he acts knowingly and of stubborn purpose." The refusal of one subpœnæd as a witness to take the oath or to answer proper questions propounded to him, when done knowingly and intentionally, is contumacious and willful, within the meaning of this statute, even though such person believes it to be his moral duty to refuse to testify.

The contumacious and unlawful refusal, in the presence of the court, by one duly subpœnæd, to be sworn as a witness is direct contempt and may be punished summarily. G.S. 5-5; *Galyon v. Stutts*, 241 N.C. 120, 84 S.E. 2d 822; *In Re Hayes, supra; Snow v. Hawkes*, 183 N.C. 365, 111 S.E. 621, 23 A.L.R. 183. In *State v. Yancy*, 4 N.C. 133, Taylor, C.J., speaking of direct contempt, said, "The punishment, in such cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage which impedes the business of the court."

G.S. 5-4 provides that the punishment for contempt by such refusal to be sworn as a witness shall be a fine not to exceed $250 or imprisonment not to exceed thirty days, or both, in the discretion of the court. Thus, the sentence of ten days in jail, imposed by the superior court in this case, was well within the statutory maximum.

It is apparent from the record that the contemner refused to be sworn due to his sincere belief that for him to take the witness stand and testify to any matters, within his knowledge concerning the matter then on trial, would violate his moral duty as a Christian minister. However, it is equally clear that his refusal was willful and intentional. With commendable patience, care, and courtesy the presiding judge explained to him that objections properly entered to questions requiring the disclosure of confidential communications to him would be sustained. It is clear that the contemner understood what was required of him by the court. His refusal to take the oath and to testify was willful and deliberate, notwithstanding the demands of his conscience which motivated it. If it was also an unlawful refusal, it constituted direct contempt, punishable summarily, and the punishment imposed was within the authority of the court.

Contempt does not necessarily proceed from a malevolent spirit. History, both sacred and secular, ancient and modern, is replete with accounts of men of noble character and lofty motives who have suffered punishment far more severe than ten days in jail for conscience' sake. History, especially in recent times, also records that the respect and acclaim which have been accorded these heroes of faith, both spiritual and political, have sometimes induced the self-seeking charlatan to follow in their footsteps — so long as the probable penalty does not outweigh the anticipated applause. Whatever the motive of the recalcitrant witness or party may be, it does not determine whether he may lawfully be adjudged in contempt and punished. The judge is also under the compulsion of conscience, and of the law, to operate the court committed to his direction in accordance with the law. To enable him to do so, he is armed by the State with the power to punish for contempt one who wilfully

and unlawfully refuses to testify when duly subpœnæd and called to the stand.

We find no merit in the contention that the sentence was originally imposed when the contemner was not represented by counsel, or in the contention that the court was under a duty to appoint counsel for him. Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel. The record shows that the contemner is a man of intelligence. As to the alleged duty of the court to appoint counsel for him, we note that he is presently represented by three able attorneys, two of whom appeared for him in the superior court on the day after sentence was imposed and presented to the court a motion that he be released upon the same grounds now argued before us. The superior court heard that motion on its merits and denied it. There is no basis for the contention that to carry out the sentence would deprive him of his liberty without due process of law on the ground that he was denied a hearing or denied representation by counsel of his choice.

We come, therefore, to the question of whether the refusal to be sworn and to testify was unlawful. It was clearly so unless it was justified by the fact that the contemner was an ordained minister who acquired his knowledge of the matters, as to which it was proposed that he be interrogated, by reason of the relationship of pastor and communicant.

The record discloses that the solicitor proposed to question the contemner only as to whether he visited the home of the defendant during or near the weekend of 4 July 1965 and there saw Cheryl Parks. The defendant, through his attorney, expressly stated that he had no objection to such testimony. We infer from the record that Cheryl Parks was the prosecuting witness. There is nothing in the record to indicate that she, the defendant's wife, or any other person interested in the case then on trial, or in the disclosure of the information in question, had any objection to the testimony of the contemner with reference to such matters.

Apart from the statute, there is no privilege with reference to communications between a clergyman, or other spiritual advisor, and his communicants or others who seek his advice and comfort. Stansbury, North Carolina Evidence, § 54; Wigmore on Evidence, 3rd ed., § 2394; 58 Am. Jur., Witnesses, § 531; 97 C.J.S., Witnesses, § 263; Comment by Dillard S. Gardner, later the Librarian of this Court, 6 North Carolina Law Review 462.

In recognition of the sociological value of free communication between one and his spiritual advisor, G.S. 8-53.1 provides:

"No clergyman, ordained minister, priest, rabbi or accredited Christian Science practitioner of an established church or religious organization shall be required to testify in any action, suit or proceeding, concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust, *when the giving of such testimony is objected to by the communicant;* provided, that the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice." (Emphasis added.)

It is not necessary for us, in the present proceeding, to determine whether the mere fact of the presence of a person in a home, into which an ordained minister has been invited in the course of his discharge of his pastoral duties, is "information which may have been confidentially communicated to him in his professional capacity" within the meaning of this statute. It is sufficient to note, in the present proceeding, that no objection to the proposed testimony was or is advanced by the defendant then on trial or by any "communicant" of this witness. Consequently, G.S. 8-53.1 does not afford justification for his refusal to be sworn and to testify.

The fact that one called as a witness fears that his testimony may decrease the esteem in which he is held in the community, or may decrease his ability to render service therein, does not justify refusal by him to testify in response to questions otherwise proper. See *Lassiter v. Phillips,* 70 N.C. 462; 58 Am. Jur., Witnesses, §§ 34 and 35.

The contemner contends that his refusal to testify was not unlawful, and so did not constitute contempt of the court, because the information desired to be elicited from him was obtained as the result of his position as a Christian minister, and to require him to divulge this confidential information would violate his own constitutional rights to the free exercise of his religion. He says that for him to divulge the information would be in violation of his professional ethics and of his dignity as a minister of an established religion.

The Constitution of North Carolina, Article I, § 26, entitled "Religious Liberty," provides:

"All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience."

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

It is well established by numerous decisions of the Supreme Court of the United States that the freedoms thus protected from congressional action by the First Amendment are so fundamental to liberty that they are also protected against state action by the Due Process Clause of the Fourteenth Amendment. See: *Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. ed. 1628; *Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900, 84 L. ed. 1213; *Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. ed. 288. The contemner here contends that to punish him for refusal to testify under the circumstances disclosed by this record would deprive him of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution, and, similarly, contends that it would deprive him of his liberty contrary to the law of the land in violation of the Constitution of North Carolina, Article I, § 17.

We think it clear that the term "rights of conscience" as used in Article I, § 26, of the Constitution of North Carolina, must be construed in relation to the right to worship God according to the dictates of one's own conscience. Consequently, the freedom protected by this provision of the State Constitution is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States. Clearly, these constitutional provisions do not provide immunity for every act which one's conscience permits him to do, or even for every act which one's conscience classifies as required by ethics, nor do they shield the defendant from a command by the State that he do an act merely because he believes it morally or ethically wrong. It is the right to exercise one's religion, or lack of it, which is protected, not one's sense of ethics.

The freedoms protected by these constitutional provisions are not limited to clergymen. Indeed, they are not limited to members of an organized religious body and, consequently, are not contingent upon proof that others share the views of the individual who asserts his own constitutional right to the freedom to exercise his religion or "right of conscience." Thus, if a clergyman, not otherwise privileged to refuse to testify, is protected from compulsion to do so by these constitutional provisions, because he believes that for him to so testify would violate his religious duty, a layman having such belief would also be protected from compulsion to testify. The con-

stitutional provisions extend their protection to the unorthodox, unusual and unreasonable belief as truly as to the belief shared by many. Thus, a holding that these constitutional provisions grant to the clergymen a privilege against compulsion to disclose upon the witness stand information given him in confidence because such disclosure would violate the clergyman's concept of religious duty, may well give rise to claims of a like privilege by laymen. The consequence might well be to deprive the courts of testimony necessary in order to administer justice, or to require them to embark upon the hazardous undertaking of determining the sincerity of the belief asserted.

The free exercise of religion is impaired not only by governmental prohibition of that which one's religious belief demands but also by governmental compulsion of that which one's religious belief forbids. *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. ed. 2d 965; *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. ed. 2d 982; *Board of Education v. Barnette, supra.* On the other hand, the freedom to exercise one's religious beliefs is not absolute. Thus, an act of Congress forbidding the practice of polygamy in territories of the United States was sustained against the contention that the defendant's religious belief required him to practice it, *Reynolds v. United States*, 98 U.S. 145, 25 L. ed. 244, and one may be required to submit himself or his children to vaccination against a dread disease notwithstanding the fact that to do so violates his religious beliefs. *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. ed. 645; *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. ed. 643. In the *Prince* case, Rutledge, J., speaking for the Court, said:

> "[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the State as *parens patriæ* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."

The use of drugs may be prohibited notwithstanding the user's asserted belief that such use is required by Divine Law. *State v. Bullard*, 267 N.C. 599, 148 S.E. 2d 565; *Shapiro v. Lyle*, 30 F. 2d

971; *State v. Big Sheep,* 75 Mont. 219, 243 P. 1067; *Sweeney v. Webb,* 33 Tex. Civ. App. 324, 76 S.W. 766.

The liberty secured by the First Amendment to the United States Constitution and by Article I, § 26, of the Constitution of North Carolina are, however, so basic and fundamental that one may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a "compelling state interest in the regulation of a subject within the State's Constitutional power to regulate." *Sherbert v. Verner, supra.* See also: *N.A.A.C.P. v. Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. ed. 2d 405; *Thomas v. Collins,* 323 U.S. 516, 65 S. Ct. 315, 89 L. ed. 430.

The effective operation of its courts of justice is obviously a "compelling State interest." *In Re Jenison Contempt Proceedings,* 265 Minn. 96, 120 N.W. 2d 515, the Supreme Court of Minnesota affirmed a conviction and sentence for contempt for the refusal of Mrs. Jenison on religious grounds to serve as a petit juror. The Supreme Court of the United States in 375 U.S. 14, 84 S. Ct. 63, 11 L. ed. 2d 39, remanded the case to the State Court for "further consideration in light of *Sherbert v. Verner," supra.* When the matter came again before the Supreme Court of Minnesota in 267 Minn. 136, 125 N.W. 2d 588, 2 A.L.R. 3d 1389, that Court reversed the conviction for contempt saying:

> "Upon reconsideration we have come to the conclusion there has been an inadequate showing that the state's interest in obtaining competent jurors requires us to override relator's right to the free exercise of her religion. Consequently we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory duty shall henceforth be exempt."

As pointed out in the annotation in 2 A.L.R. 3d 1392, following the report of the second *Jenison* decision by the Minnesota Court, "The loss of an occassional juror does not interfere enough with the operation of the government to justify refusal to excuse one who sincerely believes that service on a jury is contrary to the tenets of his religion." An entirely different situation is presented by the refusal of a witness to testify. In many instances the witness is the only person who can give the desired testimony. The "compelling interest" of the state in the rendering of a just judgment in accordance with its law overrides the incidental infringement upon the religious belief of the witness that for him to testify is wrong.

The matter now before us arose in a trial wherein the life of

the then defendant was at stake. It happened that the contemner was called to the stand by the State, but he had also been subpœnæd by the defendant. The contemner stated that he would not testify for either side because to do so would violate his religious belief as to his duty. While such religious beliefs are not lightly to be brushed aside and overridden by the order of a court, they must yield to the "compelling interest" of the state in doing justice between the state and one charged with a serious criminal offense for which, if guilt be established, his life may be forfeited. We, therefore, hold that there was no violation of the contemner's constitutional right to the free exercise of his religion guaranteed by the First Amendment to the United States Constitution, or of his right of conscience guaranteed by Article I, § 26, of the Constitution of North Carolina, in the requirement that he give the testimony sought by the State and as to which the defendant had no objection. The refusal of the contemner to testify was contumacious and unlawful and the punishment imposed was within the authority of the superior court.

Affirmed.

STATE v. DAVID McKETHAN.

(Filed 20 January, 1967.)

1. Criminal Law § 15—

Motion for change of venue on the ground of unfavorable publicity in the county is addressed to the sound discretion of the trial court, and no abuse of discretion in the denial of the motion is shown when the court makes inquiry in regard to the matter, concludes from the inquiry that no reason appears why a fair jury could not be selected in the county, instructs the jury not to read or hear accounts of the trial, and defendant does not exhaust his peremptory challenges or challenges for cause.

2. Criminal Law § 155—

Where there is no objection to the solicitor's question to an officer as to the designation of the police file the photograph identified by prosecutrix as her assailant came from, and the court sustains defendant's objection to the officer's reply that the photograph came from the rape file (the prosecution being for rape), the matter is not ground for a mistrial, there being no objection until after the improper question had been asked and the answer in, and no motion to strike.

3. Criminal Law § 91— Withdrawal of unresponsive answer of witness held to have obviated necessity for mistrial.

An officer, a witness for the State, was asked by the solicitor whether he knew the defendant prior to the incident constituting the basis of the prosecution for rape, the officer replied in the affirmative, and added that he had had the defendant "for other sex offenses". The court, in the absence of the jury, brought out the fact that the officer had made an investigation of defendant in regard to a matter that had been settled by the father of the defendant and the parents of the child in question, without any criminal charge against defendant, and offered to permit defendant's counsel to have the witness give this explanation on cross-examination. Defendant's counsel refused the offer, whereupon the judge recalled the jury and charged them not to consider the unresponsive answer of the witness. *Held:* The incident was not sufficient to require a mistrial.

4. Criminal Law § 71— Evidence held to sustain finding that confession was freely and voluntarily made.

The defendant, both on the *voir dire* and at the trial, testified that he made no incriminating statements. The testimony on the *voir dire* tended to show that defendant was advised that he had a right to remain silent, to refuse to answer any questions, that any statement made by him could be used against him in court, that he was entitled to have a lawyer and, if he was unable to employ one, the court would appoint one for him, and that upon defendant's attention being called to incriminating circumstances, he made the confession offered in evidence, the entire interrogation lasting not more than an hour. *Held:* The evidence upon the *voir dire* sustains the court's finding that defendant's statement was freely, voluntarily and understandingly made, and its admission in evidence was not error. *Miranda v. Arizona*, 384 U.S. 436, having been decided subsequent to this trial, is not applicable to this case.

APPEAL by defendant from *Carr, J.*, February, 1966 Criminal Session, CUMBERLAND Superior Court.

The defendant, David McKethan, was indicted, tried, convicted, and given two life sentences in prosecutions for rape and kidnapping. The indictments were returned at the September 27 Session, Cumberland Superior Court. The indictment in 21267 charged the defendant with the capital felony of rape. The indictment in 21270 charged the defendant with the felony of kidnapping. Each indictment named Elaine B. Fendall as the victim.

At the September Session, 1966, the defendant moved for a change of venue on account of alleged unfavorable newspaper publicity in Cumberland County. The Court, after inquiry and hearing, denied the motion. The defendant, through court-appointed counsel, entered pleas of not guilty.

The State offered evidence which in short summary disclosed the following: On September 12, 1965, Elaine B. Fendall, age 19, came to Fayetteville from her home in Princeton, New Jersey. Her purpose was to marry Gary Hanson, a soldier then stationed at Fort

Bragg. On the night of September 14-15, after Hanson had completed his assignment of duty, he and Miss Fendall, who was staying at the host house, drove to Stevens Drive-in for refreshments. After leaving the drive-in they stopped at Pope Park, just off the Fort Bragg highway. The park was unlighted. The lights had been turned off the automobile. A man appeared at the window. Miss Fendall gave this account of what followed: "I heard a voice and when I just turned around I saw something white; blood spattered all over me from his (Hanson's) head." Hanson got out of the vehicle and the intruder chased him into the woods. In the meantime he screamed for Miss Fendall to run. She started toward the woods, fell down, and then returned to the automobile and while she was trying to get the vehicle started, "The man grabbed me. He hit me on the head with this big hammer."

When she became conscious again she was in the back seat of her automobile. The man who assaulted her was driving her automobile across railroad tracks. He proceeded along a dirt road to an old, abandoned house where he stopped. At this place, the man, threatening further use of the hammer, forcibly committed the crime of rape charged in No. 21267.

After the assault, the man left, giving instructions for Miss Fendall not to move until he had time to get away. After he left she reported the assault to the officers. Hanson had already alerted them. The officers procured medical aid for both injured parties. Thereafter, Miss Fendall accompanied the officers to police headquarters where she examined pictures in the police files. After reviewing 12-15 photographs she identified the picture of her assailant. The officer in charge of the photographs, in answer to the Solicitor's question, stated that the one from which Miss Fendall was able to identify her assailant was taken from the division of the police files designated, "Rape." After the answer was in, the defendant objected. The court promptly sustained the objection. No other objection to police files was interposed.

After Miss Fendall's identification from the photograph, the police immediately arrested the defendant at the home of his aunt, took him to police headquarters for questioning. He was placed in a lineup of four prisoners and identified by Miss Fendall. He was second in line. However, she stated that his hair, then slicked down, didn't look quite as she remembered it. When his hair was combed back, she was certain of his identity. She stated, however, that she remembered his saying, "I am not going to hurt you. I am not going to kill you." As a further test, the police officers placed the four prisoners out of sight and had each in turn walk behind a screen out of sight and repeat the words which the perpetrator of the assault had

used during the attack. She correctly recognized the defendant's voice. He was the fourth in line during this test.

Mr. Hanson was called as a State's witness. He corroborated Miss Fendall up to the time that he was chased from the automobile by the assailant. He testified the perpetrator of the attack struck him on the head with some object, inflicting a wound which required six stitches. After he was injured by the assailant who chased him into the woods, he screamed for Miss Fendall to get away. As soon as he had an opportunity he called the officers and gave the alarm.

The State offered a signed statement made to the officers by the defendant in which he admitted he assaulted Miss Fendall in her automobile, then drove the automobile to the old, abandoned house across the railroad tracks where he left her in the automobile. The defendant objected to the admission of the confession. The court excused the jury and in its absence conducted a detailed examination into the circumstances under which the statement was made. The investigation covers 41 pages of the record.

In substance the evidence taken in the absence of the jury disclosed the following: The defendant was arrested at the home of his aunt in the early morning of November 15, 1965. Upon the basis of Miss Fendall's description and her examination of the photographs, she identified him. Later she confirmed the identification by sight and by voice. He was taken to the sheriff's office and interrogated. The officer, at the beginning of the interrogation, advised him that he had a right to remain silent, to refuse to answer any questions, but that if he made any voluntary statements, they could be used against him in court. He was advised that he was entitled to have a lawyer, and if he was unable to employ one the court would appoint one for him. The officer offered to call his father and mother if he wanted to see them. When the defendant was first asked about his having attacked Miss Fendall, he replied, "You will never be able to pin that on me." When his attention was called to his wet shoes, cockleburs in the wet trouser cuffs, and Miss Fendall's positive identification, he admitted he had left his aunt's home and had walked to Pope Park where he saw a man and a woman in an automobile. The man attacked him. He picked up some object from the vehicle, struck the man with it and chased him into the woods. Thereafter he assaulted the woman in the car. He then drove several miles across some railroad tracks, down an old dirt road to an abandoned house where he left her, telling her not to move until he had time to get away. The interrogation lasted not more than one hour.

After telling the above story to Officer Snipes, two other officers were called in. The defendant repeated the story and agreed to sign

a written statement, the most of which he dictated. It was read by him and signed on the third page after placing his initials on pages one and two.

Mr. Starling, a justice of the peace, was called. He read the statement, the defendant read it, and the justice of the peace stated: "Those initials were put there immediately after I had read the statement and I had read it back to him. . . . He did not act afraid; he was more or less in a jovial mood. . . ."

The defendant testified on the *voir dire,* also to the same effect before the jury. In both instances he said he knew nothing about any assault on Miss Fendall and did not go to Pope Park at any time during the night of September 14-15, 1965; that he spent the night after 9:00 or 9:30 at the home of his aunt where he slept after watching television for awhile, and where he was arrested. He admitted before the jury that he had his pants (but not his shoes) on at the time of his arrest, and that he was asleep on the couch when the officers arrived. He denied having made any incriminating admissions to the police. He did say he signed a paper consisting of one page, but that it only provided for a lie detector test and a "head examination." He said no one warned him of any constitutional rights; that the first time he ever heard about rights was at the trial. He admitted he had a tenth grade education.

At the conclusion of the *voir dire* hearing, Judge Carr made detailed findings of fact in accordance with the State's evidence and concluded the defendant had been advised of his rights; that he had voluntarily, knowingly, and understandingly made the admissions in the three page statement. The statement was admitted in evidence before the jury over the defendant's objection.

Before the jury the defendant's counsel asked of Officer Snipes this question: "Did you know David McKethan at all prior to this particular evening in question, this incident?" The witness answered, "Yes, sir, I have had David for other sex offenses." Defendant's counsel moved to strike and for instruction that the jury disregard the statement. The jury was excused. While the jury was out the court reviewed the questions preceding the one above quoted. Defense counsel moved for a mistrial. The court replied: "Well, it is unfortunate the statement was made, but I feel that I could not withdraw a juror and order a mistrial. It can be taken care of by special instructions to the jury not to consider it. I call counsel's attention to the fact that Officer Snipes cannot be expected to know the precise rules of evidence in a case, and to some extent you were at least cracking the door when you asked the officer if he had known David McKethan before. You to some extent were in-

viting a statement you got. That would not have been true if Officer Snipes had been a skilled lawyer."

The court made inquiry of Officer Snipes, still in the absence of the jury, and ascertained he meant the following by what he said: He investigated a case which was settled between the parents, mother and father of the child involved, and David's father. No indictment or prosecution followed this incident. The court offered to permit defense counsel to cross-examine the witness before the jury about what he meant by having had David for other sex offenses. The opportunity to present the above before the jury was declined by defense counsel. The court recalled the jury and gave this instruction:

> "Gentlemen: Just before you retired to the jury room, a question was asked of Officer Snipes by Mr. Brown, counsel for the defense, if he had known the defendant before September 15, 1965, and Officer Snipes said that he had and then indicated in his answer some statement as to the type of investigation that he had had made in respect to him before. Now, that statement, that he had had him for somewhat similar kind of investigation he had made in connection therewith, as to the charge, if any, the jury will please not consider. Erase from your mind and do not permit it to in any way influence your verdict in this case. I instruct you that that statement is not competent and it will be your duty to dismiss it, disabuse your mind of it and not permit it to in any way affect your verdict. You are, therefore, asked by the court to erase that part of the statement from your mind. All right, proceed."

After the State rested, the defendant testified in his own defense. He stated the officers required him to take off all his clothes; that they kept him under questioning for a considerable time, and that he understood what he signed was for a lie detector test and a head examination. He stated that he spent the night from about nine o'clock until the time of his arrest at the home of his aunt where he remained until the officers arrived, early on November 15; that he knew nothing of any assault.

The jury returned a verdict of guilty of rape as charged in the indictment and recommended that the defendant's punishment be imprisonment for life. The jury also returned a verdict of guilty of kidnapping, and the court imposed a like sentence of imprisonment for life. The defendant excepted to the sentences, and appealed.

T. W. Bruton, Attorney General, Millard R. Rich, Assistant Attorney General for the State.

Bobby G. Deaver for defendant appellant.

HIGGINS, J. The appellant's assignments of error on the appeal present three questions of law: (1) Did the court commit error by denying the motion for a change of venue? (2) Did the court commit error by denying defendant's motions for a new trial for that (a) Police Officer Studer stated the photograph by which the prosecuting witness identified the defendant was taken from the group section designated, "Rape," and (b) Deputy Sheriff Snipes, in answer to a question by defense attorney, said, "Yes, sir, I have had David for other sex offenses?" (3) Did the court commit error by admitting the incriminating statement given to Officer Snipes by the defendant after his arrest?

The defendant's motion for a change of venue on the ground of unfavorable publicity was addressed to the sound discretion of the court. The court made inquiry and concluded no reason was made to appear why a fair jury could not be selected from Cumberland County. Careful instructions were given the jury not to read or hear accounts of the trial. A motion for a change of venue or for a special venire from another county, upon the ground of unfavorable publicity, is addressed to the sound discretion of the trial court. *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916; *State v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *State v. Lea,* 203 N.C. 13, 164 S.E. 737.

A challenge to the poll (to each prospective juror) may be peremptory within the limits allowed by law, or for cause without limit if cause is shown. The record fails to disclose that the defendant had exhausted his peremptory challenges, or that any juror was accepted to which he had legal objection upon any ground. *State v. Rorie,* 258 N.C. 162, 128 S.E. 2d 229; *State v. Corl,* 250 N.C. 258, 108 S.E. 2d 615. A defendant on trial has the right to reject any juror for cause or within the limits of his peremptory challenges before the panel is completed. *State v. Walls,* 211 N.C. 487, 191 S.E. 232; appeal dismissed, 302 U.S. 635, 82 L. ed. 494.

The defendant has assigned as error the court's refusal to withdraw a juror and order a mistrial because of two occurrences during the presentation of the State's case. After Miss Fendall had identified the photograph of the defendant from the police files, the solicitor asked the officer what designation in the police files the photograph came from. There was neither objection to the question nor to the source of the photographs. The officer answered, "Rape." Counsel then objected and the court sustained the objection. De-

fense counsel did not object until after the question had been asked and the answer was in. He did not move to strike. The solicitor's question was improper. The court sustained the objection as soon as the court had opportunity, and without waiting for a motion. Ordinarily failure to object in apt time to incompetent testimony will be regarded as waiver of objection and its admission is not assignable as error unless the evidence is forbidden by statute. *State v. Warren,* 236 N.C. 358, 72 S.E. 2d 763 (citing many cases). If the testimony is incompetent, objection thereto should have been interposed to the question at the time it was asked as well as to the answer when given. Objection not taken in apt time is waived. *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598; *State v. Merrick,* 172 N.C. 870, 90 S.E. 257. The court had no opportunity to rule on the motion to strike because no such motion was made.

As a second ground for a mistrial, defendant cites the defense counsel's question and Deputy Sheriff Snipes' answer as here given: "Question: Did you know David McKethan prior . . . to this incident?" The officer answered, "Yes, sir. I have had David for other sex offenses." Defense counsel moved to strike and that the jury be instructed to disregard the statement. The court excused the jury and in its absence made inquiry of the officer as to what he meant by the statement. The officer said he had made an investigation of the complaint against the defendant but that the parents of the child and the father of the defendant settled the dispute without any criminal charge against the defendant. The court offered to permit defense counsel to have the witness give the foregoing explanation. Counsel elected not to offer the explanation; whereupon the judge recalled the jury and gave the charge heretofore quoted.

The final assignment of error involves the admissibility of the confession signed, sworn to, and admitted in evidence over the defendant's objection. When the statement was offered and challenged, the court excused the jury and in its absence followed the procedure approved in this state, heard evidence, both for the defendant and for the State, involving the circumstances under which the statement was made. *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344.

The defendant testified on the *voir dire* (and later before the jury) that he spent the entire night of September 14-15 in the home of his aunt. According to his testimony he was not involved in any attack on Miss Fendall; that he was not advised of any constitutional rights. He further testified the officers took his clothes and continued the interrogation while he put on other clothes which the

officers furnished him. He signed a one-page paper which provided for a lie detector test and a head examination; that he can read and has a tenth grade education.

The officers testified they found the defendant in bed at the home of his aunt early on the morning of September 15. The bottoms of his trousers and his shoes were wet. He was taken to the interrogation room, fully advised of all his rights to remain silent, to refuse to answer questions; that if he made a statement it might be used against him in court; that he was entitled to call a lawyer, or if he was unable to employ one the court would provide one for him; that his father and mother would be called if he wanted to see them. They required him to change his clothes in order that those he wore might be sent to the technical laboratory for examination of what appeared to be splotches or bloodstains. However, the tests made at the laboratory were negative. The officers testified the defendant admitted he had intercourse with the prosecuting witness in the front seat of the automobile after he had the fight with her companion who had fled, and that she did not consent. He admitted that when he returned to the automobile after chasing Hanson into the woods that the girl asked him if he was going to drive off some place and kill her.

The signed statement, among other admissions, contained the following: "I, David McKethan, have read this statement which begins on page one and ends on page 3. . . . The statement was made by me freely, without hope or benefit of reward, without threat of punishment and without coercion, undue influence or inducement." Pages one and two contained his initials, which he denied. The bottom of page 3 contained his signature, which he admitted.

The objection to the foregoing statement is based on grounds different from that usually assigned. While the defendant states that he was interrogated in the absence of counsel and members of his family, and while his clothing was being removed and changed, yet he contends and has testified both at the *voir dire* and at the trial that he never made any incriminating admissions at any time. He admitted he signed page 3, but it provided for a lie detector test and head examination, and nothing more; so that according to his contention and testimony, both on the preliminary investigation and on the trial, he never made any incriminating admissions, and, therefore, he does not rely on coercion or undue influence, but upon the theory that the officers substituted a different paper for the one he actually signed. In his testimony he does not say or contend he was put in fear, or the failure to have an attorney, or any other reason caused him to make any incriminating statements. He has

contended he spent the entire night at the home of his aunt and did not go to Pope Park, and knew nothing about any assault on Miss Fendall. Three officers testified David told the story as it was recorded in the paper which he signed.

On the basis of the evidence of which the foregoing is its material substance, Judge Carr, on the *voir dire,* found the statement was freely, voluntarily, and understandably made, and, hence, admissible in evidence. The evidence supports the finding.

The case was tried on February 7, 1966. Judge Carr's decision on the admissibility of the statement is sustained by our decisions. *State v. Walker, supra; State v. Keith, supra; State v. Barnes, supra; State v. Elam,* 263 N.C. 273, 139 S.E. 2d 601. *Escobedo v. Illinois,* 378 U.S. 478 (1964) and other cases are not in conflict with this decision as we understand them. The rule stated in *Miranda v. Arizona,* 384 U.S. 436, decided June 13, 1966, is not applicable to this case which was tried four months earlier. *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882.

Other matters discussed in defendant's brief, while not overlooked, are not of sufficient moment to require discussion. After full review, we conclude the defendant has had a fair trial, before a careful, painstaking, and impartial judge. The record discloses

No error.

ALAN SHAW, AS A TAXPAYER AND VOTER IN AND OF THE CITY OF ASHEVILLE, NORTH CAROLINA, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS AND CITIZENS OF SAID CITY WHO MAY DESIRE TO JOIN IN THIS ACTION, v. THE CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, THE HONORABLE EARL ELLER, MAYOR OF SAID CITY, WILLIAM F. ALGARY, ROBERT P. CROUCH, J. WALTER McRARY, CLARENCE E. MORGAN, FRANK MULVANEY, AND THEODORE B. SUMNER, MEMBERS OF THE CITY COUNCIL OF SAID CITY, J. WELDON WEIR, CITY MANAGER OF SAID CITY, AND ASHEVILLE CABLEVISION, INC., A NORTH CAROLINA CORPORATION.

(Filed 20 January, 1967.)

1. Injunctions § 8—

A citizen and taxpayer of a municipality may maintain an action to enjoin the performance by the city of an agreement granting a corporation the right to install cablevision within the municipality when such citizen alleges facts disclosing the possibility of financial loss to himself as a taxpayer and asserts the agreement is void or *ultra vires* the city.

2. Controversy Without Action § 2—

The contention that the court was without power to find facts in addi-

tion to those agreed upon by the parties and submitted to the court, is immaterial when some of the findings by the court are conclusions of law and the other findings by the court are not material to the determination of the controversy.

3. Municipal Corporations § 4—

A municipal corporation has only such powers as are granted by its charter and by general law, construed together, and all reasonable doubt concerning the existence of a power must be resolved against its existence.

4. Municipal Corporations § 18—

An agreement giving a private corporation permission to install cablevision facilities within the municipality, with power to lay the necessary cables under the streets and sidewalks and upon poles, and providing that such right should be exclusive, is a franchise and not a license.

5. Same—

Whether an agreement of a municipality constitutes a franchise or a license must be determined by the nature and provisions of the agreement and not the nomenclature employed by the parties.

6. Same—

The definitions of "public utility" and "franchise" as contained in G.S. 62-3 are *not controlling* in determining whether an agreement of a municipality constitutes a franchise or a license, since the definitions of the statute do not purport to be authoritative definitions of those terms as used elsewhere.

7. Same—

A municipality is not limited to granting franchises to a "public utility."

8. Same—

Where the charter of a city provides procedural restrictions upon the granting by the city of franchises, such city must follow such procedural restrictions of its charter in granting a franchise regardless of whether the authority to grant the particular franchise is conferred upon the city by G.S. 160-2 or by its own charter.

9. Same—

The charter of defendant municipality stipulated that it should not grant a franchise until the question had been submitted to the qualified voters of the city, that the franchise should be in the form of an ordinance and should, when apposite, fix rates, fares and charges to be made, and should provide for forfeiture of the franchise to secure efficiency of public service at reasonable rates. *Held:* An agreement of the municipality granting the right to a private corporation to construct and operate equipment for cablevision within the municipality which fails to conform to each of such charter restrictions is void.

APPEAL by plaintiff from *Falls, J.*, at the 2 May 1966 Session of BUNCOMBE.

The plaintiff, as citizen, taxpayer and registered voter of the city of Asheville, brought this action on behalf of himself and all

other persons similarly situated against the city, its mayor, members of its City Council, its city manager, and the Asheville Cablevision, Inc., hereinafter called Cablevision, to enjoin the performance of an agreement between the city and Cablevision on the ground that it is void because the city has no authority to enter into it.

The case was tried without a jury upon an agreed statement of facts. The following is a summary of the material facts so stipulated:

The City Code of Asheville was enacted as Chapter 16 of the Private Laws of 1923. (This Act is entitled, "An Act To Amend, Revise And Consolidate The Statutes That Constitute The Charter of The City of Asheville.") Section 212 provides:

> "No franchises shall be granted by the City of Asheville, until the question has been submitted, at a special or general election to the qualified voters of the city, and until a majority of those voting upon the proposition have voted in favor of granting such franchises * * *"

Section 213 provides:

> "No franchise shall be granted for a longer time than 35 years from the date of the granting of such franchise. Every grant of every franchise or right, as hereinbefore provided, shall make provision by way of the forfeiture of the grant or otherwise, for the purpose of compelling compliance with the terms of the grant and to secure efficiency of public service at reasonable rates, * * * and before any such grant of any such franchise or right shall be made, the proposed specific grant shall be embodied in the form of an ordinance, with all the terms and conditions that may be right and proper, including a provision for fixing a rate, fares, and charges to be made if the grant provides for the charging of a rate, fares and charges."

The city and Cablevision entered into a written agreement, which is designated "Lease-License Agreement." It provides:

> "The Lessor [the city] grants to the lessee [Cablevision], its successors or assigns the right to erect, install, construct, reconstruct, replace, remove, repair, maintain and operate in or upon, under, above, across and from the streets, avenues, highways, sidewalks, bridges and other public ways * * * in the City of Asheville, all equipment * * * and apparatus * * * for the purpose of receiving, amplifying, transmitting and distributing * * * television, radio, electrical and electronic energy, pictures, sounds, * * * and communications, uni-di-

rectional and multi-directional, of every nature and description * * * and to otherwise engage in the business * * * generally known as * * * community antenna television and audio communications services, * * *"

The agreement provides it will continue in force for 20 years, the rights granted will be exclusive and, in consideration of the grant, Cablevision will pay the city certain percentages of its gross receipts from monthly service charges to the users of its service. Cablevision also agrees to furnish to the city hall, fire and police stations and schools of the city certain facilities and services free of charge. The agreement requires Cablevision to file with the city a full schedule of the charges to be made to its subscribers for its services, and forbids any preference, prejudice or disadvantage as to rates or otherwise, but contains no provision requiring such rates to be reasonable or subjecting them to regulation by the city or by any other authority. It provides that Cablevision will, at its expense, replace and restore paving or other street or sidewalk surface which is disturbed. It authorizes Cablevision to trim trees and provides restrictions upon its location of poles. It requires Cablevision to maintain its system in reasonable repair, to furnish adequate and efficient community antenna reception services to all residents of the city served by any public utility and to comply with all rules and regulations of the Federal Communications Commission or other authorized agency of the United States Government. It provides for its recision by the city in event of default by Cablevision not corrected within a specified time and that upon its termination, by recision or otherwise, Cablevision will transfer all "its right, title and interest" in the plant and equipment to the city (there being no covenant against encumbrances at such time).

"Said agreement was entered into without submitting the question of the issuance of said right, authority, license and franchise to a vote of the qualified voters of the City of Asheville," without the enactment of an ordinance relating thereto and without the prior issuance to Cablevision of a certificate of public convenience and necessity by the North Carolina Utilities Commission.

The system proposed to be constructed and operated by Cablevision includes a master television antenna which is to receive television signals from distant channels. These signals are then to be increased in intensity by electronic means and relayed to a network of coaxial cables running throughout the community and into individual homes. In some areas of the city the cables are to be placed in underground conduits beneath streets and sidewalks. In other areas they are to be suspended on poles, existing poles to be used

wherever necessary agreements with the owners thereof can be made. The city's share of the gross receipts from such operation by Cablevision will be paid into its general operating fund.

Prior to entering into the agreement, the city officials negotiated with various persons interested in supplying such service. They advertised for bids. Several bids having been received, the City Council adopted a resolution accepting the bid of Cablevision and authorizing the mayor and city clerk to execute the agreement, which they did.

The plaintiff alleges that the agreement is void, that he will be irreparably damaged if it is carried out, and that he has no adequate remedy at law.

In its judgment under the heading "FINDINGS OF FACT," the superior court stated:

> "4. That on October 7th, 1965, the Council, by resolution, authorized and directed the Mayor to execute a Lease-License Agreement with Asheville Cablevision, Inc., which said agreement was duly and lawfully entered by the City of Asheville and Asheville Cablevision, Inc.;
>
> "5. That the entering of the Lease-License Agreement did not constitute the granting of a franchise, and the operation of a cable television system, or community antenna television system, is not a public utility;
>
> "6. That the construction, operation, and maintenance of a community antenna system, as described in the Lease-License Agreement, will not be an obstruction, nor will it unreasonably interfere with streets, avenues, highways, sidewalks, bridges, and other public ways now existing, or extensions or additions thereto, in the City of Asheville."

Under the heading "CONCLUSIONS OF LAW," the court, in its judgment, stated:

> "1. That the City of Asheville had the legal right to enter the Lease-License Agreement with Asheville Cablevision, Incorporated.
>
> "2. That the Lease-License Agreement does not constitute the granting of a franchise to a public utility.
>
> "3. That the terms and conditions of the Lease-License Agreement violate no Constitutional right of the plaintiff.
>
> "4. That the resolution of the Asheville City Council of October 7th, 1965, and the Lease-License Agreements, entered, were lawful and proper acts of the defendants."

The court thereupon denied the plaintiff's prayer for relief and adjudged the agreement to be a valid act of the city.

The plaintiff assigns as error the entry of the judgment and each of the above quoted provisions thereof.

Parker, McGuire & Baley by Frank M. Parker and Richard A. Wood, Jr., for plaintiff appellant.

O. E. Starnes, Jr., Vanwinkle, Walton, Buck & Wall by Herbert L. Hyde, Attorneys for City of Asheville.

G. Edison Hill, Attorney for Asheville Cablevision, Inc.

Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr., Amicus Curiæ.

LAKE, J. The plaintiff is stipulated by the parties and found by the superior court to be a citizen and taxpayer of the city. As such, he was authorized to maintain this action on behalf of himself and all others similarly situated. In *Wishart v. Lumberton,* 254 N.C. 94, 118 S.E. 2d 35, suit was instituted by a citizen and taxpayer of the defendant city to enjoin it from using a city owned park as a parking lot for motor vehicles. This Court held that a demurrer to the complaint was properly overruled, saying, through Rodman, J., "If the governing authorities were preparing to put public property to an unauthorized use, citizens and taxpayers had the right to seek equitable relief." Similarly, in *Merrimon v. Paving Company,* 142 N.C. 539, 55 S.E. 366, though holding that the complaint was demurrable for failure to state a cause of action, the Court, through Connor, J., said, "That a citizen, in his own behalf and that of all other taxpayers, may maintain a suit in the nature of a bill in equity to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers — such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc., — is well settled." See also 52 Am. Jur., Taxpayers' Actions, §§ 4, 14, 17 and 28, where the right of the taxpayer to sue for equitable relief is likened to that of a stockholder in a private corporation to sue in equity for a wrong done or about to be done to the corporation.

The present action is distinguishable from *Angell v. Raleigh,* 267 N.C. 387, 148 S.E. 2d 233, in which, at the time the taxpayer instituted his action, the city had adopted an ordinance providing for the issuance of "licenses" for the operation within the city of community antenna television systems, but had not issued or contracted to issue a license thereunder. This Court held that, in such situation,

the plaintiff taxpayer was not authorized to maintain a suit for declaratory judgment to test the validity of the ordinance. In the present case, it is stipulated that the city of Asheville has made an agreement with Cablevision and the suit is brought to enjoin the performance of that specific agreement.

The agreement here in question, among other things, purports to grant to Cablevision the right to lay cables under the streets, sidewalks and other public ways of the city of Asheville, and to erect poles and lines of cable therein for the purpose of carrying on thereby a business for private profit. Such action will, of necessity, require substantial expenditures to repair and restore the pavements or other surfaces of such public ways. The agreement provides that such expenses will be borne by Cablevision. If, however, the purported grant of rights to Cablevision is, as the plaintiff contends, unlawful and void, the undertakings by Cablevision in the agreement would be without consideration and unenforceable. *Elizabeth City v. Banks,* 150 N.C. 407, 64 S.E. 189. Part or all of the expense of such repair to the streets and other public ways may fall upon the taxpayers of the city. This, without more, is sufficient to give to the plaintiff the right to institute and maintain this action to determine the validity of the agreement and to enjoin the performance thereof if it be unlawful. We are, therefore, brought to the question of the validity of the agreement between the city and Cablevision.

The plaintiff assigns as error the inclusion in the judgment of the above quoted paragraphs 4, 5 and 6 under the caption "FINDINGS OF FACT." He contends that since this matter was submitted to the superior court upon an agreed statement of facts, the court had no authority to find additional facts. It is unnecessary for us to determine the validity of this contention for the reason that paragraphs 4 and 5 are, in reality, conclusions of law reviewable by us (see *Woodward v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639) and the finding, in paragraph 6 that the construction and maintenance of the proposed system will not "unreasonably interfere" with streets and other public ways, is not material to the determination of the validity of the agreement if, as the plaintiff contends, the proposed use of the streets is one beyond the authority of the city to grant. In such case, the degree to which the unlawful use of the streets will impair their use by the plaintiff and others so situated is not material. The reasonableness or unreasonableness of such interference is of importance only where the municipality has been granted authority to permit the use of its streets for the kind of operation proposed. See *Clayton v. Tobacco Co.,* 225 N.C. 563, 35 S.E. 2d 691.

It is well established that a municipal corporation of this State

"has only such powers as are granted to it by the General Assembly in its specific charter or by the general laws of the State applicable to all municipal corporations, and the powers granted in the charter will be construed together with those given under the general statutes." *Riddle v. Ledbetter,* 216 N.C. 491, 5 S.E. 2d 542. "Any fair, reasonable doubt concerning the existence of the power is resolved against the corporation." *Elizabeth City v. Banks, supra.*

The fact that this agreement is denominated by the parties a "Lease-License Agreement" is not controlling. Its nature, not its title, determines the power of the city to enter into it. Paragraph 1 purports to grant to Cablevision, its successors or assigns, "the right to erect, install, construct, reconstruct, replace, remove, repair, maintain and operate in or upon, under, above, across and from the streets * * * and other public ways * * * in the City of Asheville, all equipment, facilities, appurtenances and apparatus of any nature, for the purpose of receiving, amplifying, transmitting and distributing * * * television, radio, electrical and electronic energy, pictures, sounds, signals, impulses and communications, * * * of every nature and description * * *." Obviously, this is not a right possessed by inhabitants and citizens of Asheville in general. In any event, that is made clear by paragraph 3 of the agreement, which provides expressly that the right so "to use and occupy said streets * * * shall be exclusive."

In Black's Law Dictionary we find: "FRANCHISE. A special privilege conferred by government on individual or corporation, and which does not belong to citizens of country generally of common right." In Ballentine's Law Dictionary, it is said "[I]t is the privilege of doing that which does not belong to the citizens of the country generally by common right which constitutes the distinguishing feature of a franchise." See also 23 Am. Jur., Franchises, § 2; 37 C.J.S., Franchises, § 1.

In *Elizabeth City v. Banks, supra,* it is said, "A franchise is property, intangible, it is true but none the less property — a vested right, protected by the Constitution — while a license is a mere personal privilege, and, except in rare instances and under peculiar conditions, revocable." To the same effect, see 23 Am. Jur., Franchises, § 3.

In *New Orleans Gas Co. v. Louisiana Light Co.,* 115 U.S. 650, 659, 6 S. Ct. 252, 29 L. ed. 516, Harlan, J., speaking for the Court, said, "[T]he right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State, or by the mu-

nicipal government of that city acting under legislative authority." In *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138, 147, the Supreme Court of Louisiana said:

> "The right to operate gas works and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, erect lamp posts and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State and in the exercise of the police power, the State could carry on the business itself, or select one or several agents to do so."

Both the appellants and the appellees argue at length in their briefs their respective views as to whether Cablevision, by engaging in the operation described in the agreement, would become a "public utility" subject to regulation by the North Carolina Utilities Commission. The brief of the *amicus curiæ* is devoted entirely to this question. In our view, the determination of that question is not necessary to the decision of this case and we do not now determine it. The term "franchise," as used by the courts and by textwriters, is not limited to a special right granted to a public utility, as defined in G.S. 62-3. See *Taylor v. Racing Asso.*, 241 N.C. 80, 84 S.E. 2d 390; *State v. Felton*, 239 N.C. 575, 80 S.E. 2d 625. The definitions of "public utility" and "franchise" contained in G.S. 62-3 are not controlling in determining the nature of the present agreement. By the express terms of that statute, those definitions set forth the meaning to be given those terms "as used in" Chapter 62, and do not purport to be authoritative definitions of those terms as used elsewhere. We are presently concerned with the meaning of "franchise" as used in the City Code (charter) of Asheville.

Even if Cablevision be a public utility as defined in G.S. 62-3, it is not required that it obtain from the Utilities Commission a certificate of public convenience and necessity before a franchise be issued by the city to it. Such certificate is required by G.S. 62-110 before such a public utility may commence construction of its plant or operation of its business. Thus, whether Cablevision's proposed operation would or would not subject it to the authority of the North Carolina Utilities Commission, the validity of the agreement before us is not determined by the fact that no such certificate had been issued prior to the execution of the agreement.

G.S. 160-2(6) provides that a municipal corporation is authorized "to grant upon reasonable terms franchises for public utilities." In *Power Co. v. Membership Corp.*, 253 N.C. 596, 117 S.E. 2d 812,

Rodman, J., speaking for the Court, said, "Every town has by statute G.S. 160-2(6), the power to grant franchises to public utilities, that is, the right to engage within the corporate boundaries *in business of a public nature.*" (Emphasis added.) The illustrative list of such businesses there given is not confined to businesses within the definition of "public utility" in G.S. 62-3. It may well be that the term "public utility" as used in G.S. 160-2 is a broader term than it is as used in Chapter 62 of the General Statutes. If not, this would not lead to the result that the agreement in question is not a franchise. It would mean only that a city or town may not grant a franchise for an operation such as that now proposed, unless such operation be within the regulatory power of the Utilities Commission, or authority to grant a franchise for such an operation is contained in the charter of the particular municipal corporation. See *Elizabeth City v. Banks, supra.*

We hold that the agreement in question undertakes to grant to Cablevision a franchise. We come, consequently, to the questions of whether the city of Asheville has the authority to grant such franchise and, if so, whether it is authorized to grant one by the procedure followed in this instance.

If, but only if, the proposed operation is a "public utility," as that term is used in G.S. 160-2, a franchise, otherwise valid, would be within the authority conferred upon Asheville, and every other municipal corporation of this State, by that statute. If not, a franchise, otherwise valid, would be within the implied authority conferred upon Asheville by §§ 212 and 213 of the City Code, *i. e.*, the city charter (Private Laws of 1923, Chapter 16, §§ 239 and 240). These sections, by their terms, impose limitations upon the power of the city to grant franchises. They do not contain the term "public utility." The necessary implication is that the Legislature intended the city to have the power to grant franchises free from the limitation of G.S. 160-2 that the grantee be a "public utility." Nevertheless, the authority, whether conferred upon the city by G.S. 160-2 or by its own charter, is subject to the procedural restrictions imposed by the city's own charter upon its power to grant a franchise.

Section 212 of the city's charter provides, "No franchises shall be granted by the City of Asheville, until the question has been submitted, at a special or general election to the qualified voters of the city, and until a majority of those voting upon the proposition have voted in favor of granting such franchises." It is stipulated that there has been no such submission to the voters. Section 213 of the charter provides that the grant of a franchise must be in the form of an ordinance, which this agreement, of course, is not. Section 213

also provides that the grant must contain a provision for "fixing a rate, fares and charges to be made if the grant provides for the charging of a rate, fares and charges." The agreement in question plainly contemplates that Cablevision will make charges for its services but it contains no provision for fixing such charges. Section 213 also provides that, "Every grant of every franchise * * * shall make provision by way of the forfeiture of the grant or otherwise * * * to secure efficiency of public service at reasonable rates." There is no such provision in the agreement.

It follows that the agreement between the city and Cablevision has not been adopted by the procedures which are prescribed by the city charter as conditions precedent to its validity. The agreement is, therefore, beyond the authority of the city and is void.

It is unnecessary for us to determine, and we do not determine, whether the agreement is also void as an attempt to grant an exclusive emolument in violation of Article I, § 7, or a monopoly in violation of Article I, § 31, of the Constitution of North Carolina.

The plaintiff is entitled to the entry of a judgment granting him the injunctive relief prayed for in the complaint, and this action is remanded to the superior court for the entry of such judgment.

Reversed and remanded.

STATE v. PIRL WILLARD KNIGHT.

(Filed 20 January, 1967.)

1. Constitutional Law § 29; Indictment and Warrant § 2—

Under the Fourteenth Amendment to the Federal Constitution and under Article I, §§ 13 and 17 of the State Constitution, the statutory exclusion of a group or class of persons from eligibility for jury service will not render invalid an indictment returned by a grand jury selected in accordance with State law, so long as there is no reasonable basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise represented upon it, at least where the defendant is not a member of the excluded group or class.

2. Same; Jury § 3—

There is no reasonable basis for the conclusion that the groups or classes of persons exempted from the duty to serve on grand or petit juries by G.S. 9-19, G.S. 90-45, G.S. 90-150, and G.S. 127-84 would bring to the deliberations of the jury any point of view with reference to the trial of criminal prosecutions which would be otherwise unrepresented, and therefore the exclusion of such groups or classes does not offend constitutional

requirements that juries be drawn impartially from a cross section of the community.

3. Same—

Statutory exemptions of designated groups and classes from the duty to serve on grand and petit juries provide merely that one in such designated class or group may assert his or her statutory right of exemption, and do not render members of such groups or classes ineligible to serve.

4. Constitutional Law § 19—

Article I, § 7, of the State Constitution, does not preclude the granting of an exemption to a particular group or person in the furtherance of the public interest or convenience, but merely precludes the granting of such exemption to a group or to a person for the peculiar benefit of such group or person.

5. Same; Constitutional Law § 29; Indictment and Warrant § 2; Jury § 3—

The public has a substantial interest in exemption of mothers of children under the age of 12, women with sick husbands who require their care, city firemen, druggists, registered nurses, physicians, and ministers from the duty to serve on grand and petit juries, and therefore the statutory exemption of these groups and classes from the duty to serve on juries does not violate Article I, § 7, of the State Constitution.

APPEAL by the State from *Latham, S.J.,* at the 5 September 1966 Conflict Criminal Session of MECKLENBURG.

An indictment in proper form charging the defendant with murder was returned "a true bill" by the grand jury. Upon motion of the defendant, the court entered its judgment quashing the indictment.

The ground upon which the motion was made was that the Clerk has regularly and systematically exempted from service upon the grand jury and the petit jury those persons who applied to him for such exemption and who were declared entitled to such exemption by the following sections of the General Statutes of North Carolina: G.S. 9-19, 90-45, 90-150, and 127-84; prior to the selection of the grand jury which returned this bill of indictment, the Clerk exempted from service, pursuant to such statutes, prospective grand jurors who were qualified to serve as such within the meaning of the Constitution of North Carolina, Article I, § 13; similarly qualified persons have been so exempted by the Clerk from service upon each petit jury called to serve at a criminal session of the Superior Court of Mecklenburg County since the return of the indictment against the defendant by the grand jury; and the said statutes granting such exemption are in violation of the Constitution of North Carolina, Article I, §§ 7 and 17.

The motion to quash was heard upon a stipulation of facts, which may be summarized as follows:

At all times pertinent to this appeal, the selection of the names of persons to serve as jurors in the criminal courts of Mecklenburg County has been made in accordance with the procedure prescribed in the General Statutes. The Clerk has regularly and systematically exempted from jury duty those persons who have applied therefor to him and who qualify for such exemption under one or more of the above statutes. Members of the grand jury are selected from a list of names of persons called to serve on criminal jury duty after the names of persons so excused by the Clerk have been removed. Nine members of the grand jury, which returned the indictment against this defendant, were drawn from the list of jurors for the 3 January 1966 criminal session and nine were drawn from the list for the 4 April criminal session.

Twelve persons whose names were originally on the list for the 3 January session were found to be exempt and their names were removed before the grand jury which indicted the defendant was chosen. Of these, nine were so exempted on the ground that they were mothers of children under the age of 12 years, one because she was needed to care for her sick husband, one because he was a city fireman, and one because he was a druggist. Seventeen persons were so exempted and excluded from the list for the 4 April session. Of these, 12 were so exempted because they were mothers of children under the age of 12 years, one because he was a city fireman, two because they were registered nurses, one because he was a doctor, and one because she was a minister.

The indictment against this defendant was returnable at the 6 June 1966 session. A total of 63 persons were so exempted from the list of jurors at that session and subsequent sessions, to and including the session of 5 September 1966. Of these, 45 were exempted because they were mothers with children under the age of 12 years, five because they were registered nurses, one because he was an attorney at law, one because he was a railroad conductor, one because he was a printer, two because they were doctors, one because he was a railroad engineer, one because he was a linotype operator, two because they were volunteer firemen, one because he was a minister, one because he was a member of the North Carolina Air National Guard, one because he was a train dispatcher, and one because he was a city fireman.

In support of the motion, William L. Stagg, attorney for the defendant, filed his affidavit, which is not controverted and which we treat as an addition to the stipulated facts. According to this affidavit, there reside in Mecklenburg County approximately the fol-

lowing numbers of persons who are engaged in occupations whose members are so exempt from jury service by the above statutes:

Doctors	300
Dentists	125
Chiropractors	12
Druggists	125
Pilots	500 to 1000
Ministers	150
Funeral Directors	32
Embalmers	16
Postal Clerks	1000
Nurses	800 to 1000

Attorney General Bruton, Deputy Attorney General McGalliard and Staff Attorney White for the State.

Stagg & Reynolds for defendant appellee.

LAKE, J. More than 60 years ago this Court stated clearly that Article I, § 13, of the Constitution of North Carolina, requires the sustaining of a motion to quash an indictment of a Negro who proves that the members of his race have been systematically excluded from the juries of the county in which he has been indicted. *State v. Peoples,* 131 N.C. 784, 42 S.E. 814. Since that time it has never been doubted by the courts of this State that the provisions of the Constitution of North Carolina, Article I, §§ 13 and 17, are to be so interpreted and that such systematic exclusion from the grand jury of persons, otherwise qualified, because of their race, requires, upon motion duly made, the quashing of an indictment returned against a member of that race by such grand jury irrespective of the fact that all members of the grand jury were, themselves, qualified jurors. *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *State v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513.

Similarly, the Supreme Court of the United States in *Strauder v. West Virginia,* 100 U.S. 303, 25 L. ed. 664, and numerous subsequent decisions, has declared that the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States are violated by the indictment of a defendant by a grand jury from which the members of the defendant's race have been excluded by a statute of the state, the Court there saying, "The constitution of juries is a very essential part of the protection such a mode of trial is intended to secure." In *Thiel v. Southern Pacific Company,* 328 U.S. 217, 66 S. Ct. 984, 90 L. ed. 1181, 166 A.L.R. 1412, dealing with

the selection of jurors in a federal court, the Court, speaking through Mr. Justice Murphy, said the "exclusion of all those who earn a daily wage cannot be justified by federal or state law," and, "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." In *Strauder v. West Virginia, supra,* the Court observed, "Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment."

In *Fay v. New York,* 332 U.S. 261, 67 S. Ct. 1613, 91 L. ed. 2043, the Court held that the selection of the jury which tried the defendant from a "blue ribbon" list did not violate the rights of the defendant under the Fourteenth Amendment, saying, "No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it." In the *Thiel* case, *supra,* the Court said that its decision "does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographic groups of the community." In the *Fay* case, *supra,* the Court, while reserving the question of whether the defendant's lack of identity with a group, excluded by state law or by systematic state action from jury service, would necessarily be a bar to his attack upon an indictment and conviction by a grand jury and a petit jury so selected, said, "This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class."

It would thus appear to be the meaning of the Fourteenth Amendment, as interpreted by the Supreme Court of the United States, that even the complete exclusion, by state law, of a group or class of persons from eligibility for jury service will not make invalid an indictment by a grand jury, selected in accordance with such state law, so long as there is no reasonable basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise represented upon it, at least where the defendant is not a member of the excluded group. We now so hold with reference to the Constitution of North Carolina, Article I, §§ 13 and 17, reserving for future determination the question of whether the identity of the defendant with a group so excluded from jury service will, alone, require a different result.

In the present case, the defendant was indicted for murder. The record does not indicate the race of either the defendant or the

alleged victim, or that either of them was the member of any other group or class of persons, and we have no knowledge of any such circumstance. The statutes of which the defendant now complains exempt from jury service persons who engage in certain occupations. These are as varied as physicians, railroad brakemen, funeral directors, ministers, gristmillers and linotype operators. There is no basis upon which we can conclude reasonably that persons engaged in any of these occupations, or those who are members of any of the other groups exempted from jury service by these statutes, would bring to the deliberations of a jury any point of view with reference to murder, or any other criminal offense, which would be otherwise unrepresented upon a grand or petit jury considering such matter.

We observe further that the statutes of which the defendant complains do not exclude anyone from jury service. Indeed, this record does not show that no member of any of the exempted classes served upon the grand jury which indicted this defendant. Each of these statutes merely provides for those in the designated classes or groups an exemption from the duty which would rest upon them apart from such statute. Nothing else appearing, a physician, a railroad brakeman, the mother of small children, or any member of any other group designated in any of these statutes, is eligible to serve upon any grand or petit jury, if summoned for such duty and if such person does not assert his or her statutory right of exemption. See: *People v. Rawn*, 90 Mich. 377, 51 N.W. 522; 24 Am. Jur., Grand Jury, § 12.

In sustaining the validity of a Florida statute providing for all women an absolute exemption from jury service, the Supreme Court of the United States said in *Hoyt v. Florida*, 368 U.S. 57, 82 S. Ct. 159, 7 L. ed. 2d 118:

> "Manifestly, Florida's § 40.01(1) does not purport to exclude women from state jury service. Rather, the statute 'gives to women the privilege to serve but does not impose service as a duty.' *Fay v. New York, supra.* It accords women an absolute exemption from jury service unless they expressly waive that privilege. This is not to say, however, that what in form may be only an exemption of a particular class of persons can in no circumstances be regarded as an exclusion of that class. Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation. * * *

"We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a women should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities * * *

"It is true, of course, that Florida could have limited the exemption, as some other States have done, only to women who have family responsibilities. [Citing, among others, N.C. G.S. 9-19, without further comment.] But we cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption."

Thus, so far as the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution are concerned, it is sufficient, in order to sustain a state statutory exemption, that there is reasonable ground for the Legislature to believe that the public interest and general welfare will be better served by the grant of the exemption than by subjecting the members of the exempted class to the duty imposed upon other members of the community. We so hold with reference to the provisions of Article I, § 17, of the Constitution of North Carolina.

Applying this principle to an administrative practice of granting exemptions to groups similar to those exempted by the statutes involved in the present matter, the Supreme Court of the United States, speaking through Mr. Justice Holmes in a unanimous decision, in *Rawlins v. Georgia,* 201 U.S. 638, 26 S. Ct. 560, 50 L. ed. 899, said:

"The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission no doubt was that pointed out by the state court, that the business of the persons omitted was such that either they would have been entitled to claim exemption or that probably they would have been excused. Even when persons liable to jury duty under the state laws are excluded it is no ground for challenge to the array, if a sufficient number of unexceptionable persons are

present. *People v. Jewett,* 3 Wend. 314. *But if the state law itself should exclude certain classes on the bona fide ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the Fourteenth Amendment to prevent it. The exemption of lawyers, ministers of the gospel, doctors, and engineers of railroad trains, in short substantially the exemption complained of, is of old standing and not uncommon in the United States. It could not be denied that the State properly could have excluded these classes had it seen fit, and that undeniable proposition ends the case.*" (Emphasis added.)

The defendant further relies upon Article I, § 7, of the Constitution of North Carolina, which provides, "No person or set of persons are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." Obviously, this provision does not forbid all classifications of persons with reference to the imposition of legal duties and obligations. As long ago as *Bank v. Taylor,* 6 N.C. 266, this Court had before it the contention that this provision of our State Constitution made invalid a provision in a private act incorporating the Bank of New Bern, which authorized summary judgment and execution against one who defaulted in the payment of a note. Speaking through Hall, J., the Court said, "This objection will vanish when we reflect that this privilege is not a gift, but the consideration for it is the public good, to be derived to the citizens at large from the establishment of the bank." In *State v. Womble,* 112 N.C. 862, 17 S.E. 491, the Court, speaking through Avery, J., said:

"Though, as a rule, a grant of a special privilege, not conferred upon persons generally, to a particular man *for his own peculiar benefit,* naming him, may be unconstitutional, the Legislature unquestionably has the power, *in order to provide for the public convenience or to facilitate transportation of persons and property,* to confer on a designated person the right to build a bridge, or establish a ferry, with the power to charge tolls for the use of such crossings, *and, in addition, to exempt the servant who may be placed in charge, from all public burdens.*" (Emphasis added.)

Again, in *Brumley v. Baxter,* 225 N.C. 691, 36 S.E. 2d 281, this Court, speaking through Devin, J., later C.J., said:

"The constitutional limitation contained in Art. I, sec. 7, has been frequently invoked by this Court to strike down legis-

lation conferring special privileges not in consideration of public service. [Citations omitted.] *But where the motivation is for a public purpose and in the public interest, and does not confer exclusive privilege legislation has been upheld.*" (Emphasis added.)

Therefore, the limitation of Article I, § 7, like that of Article I, § 17, does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is reasonable basis for the Legislature to conclude that the granting of the exemption would be in the public interest. Here, as in questions arising under the exercise of the police power pursuant to the requirement of due process of law, the principle to be applied is that declared by Moore, J., for the Court, in *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660, where it is said:

> "The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. [Citations omitted.] The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts — it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts. [Citations omitted.]"

The record discloses that of the persons on the lists, from which members of the grand jury which indicted the defendant were drawn, only those falling in the following categories were exempted: Mothers of children under the age of 12, a woman with a sick husband who required her care, city firemen, a druggist, registered nurses, a doctor, and a minister. It is with these exemptions only that we are concerned on this appeal since no others granted by the statutes are shown by the defendant to have any possible connection with the fact of his indictment for the offense with which he stands charged. We are not, however, to be considered as suggesting that the remaining exemptions from jury service provided by these statutes are not within the power of the Legislature, or that if one or more of them are invalid under the above tests of constitutionality, the improper excusing of one or more prospective grand jurors in reliance upon such statutory exemption would require or justify the

quashing of an indictment returned by a grand jury so chosen. Those questions are not presently before us.

That the public has a substantial interest in the supervision and care of children under the age of 12 years by their mothers is too obvious to require discussion. Thus, to permit such a mother, at her request, to remain free from the time and energy consuming duties of a juror is clearly no violation of the above provisions of the Constitution of this State or those of the United States. *Hoyt v. Florida, supra.*

In *State v. Hogg,* 6 N.C. 319, Ruffin, J., later C.J., speaking for the Court, sustained the exemption from jury duty of a commissioner of navigation, notwithstanding the presence in the Constitution of the provision now found in Article I, § 7, saying:

> "The purpose of the Legislature is to forward and promote the public advantage, by leaving officers, *physicians,* and others to exercise their employments without interruption." (Emphasis added.)

The shortage at the present time of physicians, registered nurses, and registered druggists is a matter of common knowledge and great public concern. The public obviously has a most substantial interest in having all such persons free to engage in the performance of their services which are so vital to the public welfare. These exemptions are clearly within the power of the Legislature.

In *State v. Whitford,* 34 N.C. 99, the Court, speaking through Nash, J., later C.J., sustained an exemption from jury service granted by statute to members of a fire company, saying:

> "The duties which he as a member of the Atlantic Fire Company has to perform are highly important to the community, and to their due performance a regular train of drilling and exercise is necessary; and at any moment, as well in the day as at night, the services of the company may be needed."

The same urgent public necessity today justifies the exemption from jury duty of both regularly employed city firemen and volunteer firemen.

There is reasonable cause for the General Assembly to conclude that it is in the public interest that a minister be at all times available for consultation and advice to members of his congregation and others in need of spiritual comfort or guidance. This need may well be thought to outweigh the benefit of the service which might be rendered by such a minister in the deliberations of a jury.

This Court will take judicial notice of the fact that a wife ren-

ders a service of the utmost importance when she remains at home to take care of her sick husband, and we are not disposed to consider unreasonable the Legislature's conclusion that the resulting benefit to the public outweighs the contribution she might make in the jury box. This exception presents no serious threat to the working of the jury system and its allowance is within the authority of the Legislature.

We find in this record no showing that any constitutional right of this defendant has been violated by the selection of the members of the grand jury which indicted him. The motion to quash the indictment should have been denied.

Reversed.

ANNIE P. KINLAW, ADMINISTRATRIX OF THE ESTATE OF HERMAN FLOYD KINLAW AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 20 January, 1967.)

1. Appeal and Error § 30; Death § 3—

Where, in an action for wrongful death, the agreed statement of the case on appeal recites that the action was instituted by plaintiff as administratrix of the decedent, nonsuit cannot be sustained on the ground that plaintiff was not entitled to maintain the action, even though her allegation that she was the duly qualified and acting administratrix of the decedent is denied in the answer and plaintiff introduces no evidence of her qualification.

2. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be taken as true and she must be given the benefit of every reasonable inference that may be drawn therefrom.

3. Railroads § 5—

Plaintiff's evidence permitting inferences that the automatic signal lights at a railroad crossing were not flashing at the time of the collision, that the engineer did not blow any whistle, ring any bell, or otherwise give any warning of the approach of the locomotive to the crossing, and that the view of the locomotive approaching the crossing was obstructed by an embankment, is sufficient to be submitted to the jury on the issue of negligence in an action for wrongful death of a driver struck at the crossing by the locomotive.

4. Same; Evidence § 15—

Testimony of a witness that he heard no whistle or bell as he traversed the railroad crossing some seven seconds ahead of the decedent is some

evidence that no signal was given, there being no evidence that the circumstances were such that the witness could not have heard the signal had it been given.

5. Railroads § 5—

A railroad company is under duty to give a traveler notice of the approach of its locomotives to a grade crossing when the traveler's view of an approaching locomotive is obstructed by an embankment, and its failure to do so is negligence.

6. Same—

Failure of an automatic signal to function at a given moment at a railroad crossing is not sufficient of itself to establish negligence of the railroad, but evidence tending to show failure of the railroad company to give any notice whatever of the approach of its locomotive to a blind crossing, is sufficient to take the issue of negligence to the jury.

7. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's own evidence, interpreted in the light most favorable to plaintiff, discloses contributory negligence as a proximate cause of the accident so clearly that no other conclusion can reasonably be drawn therefrom.

8. Railroads § 5—

Evidence tending to show that intestate was driving a truck some 15 miles per hour, downgrade, in approaching a railroad crossing, that his view of the approaching locomotive was obstructed by an embankment, that at the time the automatic crossing signals were not flashing, that the engineer gave no warning of the approach of the locomotive by bell, whistle, or other wise, *held* not to disclose contributory negligence as a matter of law on the part of intestate as a proximate cause of the ensuing crossing accident.

9. Same—

Nothing else appearing, the failure of a driver to operate his vehicle at a speed and with a lookout such that he can bring it to a stop before reaching a crossing and colliding with an approaching train, is negligence, but where it further appears that the automatic signals erected at a blind crossing were not flashing at the time and that the approaching locomotive gave no signal by whistle or bell or otherwise, nonsuit for contributory negligence should not be allowed, since, even though the failure of the signals does not relieve the motorist of the duty to exercise due care, such failure has a natural tendency to lessen or abate his caution.

10. Death § 4—

The effect of the 1951 amendment to G.S. 1-53 and G.S. 28-173 is to make the time limitation for the institution of an action for wrongful death a statute of limitations and not a condition precedent to the right of action.

11. Time—

In computing the time within which an act must be done, the first day must be excluded and the last day included, and if the last day is a Saturday, Sunday or a legal holiday, it must be excluded. G.S. 1-593.

12. Holidays—

The first Monday in September each year is a public holiday. G.S. 103-4.

13. Evidence § 3—

The courts will take judicial notice of the concurrence of days of the week with days of the month for any year not unreasonably distant.

14. Death § 4; Limitation of Actions § 3.1—

This action for wrongful death was instituted two years and two days after the death of intestate, but the last day of the two year period was a Sunday and the following day was Labor Day. *Held:* The action was instituted within the time allowed by G.S. 1-53.

APPEAL by plaintiffs from *Latham, S.J.*, at the May 1966 Civil Session of HARNETT.

The plaintiff administratrix brought this action to recover damages for the wrongful death of her intestate. The United States Fidelity & Guaranty Company was joined as an additional party plaintiff upon the motion of the defendant railroad. It filed a complaint adopting the allegations of the complaint of the original plaintiff, hereinafter called the plaintiff, and alleging certain rights by way of subrogation. Its participation in the action presents no additional question upon this appeal. Hereinafter, "plaintiff" refers to Annie P. Kinlaw, Administratrix, only.

Originally, the plaintiff joined as defendant Brown Paving Company and Seth Wooten Company. Each of them demurred to the complaint for its failure to state a cause of action against such defendant. Each demurrer was sustained. There was no appeal from the sustaining of these demurrers and no amendment to the complaint with reference to either of these original defendants. Hereinafter, "defendant" refers to the railroad only.

Summons was issued 4 September 1962. It is not disputed in the record on appeal that the deceased died on 2 September 1960.

The plaintiff alleges in her complaint that her intestate was killed in a collision between a locomotive of the defendant railroad and a vehicle, described as a "Euclid waterwagon," at an intersection of the railroad with U. S. Highway 401 in or immediately north of the town of Lillington. She alleges that the proximate cause of the collision and death was the joint and concurring negligent acts and omissions of the defendant, the Brown Paving Company and the Seth Wooten Company. She alleges that the defendant was negligent in that it failed to give any warning of the approach of its locomotive to the crossing, failed to keep a lookout, and failed to stop the locomotive before striking the waterwagon, which it could have done if its engineer had maintained a proper lookout.

The defendant, in its answer, admits the occurrence of the col-

lision at this crossing on 2 September 1960, and the resulting injury and death of the plaintiff's intestate on that date. It also admits all acts and omissions of the Brown Paving Company and the Seth Wooten Company, but denies all allegations of the complaint with reference to negligence by the railroad. As one affirmative defense, it alleges that the plaintiff's intestate was guilty of contributory negligence in that he drove the waterwagon upon the crossing although automatic signal lights, indicating the approach of the locomotive, were flashing and visible to him as the machine and the locomotive both approached the crossing. As a further affirmative defense, it alleges that more than two years elapsed from the accrual of the plaintiff's alleged cause of action to the institution of this suit, so that the provisions of G.S. 1-53 bar recovery by the plaintiff in this action.

At the conclusion of the plaintiff's evidence, a judgment of nonsuit was entered. The plaintiff appeals, assigning as error only the entry of such judgment.

In addition to testimony as to the health, age and earnings of the deceased, the evidence introduced by the plaintiff may be summarized as follows:

The deceased died on 2 September 1960 at the intersection of the railroad track and the highway referred to in the pleadings. The collision between the waterwagon operated by him and the locomotive occurred at approximately 1 p.m. The waterwagon consisted of a tractor with a water tank trailer attached. Its total length was 35 or 40 feet. The deceased was driving the waterwagon northwardly on Highway 401 through the town of Lillington, 100 to 150 feet behind another construction machine, driven by William Bass, who testified for the plaintiff.

There was in progress a highway construction project involving the widening of the highway so as to provide two lanes for traffic in each direction. Four lanes were complete and open for traffic south of the crossing but the two lanes ultimately designed for northbound traffic were not open beyond it. Immediately south of the crossing, barriers were placed upon the northbound lanes so as to divert northbound traffic onto what would ultimately become one of the southbound lanes. The deceased, William Bass and their employer had no connection with this construction project, they being simply engaged in the movement of these machines along the highway as members of the traveling public.

Approximately 700 feet before reaching the crossing, Bass and the deceased stopped for a traffic signal in the town of Lillington. From that point to the crossing, the highway proceeded at a substantial downgrade. At the crossing, on each side of the highway,

there were substantial structures carrying electrically operated signal lights designed to operate automatically and, by flashing lights, give warning to travelers upon the highway of the approach of a train. There was also a "railroad crossing" sign erected on the side of the highway facing northbound traffic. Thus, the existence of the railroad crossing was readily discernible to the deceased from the time he left the traffic light 700 feet to the south.

The locomotive was traveling east so that it approached the crossing from the left of the plaintiff's intestate. Upon that side of the highway the track runs sharply upgrade to the crossing and through a wooded area. An embankment rising from the edge of the highway to the left of the plaintiff's intestate reached a height of 18 feet at a point 17 feet from the edge of the highway and 50 feet from the center of the railroad track. Trees and bushes grew upon the top of this embankment. Thus, the view of the deceased of an eastbound locomotive and the view of the engineer of northbound highway traffic were obstructed as each approached the crossing. Upon the structure on which the electrically operated flashing signal lights were suspended, there was, facing the deceased as he approached the crossing, a sign reading, "Stop on Red Signal."

As an incident to the highway construction project, the railroad had raised the level of its tracks at and approaching this project, this having been completed prior to the date of the collision.

No witness for the plaintiff saw the collision. Bass, driving the first machine, observed the automatic signal lights as he approached the crossing. Prior to reaching the crossing, he last looked at them when 25 feet away. After passing the crossing, he looked back. At that time, the deceased's machine was so following him and about 150 feet to the rear. Both were moving downgrade, 10 to 15 miles per hour. At that time, Bass again looked toward these signal lights. He looked back toward the crossing again when about 200 feet beyond the crossing. At no time did he see the signal lights in operation. As he went over the crossing, he looked to his left and saw no train, the track curving into the woods some 300 feet from the crossing. At no time did Bass hear any signal, bell or whistle indicating the approach of the locomotive. When he had gone approximately 300 feet beyond the crossing, he observed a "commotion" at the crossing. He went on to a point where he could turn around, which was about a mile from the crossing, and there turned his vehicle and went back. Upon his return to the crossing he saw that the collision had occurred. At that time, he still did not see the crossing lights in operation, but the locomotive had proceeded be-

yond the crossing a substantial distance, there being no cars attached to it.

After Bass arrived at the crossing, he observed someone go to the "control box" upon the structure on which the automatic signal lights were suspended and open and close this box. Thereafter, the locomotive was backed over the crossing and the signal lights worked. Bass did not observe the signal lights flashing until after such opening and closing of the "control box."

At the time of the collision, Tommy Roberts, apparently an employee of a contractor engaged upon the highway construction project, was operating a grading machine 300 or 400 feet north of the crossing. He did not see the collision but heard the impact. Prior to the impact, he did not hear a whistle blow. The grader being operated by him "makes a lot of noise," and he had his attention on his work.

The vehicles operated by Bass and the plaintiff's intestate had diesel motors and each "made a noise about like a truck."

Neill McK. Ross and D. K. Stewart for plaintiff appellants.
R. N. Simms, Jr., for defendant appellee.

LAKE, J. The allegation in the complaint that the plaintiff is the duly qualified and acting administratrix of the deceased is denied in the answer and the record does not disclose any evidence that she was so appointed. Nothing else appearing, the judgment of nonsuit would have been proper on this ground. *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761; *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544. However, the agreed statement of the case on appeal states, "This is a civil action instituted by Annie P. Kinlaw, Administratrix of the Estate of Herman Floyd Kinlaw, deceased." We infer from this that the defendant concedes her due appointment and qualification. See *Abernethy v. Burns,* 210 N.C. 636, 188 S.E. 97. Consequently, the judgment of nonsuit cannot be sustained upon the ground that the plaintiff is not the party entitled to maintain this action.

To determine whether the plaintiff's evidence shows negligence by the defendant which was the proximate cause of the collision and death, the evidence of the plaintiff must be taken as true, and every reasonable inference favorable to her must be drawn therefrom. *Cox v. Gallamore,* 267 N.C. 537, 148 S.E. 2d 616; *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536; *Sink v. Moore,* 267 N.C. 344, 148 S.E. 2d 265.

So considered, the plaintiff's evidence is sufficient to permit,

though not to compel, the inference that the automatic signal lights at the crossing were not flashing, or illuminated, prior to the collision. Her evidence is also sufficient to permit, though not to compel, the inference that the defendant did not blow any whistle, ring any bell, or otherwise give any warning of the approach of the locomotive to the crossing. "[T]estimony that a person nearby who could have heard and did not hear the sounding of a whistle or the ringing of a bell is some evidence that no such signal was given." *Johnson & Sons, Inc., v. R. R.*, 214 N.C. 484, 199 S.E. 704; and see *Cox v. Gallamore, supra.*

The testimony of the witness Bass is that he heard no whistle or bell as he approached the crossing, went over it and proceeded beyond it. He also testified that he was approximately 150 feet in front of the machine driven by the deceased, which, at the speed at which they were driving, according to his testimony, placed him about seven seconds ahead of the deceased in reaching the crossing. The witness testified that these machines made about the same noise as a diesel powered truck. It could be found by a jury that such a vehicle, proceeding slowly downgrade, would not make sufficient noise to prevent the driver from hearing the whistle or bell of an approaching train. The evidence does not indicate any other vehicle or equipment nearer to the crossing than 400 feet.

Though the complaint alleges that "Immediately to the east of said crossing heavy earth moving equipment was in operation creating unusual and abnormal amounts of noise which tended to overshadow any noise being made by said locomotive," the answer categorically denies this allegation and alleges, "there was nothing to prevent plaintiff's intestate from * * * hearing the whistle of the train." What would otherwise be a damaging admission in the complaint has thus been obliterated by the answer.

Taking the evidence, together with these allegations in the pleadings, in the light most favorable to the plaintiff, it is sufficient if believed, to permit a jury to find that the defendant operated its locomotive to and upon this crossing without giving any signal whatever of its approach thereto. There is also ample evidence to support a finding that this was a crossing at which an embankment obstructed the view of a northbound traveler upon the highway, a fact of which the railroad necessarily had notice. The railroad was, therefore, under a duty to give to such traveler notice of the approach of its locomotive to such crossing. If it failed to do so, it was negligent. *Cox v. Gallamore, supra,* and cases there cited.

This Court has held that the proof of a failure of automatic signals to function at a given moment is not sufficient of itself to show negligence by a railroad. *Johnson v. R. R.*, 255 N.C. 386, 121

S.E. 2d 580, 90 A.L.R. 2d 344. This is especially true here in view of the allegation in the complaint, admitted in the answer, that Brown Paving Company interfered with the operation of the signals. However, the operation of a locomotive to and upon a blind crossing of a main highway with no notice whatever of its approach is a lack of due care for the safety of users of the highway. The plaintiff's evidence, when considered in the light most favorable to her, is sufficient to support such a finding.

A judgment of nonsuit may not be sustained on the ground of contributory negligence by the deceased unless the plaintiff's own evidence, interpreted in the light most favorable to the plaintiff, shows that negligence by the deceased was one of the proximate causes of his injury and death so clearly that no other conclusion can reasonable be drawn therefrom. *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360; *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292. We do not have in this record the defendant's version of how the collision occurred and, if we did, it could not be considered upon a motion for judgment of nonsuit except insofar as it might be favorable to the plaintiff.

There is no evidence in this record to show the manner in which the deceased approached the crossing, except that when approximately 150 feet therefrom he was driving at a speed not in excess of 15 miles per hour. He was proceeding on a substantial downgrade with a heavy machine. There is no evidence that he saw, or should have seen, the approaching locomotive in time to stop his machine before it reached the crossing. As above stated, there is no evidence in this record to show that the defendant gave any signal by any means whatever of the approach of the locomotive before it came into the view of the deceased. There is no evidence in this record that the automatic signal lights erected at the crossing were flashing. All the evidence in the record on that point indicated they were not.

In *Cox v. Gallamore, supra,* there were no automatic signals erected at the crossing. We said there that it is the duty of the driver of a vehicle approaching a crossing, of the existence of which he has notice, to reduce his speed so that he can look along the track and see that no train is approaching before he proceeds onto the crossing. Nothing else appearing, the failure of the driver to operate his vehicle at a speed and with a lookout such that he can bring it to a stop before reaching a crossing in time to collide with an approaching train is negligence by the driver. However, in this record something else appears. Here, the record, accepting the evidence of the plaintiff as true, shows that there were erected at the crossing devices which were designed to give automatic signals of the ap-

proach of the train, and upon the device facing the deceased there was a sign directing users of the highway to stop when the flashing lights appeared. The evidence of the plaintiff, if believed, will support the inference that these lights did not work in this instance.

In *Johnson v. R. R., supra,* Moore, J., speaking for the Court, said:

> "The mere momentary failure of an automatic signaling device to operate upon the occasion of an accident is not evidence of negligence on the part of the railroad company. *Res ipsa loquitur* has no application in such circumstances. But is proper to consider such failure in measuring the care exercised by the traveler in negotiating the crossing, and it is therefore relevant on the question of contributory negligence. A traveler on a highway has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed. But the fact that an automatic warning signal is not working does not relieve the traveler of the duty to look and listen for approaching trains when from a safe position such looking and listening will suffice to warn him of danger. Where there are obstructions to the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury." (Citations omitted throughout.)

When the *Johnson* case was again before this Court in 257 N.C. 712, 127 S.E. 2d 521, Moore, J., repeated the above statement and added:

> "We are of the opinion that the failure of automatic signal lights at a railroad crossing to work has the tendency to abate the ordinary caution of a traveler on the highway, and that he has the right to place some reliance on such failure. In the absence of other timely warning, it would seem that it is an implied permission to proceed in those cases in which the traveler has taken reasonable precautions and made reasonable observations under the circumstances."

There is no evidence in this record to show any failure by the deceased to keep a lookout, or that he approached the crossing at a speed which was unreasonable in the light of the circumstances known to him. The judgment of nonsuit cannot be sustained on the ground of contributory negligence.

There remains to be considered the contention of the appellee that the judgment of nonsuit was proper for the reason that the action was not instituted within the time allowed by G.S. 1-53. That

statute and G.S. 28-173 were amended in 1951 so as to remove from the latter section the provision previously contained therein fixing the period of time in which an action for damages for wrongful death must be instituted and so as to make such action subject to the two year statute of limitations set forth in G.S. 1-53. The effect of the amendment was to make the time limitation a statute of limitations and no longer a condition precedent to the right to bring and maintain the action. *Graves v. Welborn, supra; McCrater v. Engineering Corp.,* 248 N.C. 707, 104 S.E. 2d 858.

G.S. 1-593 provides:

> "The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday or a legal holiday, it must be excluded."

G.S. 103-4 provides that the first Monday in September of each and every year is a public holiday. In *Oxendine v. Lowry,* 260 N.C. 709, 133 S.E. 2d 687, and in *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733, this Court took judicial notice of the relationship of certain hours to sunrise and sunset on specified dates in North Carolina. Upon the same principle, courts will take judicial notice of the concurrence of days of the week with days of the month in any year — at least, in a year not unreasonably distant. 31A C.J.S., Evidence, § 100. Consequently, we take notice of the fact that 2 September 1962, the last day of the two year period beginning with the death of the plaintiff's intestate, was Sunday and that the following day was the first Monday in September, a public holiday. This action was instituted on 4 September 1962 by the issuance of summons and, therefore, was instituted within the time allowed by G.S. 1-53. Thus, the judgment of nonsuit may not be sustained on the ground of the statute of limitations.

In holding, as we do, that the allowance of the motion for judgment of nonsuit upon the evidence set forth in the record before us was error and that this action must be remanded to the superior court for a new trial, we, of course, do not express any opinion as to what were the facts with reference to this collision. They must be determined upon the evidence which will be presented at the new trial of the action. The credibility of the witnesses who will then testify is to be determined by the jury at that trial. The sufficiency of the evidence then introduced to raise a question for the jury must be determined in the light of that evidence by the judge then presiding.

Reversed.

MARY F. DAVIS v. HERBERT LEE DAVIS, JR.

(Filed 20 January, 1967.)

1. Divorce and Alimony §§ 1, 18—

Issuable facts raised by the pleadings in an action for alimony without divorce must be determined by the jury before a judgment granting permanent alimony may be entered, G.S. 50-16; allowances for alimony *pendente lite* do not affect the final rights of the parties and may be entered by the judge without the intervention of a jury.

2. Husband and Wife § 10—

A separation agreement entered into in this State which fails to comply with the requirements of G.S. 52-12 (now G.S. 52-6) is void *ab initio*.

3. Courts § 20—

The validity and construction of a contract are to be determined by the law of the state where executed; where the contract provides for performance in another state, the law of the place of performance governs generally or as to matters relating to performance, but when the duty of performance exists regardless of the residence of the parties, the *lex loci* controls.

4. Same—

Under comity, an instrument executed in accordance with the *lex loci* and there valid, will generally be regarded as valid under the *lex fori* unless contrary to the settled public policy of the forum.

5. Same—

The rule that an instrument executed in another state will not be given effect in the state of the forum if such instrument is contrary to the settled public policy of the forum, relates to substance and not form, and if the subject matter of the contract, executed in another state in conformity with its laws, is not contrary to public policy in this State, it will not be declared invalid here merely because of the failure to comply with our statutory requirements governing the execution of such contracts.

6. Same; Husband and Wife § 10— Separation agreement executed in another state will be upheld here provided it is not injurious to the wife under the then existing conditions of the parties.

Separation agreements between husbands and wives are not contrary to the public policy of this State provided they are not unreasonable or injurious to the wife, and therefore a separation agreement executed in accordance with the laws of the state of the residence of the parties will not be held invalid here because of the failure to observe our statutory requirements in the execution of such an agreement, G.S. 52-12 (now G.S. 52-6), but may be attacked here if the wife alleges and establishes that the agreement, having due regard to the condition and circumstances of the parties at the time it was made, was unreasonable or injurious to the wife, the matter to be determined by the court as a question of fact, with the burden of proof upon the party attacking the validity of the agreement.

7. Husband and Wife § 11—

Separation agreements are not final and binding as to the custody of

minor children of the marriage or as to the amount provided for their support and education.

8. Appeal and Error § 55—

Where an order is issued under a misapprehension of the applicable law, the cause must be remanded.

APPEAL by plaintiff from *Cowper, J.*, May 23, 1966 Special Civil Session of NEW HANOVER.

Plaintiff (wife) instituted this action June 11, 1965, under G.S. 50-16, (1) for alimony without divorce and (2) for alimony and counsel fees *pendente lite.*

Admissions in the pleadings establish these facts: Plaintiff is a resident of New Hanover County, North Carolina. Defendant is a resident of Duval County, Florida. Plaintiff and defendant were married on or about June 15, 1940, in Wilmington, North Carolina. At Jacksonville, Duval County, Florida, on September 7, 1962, plaintiff and defendant executed a "SEPARATION AGREEMENT" in which they agreed, *inter alia,* to live separate and apart from each other during their natural lives.

The "SEPARATION AGREEMENT," in addition to provisions relating to (1) furniture and household equipment, (2) real estate in North Carolina, and (3) real estate in Florida, obligated defendant to make specified monthly payments to plaintiff until his death or until her death or remarriage, and also to make additional specified monthly payments to plaintiff for the support of their two minor children.

The Notary Public of Duval County, Florida, before whom plaintiff acknowledged her execution of the separation agreement, did not examine her, separate and apart from her husband, and made no finding that the separation agreement was not unreasonable or injurious to her.

Plaintiff alleged: In 1962, "Defendant separated himself from the Plaintiff and lived separate and apart from her." Defendant "forced the Plaintiff to enter into" said separation agreement. The separation agreement is void because it was not executed "in accordance with the requirements of the statute law of North Carolina, to wit, G.S. 52-12, and is contrary to the public policy of the State of North Carolina." Although defendant has made all payments required of him by the terms of the separation agreement, these payments have not been sufficient to support plaintiff and her minor children or child according to defendant's means and condition in life. The children are now twenty-three and ten, respectively; and, as provided in the separation agreement, the entire amount of the monthly payment of $120.00, originally for the support of both children, is now for the support of the younger child. Defendant, as

an employee of Atlantic Coast Line Railroad Company in Jacksonville, has annual gross earnings of $12,000.00.

Answering, defendant denied he forced plaintiff to enter into the separation agreement. He alleged the separation agreement was valid and that he had made all payments required by its terms.

As a cross action, defendant, based on his separation from plaintiff since September 7, 1962, prayed that he be granted an absolute divorce.

Plaintiff, in a reply, alleged, in substance, she was forced, by defendant's coercive conduct, to sign the separation agreement; and that, the separation having been caused by his wrongful conduct, defendant is not entitled to an absolute divorce.

The order entered at said May 23, 1966 Session contains findings of fact in detail as to the relations between plaintiff and defendant from 1960 in Wilmington until their separation on September 7, 1962, in Jacksonville. Upon these findings of fact, the court made these conclusions of law: "1. That the plaintiff has failed to show that the defendant has not provided her and the children of the marriage with necessary subsistence according to his means and condition in life; 2. That the plaintiff has failed to show that the defendant is guilty of any misconduct or actions that would be or constitute cause for divorce; 3. That the plaintiff and defendant entered into a voluntary agreement of separation, valid under the laws of the State of Florida, and that such separation agreement, so long as it is observed by the defendant herein, is a bar to the allowance of any additional alimony without divorce."

The order concludes. "IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that the plaintiff's Complaint be dismissed, and that the defendant's counterclaim for divorce be retained upon the docket of this Court for trial."

Before signing said order, the court had stated: "I am going to hold that she is bound by this separation agreement entered into voluntarily, with counsel of her own choosing." Plaintiff excepted, this (plaintiff's Exception #1) being plaintiff's only numbered exception.

Plaintiff also excepted to the order and appealed therefrom. She assigns as error "(t)he signing and entry of the Judgment by the lower Court sustaining the validity of the separation agreement referred to and holding that it was binding upon the *feme* Plaintiff in North Carolina while she is a resident of North Carolina."

Rountree & Clark for plaintiff appellant.
Poisson & Barnhill for defendant appellee.

BOBBITT, J. During oral argument, it became apparent there was a misunderstanding as to whether the cause was calendared for final hearing or for hearing on a motion for alimony and counsel fees *pendente lite.*

The evidence before Judge Cowper, offered by plaintiff, consists of an affidavit by plaintiff and of plaintiff's testimony, on direct and cross-examination. The only evidence offered by defendant (Exhibit D-1) consists of the summons, the sheriff's return of service and the complaint (identified by plaintiff) in plaintiff's action for absolute divorce commenced July 26, 1962, in the Circuit Court of Duval County, Florida, In Chancery, which action, according to plaintiff's testimony, was abandoned when plaintiff's counsel negotiated with defendant the terms of the separation agreement.

Plaintiff states in her brief, as the question presented by her appeal, the following: "Is a separation agreement between husband and wife executed in Florida just prior to the wife's return to North Carolina to live, as known to the parties, but entered into while the parties were living in Florida and valid under Florida law, enforceable in this state in the wife's action for alimony without divorce, when such contract did not comply with G.S. 52-12 providing for the privy examination of the wife and a certificate of the examining officer that the contract is not unreasonable or injurious to her?"

The issuable facts raised by the pleadings in an action for alimony without divorce under G.S. 50-16 must be submitted to and passed upon by a jury before a judgment granting permanent alimony may be entered. *Crews v. Crews,* 175 N.C. 168, 95 S.E. 149. However, in respect of allowances for alimony and counsel fees *pendente lite,* "the allowances *pendente lite* form no part of the ultimate relief sought, do not affect the final rights of the parties, and the power of the judge to make them is constitutionally exercised without the intervention of the jury." *Peele v. Peele,* 216 N.C. 298, 4 S.E. 2d 616.

Upon the record before us, it must be considered the cause was before Judge Cowper for hearing solely with reference to allowances for alimony and counsel fees *pendente lite,* not for final determination and judgment.

Under the North Carolina statute then codified as G.S. 52-12 and the decisions of this Court, a separation agreement entered into in September 1962 was void *ab initio* unless it complied with these statutory requirements: That "such contract (be) in writing, and . . . duly proven as is required for the conveyances of land; and (that) such examining or certifying officer shall incorporate in his certificate a statement of his conclusions and findings of fact as to

whether or not said contract is unreasonable or injurious" to the wife. *Daughtry v. Daughtry,* 225 N.C. 358, 34 S.E. 2d 435, and cases cited; *Bolin v. Bolin,* 246 N.C. 666, 99 S.E. 2d 920, and cases cited. Under said statute, "(t)he certificate of the officer shall be conclusive of the facts therein stated," but "may be impeached for fraud as other judgments may be." By virtue of Chapter 878, Session Laws of 1965, statutory provisions of like import are now codified as G.S. 52-6.

Plaintiff contends the separation agreement is void and of no avail to defendant as a defense in this action. Unquestionably, if it had been executed in North Carolina when the husband and wife were residents of and domiciled in this State, it would be void *ab initio* because not in compliance with said North Carolina statute. However, it appears clearly from the pleadings, the affidavit of plaintiff and the testimony of plaintiff that the separation agreement was signed in Florida when plaintiff and defendant were residents of and domiciled in Florida.

The general rule, well established in this jurisdiction, is that the validity and construction of a contract are to be determined by the law of the place where it is made. *Cannaday v. R. R.,* 143 N.C. 439, 55 S.E. 836; *Roomy v. Ins. Co.,* 256 N.C. 318, 123 S.E. 2d 817; *Cocke v. Duke University,* 260 N.C. 1, 8, 131 S.E. 2d 909, 913; 16 Am. Jur. 2d, Conflict of Laws § 39; 15A C.J.S., Conflict of Laws § 11(2); Restatement, Conflict of Laws § 332 *et seq.*

We are advertent to the decisions holding that, with reference to contracts providing for performance in another state, the law of the place of performance governs generally or as to matters relating to performance. 15A C.J.S., Conflict of Laws § 11(3); 16 Am. Jur. 2d, Conflict of Laws § 40; Restatement, Conflict of Laws § 355 *et seq.* Suffice to say, our research has disclosed no decision in which the "place of performance" rule has been applied to a separation agreement. The separation agreement under consideration implies the wife intended to leave Florida with the children and take up residence in North Carolina. However, she was not required to do so; and defendant's obligation to make the stipulated payments for her support was general and unconditional, whether she resided in Florida, North Carolina or elsewhere.

The conclusion reached is that the validity and construction of the separation agreement are to be determined by the law of Florida.

Although plaintiff concedes the validity of the separation agreement under Florida law, she contends such agreement cannot be enforced or relied upon in North Carolina because it conflicts with

the public policy of this State as declared in the North Carolina statute then codified as G.S. 52-12.

The extent to which the law of one state will be recognized and enforced in another depends upon the rule of comity. *Howard v. Howard,* 200 N.C. 574, 158 S.E. 101; 16 Am. Jur. 2d, Conflict of Laws § 4; 15A C.J.S., Conflict of Laws § 3(3). In 16 Am. Jur. 2d, Conflict of Laws § 4, this statement appears: "The general rule is that things done in one sovereignty in pursuance of the laws of that sovereignty are regarded as valid and binding everywhere; and, vice versa, things invalid where done are invalid everywhere."

" It is thoroughly established as a broad general rule that foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum." 15 C.J.S., Conflict of Laws § 4(4)a. Accord: 16 Am. Jur. 2d, Conflict of Laws § 51; *Howard v. Howard, supra; Ellison v. Hunsinger,* 237 N.C. 619, 625, 75 S.E. 2d 884, 889, and cases cited; *Gooch v. Faucett,* 122 N.C. 270, 29 S.E. 362; *Cannaday v. R. R., supra; Burrus v. Witcover,* 158 N.C. 384, 74 S.E. 11.

In *Howard v. Howard, supra,* Adams, J., for this Court, states: "(T)he fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other." The opinion notes: "Application of the principle that foreign laws will not be given effect when contrary to the settled public policy of the forum is often made in a certain class of cases — such, for example, as prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquor, and others." Accord: 15A C.J.S., Conflict of Laws § 4(4)a; 16 Am. Jur. 2d, Conflict of Laws § 52.

There remains for consideration whether recognition or enforcement of the separation agreement would contravene the settled public policy of North Carolina.

In *Collins v. Collins,* 62 N.C. 153, decided in 1867, it was held that "articles of separation between husband and wife, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced in this court." Changes in our public policy resulting in large measure from subsequently enacted statutes effecting radical changes in respect of the status and rights of married women, have been reviewed in prior decisions. *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327; *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148. In *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235, Denny, C.J., stated that this Court, since *Archbell v. Archbell, supra,* "has upheld separation agreements whenever a fair, just and reasonable provision has been made for the wife, hav-

ing due regard to the condition and circumstances of the parties at the time the agreement was made, and when the agreement has been executed in the manner required by law." Higgins, J., in *Tripp v. Tripp,* 266 N.C. 378, 146 S.E. 2d 507, in accord with cases cited, said: "When the contract is made in good faith, is executed according to the requirements, and performed on one side, the Court does not look with favor on efforts to set it aside except upon valid legal grounds." In this connection, see 2 Lee, North Carolina Family Law § 188.

To be valid under North Carolina law, the separation agreement "must be reasonable, just, and fair to the wife — having due regard to the condition and circumstances of the parties at the time it was made." *Smith v. Smith, supra; Bowles v. Bowles,* 237 N.C. 462, 75 S.E. 2d 413. A separation agreement is invalid if "unreasonable or injurious" to the wife. When a separation agreement is executed in North Carolina by persons residing and domiciled here, our statute provides for the determination of this essential prerequisite to validity by the officer who takes the acknowledgment, based upon an examination of the wife separate and apart from her husband, and requires that the officer set forth his findings and conclusions in his certificate.

A separation agreement executed in Florida by persons residing and domiciled in Florida and valid under Florida law will not be rejected as void in North Carolina solely because of failure to comply with the quoted provisions of the North Carolina statute now codified as G.S. 52-6. Such a separation agreement, if and when attacked in a North Carolina court, will be recognized as valid and enforceable here unless it is alleged and established in our Court that such agreement, having due regard to the condition and circumstances of the parties at the time it was made, was unreasonable or injurious to the wife. A determination of the *question of fact* so presented must be made by the presiding judge, with the burden of proof on the party attacking the validity of such agreement. If it be found as a fact upon competent evidence that the agreement when executed was unreasonable or injurious to the wife, then it will not be recognized as valid and enforced in this State. If it be found as a fact it was not unreasonable or injurious to the wife, it will be recognized as valid and enforced as if in full compliance with the North Carolina statute. The settled public policy of North Carolina is concerned with substance rather than form.

Our research discloses a Florida statute, 5 Florida Statutes Annotated § 65.15, providing, *inter alia,* for modification of a separation agreement in respect of *the amount* of the payments the hus-

band is required to make for the support of the wife by court action in Florida. Since this statute is not discussed or referred to in either brief, we express no opinion as to its significance, if any, in relation to the present case. However, it seems a subject worthy of exploration by counsel prior to the next hearing in superior court.

It is noted that in North Carolina separation agreements "are not final and binding as to the custory of minor children or as to the amount to be provided for the support and education of such minor children." *Hinkle v. Hinkle,* 266 N.C. 189, 195, 146 S.E. 2d 73, 77. See 2 Lee, North Carolina Family Law, § 189; § 152, pp. 223-225.

It should be noted that we express no opinion as to the sufficiency of the allegations of the complaint in respect of the alleged coercive conduct of defendant prior to execution of the separation agreement.

In our view, the order from which plaintiff appeals was entered under misapprehension of the applicable law. Accordingly, the order, in respect of the portion thereof which dismissed the action, including the findings of fact and conclusions of law on which it is based, is vacated; and the cause is remanded for further proceedings not inconsistent with this opinion. 1 Strong, N. C. Index, Appeal and Error § 55. The portion of the order providing "that the defendant's counterclaim for divorce be retained upon the docket of this Court for trial" is not involved in or affected by this appeal.

Error and remanded.

EXCEL, INC., v. IVEY L. CLAYTON, ACTING COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA.

(Filed 20 January, 1967.)

1. Constitutional Law § 27; Taxation § 29—

A sales tax on an interstate transaction is a burden on interstate commerce prohibited by the Commerce Clause of the Federal Constitution, but a tax on a sale completed in this State does not constitute a burden on interstate commerce merely because the buyer and the seller intend the goods sold should be used outside the State.

2. Same— Where purchaser of goods in this State for out of state use is a carrier, it may not assert it occupied dual roles of carrier and purchaser.

Sale of goods to interstate carriers for use by the carriers at terminals outside this State are intrastate transactions subject to the North Caroline sales tax when the goods are delivered to the carriers at the seller's

plant in this State notwithstanding the carriers take the goods f.o.b. the seller's plant under bills of lading with themselves as consignees at the respective terminals, without transportation charges, and inspection of the goods is had at, and payment is forwarded from, such foreign terminals. The imposition of such tax does not offend the Commerce Clause of the Federal Constitution and is not precluded by sales tax regulation No. 23.

APPEAL by plaintiff from *Anglin, J.*, January 1966 Civil Session of LINCOLN.

Civil action, by virtue of G.S. 105-267, against the Acting State Commissioner of Revenue to recover a payment of sales tax in the amount of $1,769.02, with $216.71 in interest and a penalty of $176.90, paid under protest.

The parties waived a trial by jury and submitted the case to Judge Anglin to decide upon stipulated and agreed facts, which are summarized as follows, except when quoted:

Excel, Inc., is a North Carolina corporation, with its offices and principal place of business in Lincolnton, North Carolina, and in the ordinary course of its business it manufactures textile handling equipment, four-wheel push carts, and other materials in its plant in Lincolnton, which it sells to customers both within and without the State of North Carolina. Ivey L. Clayton is the Acting Commissioner of Revenue of the State of North Carolina.

Between 1 March 1961 and 31 October 1963, Excel made sales of four-wheel push carts and other equipment totaling $58,967.34 to Huckabee Transport Corporation (hereafter called Huckabee), Carolina-Norfolk Truck Lines, Inc. (hereafter called Carolina-Norfolk), and McLean Trucking Company (hereafter called McLean), each of which is a licensed common carrier of freight, for use by the purchasing carriers at their out-of-State trucking terminals. Each of the purchasers has interstate operating rights as a common carrier of freight.

Huckabee is a South Carolina corporation, with its principal offices in Columbia, South Carolina. It is a carrier of interstate commerce, but it does not possess any rights from the Interstate Commerce Commission to transport as a common carrier commodities of any kind from Lincolnton, North Carolina, to Columbia, South Carolina. The total amount of Excel's sales to Huckabee are represented by twelve invoices amounting to $8,259.84. All sales to Huckabee covered by the twelve invoices were made in response to orders placed by Huckabee from its offices in Columbia, South Carolina. Payments for the merchandise were likewise transmitted from Huckabee's offices in Columbia, South Carolina, to the plaintiff in Lincolnton, North Carolina. Such sales were f.o.b. Lincolnton, North Carolina, and the delivery of the merchandise to Huckabee was ac-

companied by waybills indicating the destination as Columbia, South Carolina, and that the property was to be transported without charge.

Carolina-Norfolk is a Virginia corporation with its principal offices in Norfolk, Virginia. It is an interstate common carrier of freight, but it possesses no operating rights from the Interstate Commerce Commission to transport as a common carrier general commodities from Lincolnton, North Carolina, to Norfolk, Virginia. Its operating rights for shipments originating in North Carolina are limited to the transportation of empty containers and petroleum products. None of the merchandise purchased by Carolina-Norfolk from plaintiff consisted of empty containers or petroleum products. Excel's sales to Carolina-Norfolk are represented by three invoices, and the total sales were $5,000. All sales by Excel to Carolina-Norfolk were made in response to orders placed by Carolina-Norfolk from its offices in Norfolk, Virginia. Payments for all merchandise were submitted by Carolina-Norfolk from its offices in Norfolk, Virginia, to Excel at Lincolnton, North Carolina. Sales were f.o.b. Lincolnton, North Carolina, and the delivery of the merchandise to Carolina-Norfolk was accompanied by waybills indicating the destination as Norfolk, Virginia, and that the property was to be transported without charge.

McLean is a North Carolina corporation with its principal offices in Winston-Salem, North Carolina. It is an interstate common carrier of freight, and possesses operating rights from the Interstate Commerce Commission to transport general commodities to all cities listed as destinations on its invoices for sales to McLean. Plaintiff's sales to McLean represented by twenty-five invoices amounted to $45,707.50. The destinations of all purchases made by McLean were cities in states other than North Carolina in which McLean had terminals. Payments to Excel for all merchandise were transmitted from McLean's offices in Winston-Salem to plaintiff in Lincolnton, North Carolina. Such sales to McLean were f.o.b. Lincolnton, North Carolina, and the delivery of the merchandise to McLean was accompanied by waybills indicating the various destinations shown on the invoices.

All merchandise represented by the sales to Huckabee, Carolina-Norfolk, and McLean was packaged and crated by Excel prior to delivery to the purchasers and was not thereafter unpackaged or uncrated or inspected until it reached the out-of-State destination shown on the invoices. Payments for such merchandise were forwarded by purchasers to Excel after the receipt of the merchandise and inspection at out-of-State destinations. At the time that all the merchandise purchased from Excel was delivered, it was intended to

be used by the purchasers outside of North Carolina, and was so used.

Excel is registered with the Sales and Use Tax Division of the North Carolina Department of Revenue, and reports and pays its sales tax to the Commissioner of Revenue monthly. It did not report or remit any sales tax to the State on the purchases made by Huckabee, Carolina-Norfolk, and McLean, as set forth in the instant case.

Following an audit of Excel's books and records in December, 1963, the defendant Commissioner located sales totaling $58,967.34 to Huckabee, Carolina-Norfolk, and McLean, on which the North Carolina 3% sales tax had not been paid. Assessment was thereafter made by the defendant Commissioner against plaintiff in the amount of $2,162.63, such sum representing $1,769.02 in tax, $216.71 in interest, and $176.90 in penalty.

Excel, in apt time, on 28 January 1964, objected to this assessment, charging that the assessment was based on sales which were exempt from the North Carolina sales tax under G.S. 105-164.13(17) as sales in interstate commerce. On 7 May 1964 a hearing was held in the office of the defendant Commissioner in Raleigh on objections entered by Excel to the assessment of the sales tax in the instant case, which contentions defendant Commissioner rejected.

On 14 August 1964 Excel paid to the defendant Commissioner under protest the sum of $2,162.63, such sum representing the assessment of $1,769.02 in tax, $216.71 in interest, and $176.90 in penalty. On 2 June 1965 Excel commenced this action to recover the tax, interest, and penalty on the sales here.

> "18. If the Court should conclude that all of the sales in issue were made outside of North Carolina, the plaintiff would be entitled to recover of the defendant $2,162.63 plus interest at six percent from August 14, 1964, until paid.
>
> "If the Court should conclude that the sales to Carolina-Norfolk Truck Line, Inc., and Huckabee Transport Corporation were made in North Carolina but that sales to McLean Trucking Company were made outside of North Carolina, the plaintiff would be entitled to recover of the defendant $1,676.32 plus interest at six percent from August 14, 1964, until paid.
>
> "If the Court should conclude that all sales in issue were made in North Carolina, the plaintiff should not be allowed any recovery."

The judge entered judgment in which, after reciting the stipulated and agreed facts in full, he concluded as a matter of law that all sales in controversy made by Excel to Huckabee, Carolina-Nor-

folk, and McLean were sales made in North Carolina and as such were properly includable in the plaintiff's net taxable sales for sales tax purposes under the North Carolina law. Whereupon, he adjudged and decreed that plaintiff take nothing by its action, and that defendant recover of plaintiff the costs of this action.

From this judgment, plaintiff appeals to the Supreme Court.

Jonas & Jonas by Harvey A. Jonas, Jr., and Don M. Pendleton for plaintiff appellant.

Attorney General T. W. Bruton and Assistant Attorney General Charles D. Barham, Jr., for defendant appellee.

PARKER, C.J. Excel manufactures textile handling equipment and other tangible property at its plant in Lincolnton, North Carolina, for sale as a retailer both in North Carolina and outside of the State. A sales tax is a tax on the freedom of purchase, and, when applied to interstate transactions, is a tax on the privilege of doing interstate commerce, creates a burden on interstate commerce and runs counter to the commerce clause of the Federal Constitution. *McLeod v. Dilworth Co.*, 322 U.S. 327, 88 L. Ed. 1304; *Johnston v. Gill, Comr. of Revenue,* 224 N.C. 638, 32 S.E. 2d 30.

Incidental interstate attributes do not, however, transform purely local transactions into interstate transactions and thereby create a burden on interstate commerce, and run counter to the commerce clause of the Federal Constitution. *Department of the Treasury of the State of Indiana v. Wood Preserving Corp.,* 313 U.S. 62, 85 L. Ed. 1188; *International Harvester Co. v. Department of the Treasury,* 322 U.S. 340, 88 L. Ed. 1313.

The mere intention of the buyer and the seller that the goods sold be used outside of the state does not make the sales transaction any less a local intrastate activity. Where the delivery of the goods sold is in the taxing state and is accepted within the taxing state, a sales tax may lawfully be imposed upon the transaction. *Superior Oil Co. v. State of Mississippi ex rel. Knox,* 280 U.S. 390, 74 L. Ed. 504; *Department of the Treasury of the State of Indiana v. Wood Preserving Corporation, supra; International Harvester Co. v. Department of the Treasury, supra; State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.,* 372 U.S. 605, 10 L. Ed. 2d 8; *Phillips v. Shaw, Comr. of Revenue,* 238 N.C. 518, 78 S.E. 2d 314; *Superior Coal Co. v. Department of Revenue,* 4 Ill. 2d 459, 123 N.E. 2d 713; *Pressed Steel Car Co. v. Lyons,* 7 Ill. 2d 95, 129 N.E. 2d 765; *Rite Tile Co. v. State,* 278 Ala. 100, 176 So. 2d 31.

Plaintiff states in its brief: "Plaintiff concedes that if purchasers

had not been franchised interstate commerce carriers who delivered the merchandise out of the state under bill of lading, the sales would be taxable." It seems that plaintiff's basic contention is this: Huckabee, Carolina-Norfolk, and McLean took custody of the property which each purchased in the capacity of a common carrier and that possession and control over the property was deferred by them until it delivered the property to itself as a purchaser outside of the State. Inherent in this contention is the assertion that the purchasing motor carrier has a dual personality when it carries property consigned to itself so that its role as carrier is divorced from its role as purchaser. This concept, while a novel proposition with us, has been passed upon and rejected in a series of cases in Illinois and California. *Superior Coal Co. v. Department of Finance,* 377 Ill. 282, 36 N.E. 2d 354; *Moffat Coal Co. v. Daley,* 405 Ill. 14, 89 N.E. 2d 892; *Superior Coal Co. v. Department of Revenue, supra; Pressed Steel Car Co. v. Lyons, supra; Standard Oil Co. of California v. Johnson,* 33 Cal. App. 2d 430, 92 P. 2d 470; *Id.* 56 Cal. App. 2d 411, 132 P. 2d 910; *Id.* 135 P. 2d 638; *Id.* 24 Cal. 2d 40, 147 P. 2d 577.

In *Pressed Steel Car Co. v. Lyons, supra,* the Court held that where railroads purchase goods in Illinois which are shipped by the seller under uniform straight bills of lading from its Illinois plant to the purchasing railroad at a destination outside of Illinois, but in each instance the purchasing railroad receives the goods in Illinois as carrier, the transaction is an intrastate sale and is subject to the Illinois retailers' occupation tax, as the reality of the situation must be recognized, and the carrier hauling its own goods does so as a purchaser and not as an agent of the seller. In its opinion the Court said:

> "The argument against the tax is based upon the commerce clause of the Federal constitution, and stresses the intention of the seller and the purchaser that the goods sold should be shipped to a destination outside of Illinois, and the fact that the goods were actually so shipped. It appears to be settled, however, that a transaction by which a purchaser buys goods which are delivered to him within the taxing State may properly measure a tax, even though both parties know that the goods are purchased for use outside of the State, and they are so used. [Citing voluminous authority.]
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> * * *
>
> "Inherent in this contention is an assertion that the purchasing railroad has a dual personality when it carries goods consigned to itself so that its role as carrier is divorced from its role as purchaser.

* * *

". . . In the absence of congressional action, we do not find in the language of the commerce clause or in any authoritative decision a requirement that a State must recognize for taxing purposes a dual personality on the part of railroads which are carriers of goods they have purchased."

The United States Supreme Court in the case of *Department of the Treasury of the State of Indiana v. Wood Preserving Corp., supra,* had this to say, which is pertinent to the contention that a bill of lading requiring delivery to out-of-state destination indicated that a railroad was a carrier but not a purchaser:

"These were local transactions, — sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for the treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana."

The only decision which lends any possible credence to Excel's view that common carriers purchasing for their own use have a dual personality is *In re Globe Varnish Co.,* 114 F. 2d 916, cert. den. 312 U.S. 690, 85 L. Ed. 1126. The subsequent decision of the United States Supreme Court in *Department of the Treasury of the State of Indiana v. Wood Preserving Corp., supra,* casts considerable doubt upon the soundness of the result reached in *Globe Varnish.* The *Wood Preserving Corporation* case, 7 Cir., 114 F. 2d 922, was a companion case to *In re Globe Varnish Co.* in the Circuit Court of Appeals. Similar facts were resolved by that court in similar fashion in the two cases. Subsequently, review by the United States Supreme Court was sought in both cases. A unanimous court reversed the judgment in the *Wood Preserving Corporation* case. *Certiorari* was denied in the *Globe Varnish* case on a procedural ground. 312 U.S. 690, 85 L. Ed. 1126. (For an excellent analysis of the effect of *Wood Preserving Corporation* decision upon the holding in *In re Globe Varnish Co., supra,* see *Pressed Steel Car Co. v. Lyons, supra,* at pages 769-

770.) Following the *Wood Preserving Corporation* decision, the California Court on two separate occasions repudiated one of its earlier decisions based upon the *Globe Varnish Company* case; *Standard Oil Co. of California v. Johnson,* 56 Cal. App. 2d 411, 132 P. 2d 911; *Id.* 135 P. 2d 638. In the latter decision the Court said: "The mere use of a standard bill of lading and a designation of respondent as consignor should not be allowed to change what is essentially an intrastate transaction into an interstate transaction." 135 P. 2d, at page 642.

Plaintiff further contends that the defendant should be bound by the terms of Regulation 23 which it promulgated, that plaintiff has complied with the direct terms of that regulation, and that the transactions here are exempt from North Carolina sales tax on the basis of that regulation. This contention is untenable. This regulation merely recognizes that where a seller is required to deliver the property out of the State to the purchaser in order to complete the sale, the transaction is considered an interstate sale and exempt from the North Carolina sales tax.

In this case, Huckabee, Carolina-Norfolk, and McLean each purchased push carts and other material from Excel in the State of North Carolina, each received complete delivery of the push carts and other material within the State of North Carolina, and each of them loaded the push carts and other material on their trucks in North Carolina and transported the push carts and other material in their trucks out of the State of North Carolina to the places designated by the waybills. Sales were f.o.b. Lincolnton. The sales, according to the stipulated and agreed facts, were essentially intrastate transactions and not interstate transactions, and we find no ground for holding that in imposing a sales tax upon the receipts from these local transactions North Carolina has exceeded its constitutional authority by taxing interstate commerce or discriminating against it.

The unconditional commitment of property to a common carrier for transportation in regular course to another state or country is generally held to place it in the stream of interstate or foreign commerce, so as to render it immune from local taxation. Annot., 11 A.L.R. 2d 944. That principle of law is not applicable here for the reason that the push carts and other material were delivered to Huckabee, Carolina-Norfolk, and McLean in North Carolina, the taxing jurisdiction. 47 Am. Jur., Sales and Use Taxes, § 10, pp. 210-11; Annot., 128 A.L.R. 900.

The judgment below is

Affirmed.

STATE v. HERBERT B. WALKER.

(Filed 20 January, 1967.)

1. Criminal Law § 99—

Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit.

2. Robbery § 4—

The evidence in this case *held* sufficient to be submitted to the jury on the question of defendant's guilt as an aider and abettor in the perpetration of an armed robbery.

3. Criminal Law § 71—

While a witness may read to the jury a voluntary confession made by defendant as typed, transcribed or put down in shorthand by the witness when the witness testifies that the writing contains verbatim the words of defendant, this rule does not extend to the reading by the witness of the witness' interpretative narration of what the witness understood to be the purported statements made by accused.

4. Same—

Where defendant signs a written statement of his purported voluntary confession, even though reduced to writing by another person, it will be presumed, nothing else appearing, that the accused had read it or had knowledge of its contents, but this presumption cannot be indulged when the State's own evidence establishes that the statement was not read to, or by, the accused before he signed it.

5. Same—

While a witness may refer to a written memorandum prepared by him for the purpose of refreshing his memory as to incriminating statements made by the defendant, only the personal sworn testimony of the witness, and not the memorandum, would be competent as substantive evidence, and when the witness reads the memorandum itself to the jury and the memorandum does not tend to corroborate the testimony of the witness, but is in direct conflict with the statements attributed to defendant by the witness at the trial, the admission of the written statement in evidence is prejudicial error.

APPEAL by defendant from *Copeland, Special Judge,* March 21, 1966 Regular Criminal Session of GUILFORD Superior Court, Greensboro Division.

The indictment charging armed robbery, for which appellant was tried, convicted and sentenced at May 24, 1965 Criminal Session of Guilford Superior Court, Greensboro Division, is set out in *S. v. Walker,* 266 N.C. 269, 145 S.E. 2d 833, where this Court, for reasons stated, awarded a new trial. Pursuant thereto, defendant was again tried on the same indictment at said March 21, 1966 Criminal Session, and was again represented at trial by James G. Exum, Esq., court-appointed counsel.

At the first (1965) trial, the *Walker, Lawson* and *Moore* cases

were consolidated for trial. Roberts testified as a State's witness. Walker, Moore and Lawson did not testify. At the second (1966) trial, defendant did not testify. Roberts, Moore and Lawson, *as witnesses for defendant,* did testify.

The jury returned a verdict of "guilty as charged in the bill of indictment," and judgment, imposing a prison sentence of not less than twelve nor more than fifteen years, was pronounced. Defendant excepted and appealed.

Attorney General Bruton, Deputy Attorney General McGalliard and Staff Attorney White for the State.

Smith, Moore, Smith, Schell & Hunter and James G. Exum, Jr., for defendant appellant.

BOBBITT, J. There was evidence tending to show: Soon after 5:00 p.m. on Tuesday, March 30, 1965, Roberts, Moore and Lawson entered the place of business of Charles Fine and his wife, Jean Fine, at 332 South Elm Street, Greensboro, N. C. The overt acts constituting the robbery charged in the bill of indictment were committed by Roberts and Moore. After the robbery, Roberts, Moore and Lawson, pursued by Mr. Fine and Officer Brewer, fled through an alley to a parking lot. Moore and Lawson ran to and got in a car, parked on McGee Street, occupied solely by Walker. Moore then jumped out and ran. Walker and Lawson were in the car when Officer Brewer arrived and arrested them. Later, elsewhere, Roberts and Moore were arrested. Walker was tried and convicted upon the theory that he aided and abetted Roberts, Moore and Lawson in the commission of said robbery.

Defendant excepted to and assigns as error the denial of his motion for judgment as of nonsuit at the conclusion of all the evidence. This assignment is without merit. "Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit." 1 Strong's N. C. Index, Criminal Law § 99. The evidence, when considered in the light of the legal principles stated in our opinion on former appeal, was sufficient to require submission to the jury.

Defendant assigns as error the admission, over his objection, of testimony of Sergeant Melton, of the Detective Division of the Greensboro Police Department, as to statements made by defendant when questioned by him the night of March 30th. It is noted that this appeal is from a trial conducted prior to the decision in *Miranda v. State of Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974. In the absence of the jury, the court heard evidence relevant to the admissibility of this testimony, the State offering tes-

timony of Sergeant Melton and of Captain Jackson (of said Detective Division), and defendant offering his own testimony and the testimony of Roberts and Lawson. After consideration of this conflicting evidence, the court found as facts that defendant had been fully informed as to his constitutional rights and that any statements made by him were made voluntarily. We pass, without decision or discussion, assignments of error with reference to the asserted insufficiency of the evidence to support said findings.

Decision on this appeal is based on the ground Sergeant Melton was permitted, over defendant's objection, to read to the jury a two-page typed statement bearing defendant's signature and produced and signed under circumstances narrated below. The statement is quoted in full in the record before us.

A preliminary hearing for Walker was held March 31, 1965, during the morning session of the Greensboro Municipal-County Court.

The State's evidence tends to show: Walker, awaiting preliminary hearing, was confined in the lockup room just outside the courtroom. Sergeant Melton produced the two-page typed statement, told Walker he would like to get his signature on it and passed the statement and the pen into the room where Walker was confined. Walker was in said lockup room when he signed the statement with said pen. Sergeant Melton testified that "Walker had an opportunity to read" the statement; that Walker stated "that he didn't want to read it, that he knew what was in it"; and that Walker "signed it with his (Melton's) pen." He also testified that the case "had already been called in the Municipal-County Court for hearing when (he) confronted (Walker) with the typewritten statement which he signed." The final paragraph includes the following: "I have heard this statement read to me . . ." Actually, the statement was never read to defendant. Sergeant Melton testified: "The fact is that the defendant Walker never read it. He refused to read it. He just signed it." Note: Walker testified (on *voir dire)* he had no opportunity to read the statement; that it was presented to him, after his case had been called, just as he was being taken from the lockup room to the courtroom; that he put it against the wall and signed it when he "was standing up at the door getting ready to go into the courtroom"; and that he signed it because he had been given assurances it would be to his interest to cooperate with the officers.

Before the statement was read in evidence, Sergeant Melton answered affirmatively the court's question as to whether the typed statement set forth "exactly what Walker had told (him) happened."

The night of March 30th Walker was first questioned by Sergeant Melton. Melton (on *voir dire)* testified: "He (defendant) kept

making the statement that he didn't know anything about the robbery at Fine's Loan Company. He denied any knowledge of any robbery at Fine's Loan Company. After questioning Walker about thirty to forty minutes, I carried him to Captain Jackson's office where he was placed with Mr. Lawson and Mr. Roberts. Officers had been questioning Lawson and Roberts separately during this time. Statements had been taken from both Roberts and Lawson. Both Roberts and Lawson had said that Walker did not know the robbery was going to be committed at Fine's. The statements of Lawson and Roberts tended to absolve Walker from any knowledge or implication from the robbery at Fine's." Again: "Walker and Lawson had told us that they had planned to rob a jewelry store but had called it off. Roberts, the one who pulled the gun on Mr. Fine, had told us that this was something he had decided to do on the spur of the moment and Lawson agreed with Roberts's characterization of this action." Captain Jackson (on *voir dire)* testified: "He (defendant) had told us that he had not known anything about the robbery. That is what Officer Melton told me he said. In my office he told all of us that he did not know anything about it. He maintained this story throughout the evening of March 30, 1965." About nine o'clock the morning of March 31st, Detective Belvin and Sergeant Melton "got Walker from his cell and questioned him again"; but there is *no testimony* as to what Walker said at that time.

The witnesses for defendant at trial testified a plan to rob a jewelry store had been abandoned; that there was no plan to rob any person or place of business when they left defendant shortly before the robbery at Fine's Loan Company; that their original purpose when they went into Fine's Loan Company was to see if Moore could pawn a ring and watch; and that the robbery was triggered, without prior plan, by Roberts's impulsive and unforeseen actions.

In contrast to the statements made by Walker, Roberts and Lawson on the night of March 30th, and also in contrast to the testimony of Roberts, Lawson and Moore at the trial, the typed statement purports to be a complete confession of guilt by Walker. While there are other incriminating portions, the following excerpt is sufficient to show such contrast: "Then Herbert states the conversation started about robbing or breaking in a place because they needed the money. This was around twelve noon. They drove around in the uptown area, looking for a place. They picked out this jewelry store on South Elm Street. They circled the block three or four times, looking for a place to park, and at the same time, casing the jewelry store. Herbert was driving at this time. He parked the car near the

corner of McGee and South Greene Street, headed west. The plan was that Charles Roberts, James Lee Lawson, and Henry Lee Moore were to go to the jewelry store and rob it, and Herbert Lee Walker was to stay in the car to drive the car away after the robbery. Herbert stated the three, Charles, James, and Henry, left the car, went to the jewelry store, and in a few minutes they came back and stated they saw a policeman, so they returned to the car. They sat there a few minutes and talked. They said then that they were going back and rob this place, this time for sure, they had to do it."

Under the court's charge, Walker's guilt or innocence was made to depend upon whether he knew Roberts, Moore and Lawson, when they left him shortly before the robbery at Fine's Loan Company, went forth for the purpose of robbing some person or place of business. The State relied upon the devastating confession in the typed statement as substantive evidence of the crucial element of guilty knowledge.

The admissibility of the typed statement must be considered in the light of the legal principles stated below.

"A confession which has been wholly or partially reduced to writing is ordinarily admissible against an accused where it was freely and voluntarily made by him, regardless of the fact that it was reduced to writing by another person, where it was read over to or by accused, or was translated to him, and signed or otherwise admitted by him to be correct." 23 C.J.S., Criminal Law § 833(a).

"If a statement purporting to be a confession is given by accused, and is reduced to writing by another person, before the written instrument will be deemed admissible as the written confession of accused, he must in some manner have indicated his acquiescence in the correctness of the writing itself. If the transcribed statement is not read by or to accused, and is not signed by accused, or in some other manner approved, or its correctness acknowledged, the instrument is not legally, or *per se*, the confession of accused; and it is not admissible in evidence as the written confession of accused." 23 C.J.S., Criminal Law § 833(b).

In our opinion, the reading verbatim of the typed statement to the jury had the same prejudicial force and impact as if such statement had been identified and received in evidence as an exhibit.

When a statement purporting to be a confession bears the signature of the accused, it is presumed, nothing else appearing, that the accused has read it or has knowledge of its contents. Here, it appears affirmatively *from the State's evidence* that the typed statement was not read by or to defendant; and, notwithstanding the testimony that defendant had stated in effect he knew what was in the state-

ment, it appears positively *from the State's evidence* that defendant did not have such knowledge.

We have not overlooked the testimony of Sergeant Melton, in response to the court's question, to the effect the typed statement set forth exactly what Walker had said. The statement had been typed the morning of March 31st. Page one was transcribed from notes made by Sergeant Melton the preceding night. Page two was transcribed from notes made by Detective Belvin that morning. The typed statement does not purport to be a verbatim record of statements made by Walker. Page one purports to be a transcript of Sergeant Melton's narration of what Walker had said. Page two purports to be a transcript of detective Belvin's narration of what Walker said Moore had told him. With reference to page two, it is noted there was *no testimony* as to any statements made by Walker the morning of March 31st relating to the alleged robbery. It is noted further that the statements attributed to Walker on page one are in conflict with the oral statements of defendant referred to in Sergeant Melton's testimony. Although it would be permissible for Sergeant Melton or Detective Belvin to refer to a memorandum prepared by him for the purpose of refreshing his recollection as to statements made by defendant, their personal sworn testimony would be the only competent substantive evidence. Under the circumstances, the verbatim reading to the jury of the typed statements was not competent substantive evidence of the matters set forth therein. Moreover, it was not competent as corroborative evidence. As noted above, page one did not corroborate Sergeant Melton. Page two could not corroborate Detective Belvin. Belvin did not testify.

We have considered each of the decisions relied on by the State in its excellent brief and, in addition, *Hall v. State,* 223 Md. 158, 162 A. 2d 751.

In *Jordan v. People,* 151 Colo. 133, 376 P. 2d 699, the court found no error in the reading by an officer of a reporter's transcript of the answers of an accused to questions of the officer. The opinion concludes: "There was no dispute in this case as to the facts recorded. Indeed, Jordan admitted that the statement as recited verbatim to the jury truly set forth the questions and answers. But he does deny that his answers spoke the truth."

In *Fields v. State,* 125 Neb. 290, 250 N.W. 63, the court held it was not error to permit a stenographer, who had recorded the accused's statements in shorthand, to read her shorthand notes from the witness stand notwithstanding the shorthand notes had not been reduced to writing.

In *State v. Ellis,* 232 Ore. 70, 374 P. 2d 461, the court said: "It is undisputed that Ellis both saw and signed the confession. He admits that he read a part of it. He does not deny that he had ample opportunity to read the remainder and to have it explained to him if he so desired. By his signature he acquiesced in its correctness, 23 C.J.S. Criminal Law § 833, page 238, to the extent of rendering it admissible." A distinguishing fact in the present case is that it appears affirmatively from the State's evidence that Walker did not know what was in the typed statement. Moreover, as stated, the officer's testimony as to what Walker *said* is in sharp contrast to statements attributed to Walker in the typed statement.

In *State v. Bindhammer,* 44 N.J. 372, 209 A. 2d 124, followed by *State v. Aviles,* 45 N.J. 152, 211 A. 2d 796, it was held permissible for a court reporter, who had recorded the confession of defendant, to read the questions and answers verbatim to the jury.

In *Hall v. State, supra,* a detective and a court reporter were permitted to testify from their records of confessions made by the accused. The detective testified he "took very full notes of this statement in longhand — in fact, the entire statement, word for word." The reporter testified he made stenotype notes of a statement made by defendant. The detective "was permitted virtually to read to the jury from the longhand statement which he had taken down." The reporter "was permitted to read the questions and answers from his stenotype notes." Although each testified his recorded notes were correct when made, "(n)either felt able to give accurately and fully the statement recorded by him even after refreshing his recollection by reading the statement." The opinion discusses at length the class of evidence referred to by Wigmore as "past recollection recorded," 3 Wigmore, Evidence (Third Edition) §§ 734-755. There is a sharp difference between reading from a transcript which, according to sworn testimony, records the exact words used by an accused, and reading a memorandum that purports to be an interpretative narration of what the officer understood to be the purport of statements made by the accused.

Decisions referred to above differ from the present case in these material respects: (1) Here, the typed statement does not purport to be in the defendant's words but in the words of Sergeant Melton and Detective Belvin. (2) As to page one, testimony of Melton at trial as to defendant's statements on the night of March 30th is in direct conflict with the statements attributed to defendant in the typed statement in respect of the crucial phase of the case. (3) Page two does not purport to record any statement made by defendant with reference to his participation or nonparticipation in the rob-

bery but simply records statements by defendant as to what he had been told by Moore as to events relating to the robbery.

For the reasons stated, the court erred in permitting Sergeant Melton to read into evidence said typed statement, and for prejudicial error in this respect defendant is entitled to a new trial.

New trial.

MILDRED COLLINS BEAVER, PLAINTIFF, v. P. L. LEDBETTER AND WIFE, KATHERINE H. LEDBETTER, DEFENDANTS.

(Filed 20 January, 1967.)

1. Mortgages and Deeds of Trust § 15—

Where all the evidence, uncontradicted, tends to show that upon conveyance of property subject to a deed of trust to a husband and wife, the husband agreed to assume and pay the indebtedness, and that the deed containing the debt assumption agreement was delivered to him and accepted by him, the holder of the note secured by the instrument is entitled to peremptory instructions against the husband in an action on the debt assumption agreement.

2. Husband and Wife § 3—

The marital relationship raises no presumption that the husband is authorized to act as agent for the wife.

3. Mortgages and Deeds of Trust § 15—

Evidence that a deed to husband and wife contained an agreement by the grantees to assume and pay off a prior mortgage indebtedness on the land, that the deed was delivered to the husband alone and that all communications relating to the transaction were had with him alone, and without any evidence that the wife knew of the debt assumption agreement or had knowledge of the existence of the deed, or received any benefit from the transaction, or did anything indicating a ratification thereof, is insufficient to make out a case against the wife in an action by the holder of the note on the debt assumption agreement.

4. Same—

A debt assumption agreement by the grantee of land is a personal contractual undertaking relating to the consideration.

5. Same; Deeds § 18—

While the registration of a deed raises the presumption of delivery and ordinarily binds the grantee to covenants contained therein which run with the land, registration raises no presumption that the grantee agreed to a collateral contractual provision in the deed for the assumption by the grantee of a prior mortgage indebtedness on the land.

BEAVER *v.* LEDBETTER.

APPEAL by defendants from *McLean, J.,* March 21, 1966, Schedule "A," Civil (Jury) Session, of MECKLENBURG.

Plaintiff seeks to recover from defendants on their alleged assumption and agreement to pay a $12,000.00 purchase money note executed and delivered by Hagerty Realty Corporation (Hagerty) to plaintiff.

Plaintiff sold and conveyed to Hagerty a lot in Charlotte on which an 8-unit apartment is located. Hagerty executed (1) a first lien deed of trust to I. O. Brady, Trustee, as security for Hagerty's debt of $25,000.00 to Durham Life Insurance Company for money borrowed, and (2) a second lien deed of trust to Brock Barkley, Trustee, as security for Hagerty's $12,000.00 purchase money note to plaintiff. The $12,000.00 note bears interest from date (July 12, 1963) and is payable in monthly installments. Provision is made for the entire balance to become due and payable immediately if there is default in respect of any installment.

A deed dated March 22, 1965, recorded on April 16, 1965, in Book 2637, p. 127, Mecklenburg Registry, executed by Hagerty, purports to convey said property to P. L. Ledbetter and wife, Katherine H. Ledbetter. The deeds of trust in favor of Durham Life Insurance Company and plaintiff are excepted from the warranty provisions and it is set forth that "the parties of the second part" assume and agree to pay, *inter alia,* "that certain obligation due to Turner Brothers for rental and maintenance in the amount of $642.05," and "the balance due Mildred C. Beaver on the aforesaid deed of trust . . ."

There was evidence tending to show a foreclosure of the deed of trust to Brady, Trustee, was completed on July 27, 1965. Plaintiff alleged "the property was bid in at a price sufficient only to pay the balance of the indebtedness to Durham Life Insurance Company and the expenses of the sale." Defendants' brief contains a statement to this effect.

Defendants, answering, alleged in substance: Katherine H. Ledbetter had no part in or knowledge of any transaction involving said property. In February or March 1965, a representative of Hagerty proposed a sale of said property to P. L. Ledbetter; that P. L. Ledbetter "made no down payment or any other payment on said property and never consummated the contract proposed by Hagerty Realty Corporation"; and that, notwithstanding P. L. Ledbetter had neither accepted nor rejected Hagerty's proposal, Hagerty, without instructions from P. L. Ledbetter, caused said deed dated March 22, 1965, to be prepared and recorded.

A summary of the testimony of each of the witnesses for plaintiff is set forth below.

Plaintiff's testimony: The last payment on the $12,000.00 note was made in March 1965, leaving an unpaid principal balance of $10,738.80. She had five telephone conversations with P. L. Ledbetter with reference to his purchasing her second mortgage or making payments thereon. He assured her he would come over "in about two weeks" to talk about it and try "to get together with (her) on it." She had no communication or contact with P. L. Ledbetter except in these telephone conversations. She had no contact or communication whatsoever with Katherine H. Ledbetter.

Testimony of John G. Turner: He collected the rents from said apartments as rental agent for Hagerty through March 1965. Thereafter the statements were mailed to Mr. P. L. Ledbetter, 252 Union Cemetery Road, Concord, North Carolina. Turner's check dated June 10, 1965, for $108.85, payable to P. L. Ledbetter, was mailed, apparently with the June statement, to Mr. P. L. Ledbetter. It was endorsed, paid by the drawee bank and returned to Turner. The April and May statements showed the receipts had been applied to reimburse Turner for the amount he had expended from his own funds while acting as rental agent for Hagerty. The July statement showed receipts for twenty-one days and the expenditure of all except $4.75 retained by Turner to cover an outstanding expense item.

Testimony of Raymond L. Jordan: He is a brother-in-law of Mrs. Beaver, the plaintiff. He knew Mr. Ledbetter and was in contact with him "some time after March or April." He contacted Mr. Ledbetter "to determine the fact that the property had changed ownership to *him* in accordance with the statement of Mr. Hagerty." (Our italics.) Mr. Ledbetter told him that *he* had purchased the property; that *he* knew Mrs. Beaver was holding a second mortgage on it; and that *he* intended to send the payments to Mrs. Beaver. Later, Mr. Ledbetter said the apartment was not working out the way he expected; that it had been misrepresented to him by Hagerty; but that "he would try to make some arrangements for Mrs. Beaver and work it out."

Testimony of James A. Hagerty: He lives in Concord, North Carolina. As president of Hagerty Realty Corporation, "(he) handled the transaction of this sale of the apartment house to Mr. & Mrs. Ledbetter." He delivered the deed personally to Mr. Ledbetter. He had drafted it "according to (their) agreement." "*Mr.* Ledbetter was told the terms of the $12,000.00 second mortgage and *he* agreed to assume it." (Our italics.) He had no conversation with Mrs. Ledbetter except that he "chatted with her in her house waiting for him (Mr. Ledbetter) to come, but nothing concerning this transaction."

Defendants did not offer evidence.

The motion of each defendant for judgment of nonsuit was denied. With reference to each of the three issues, the court gave a peremptory instruction in favor of plaintiff.

The issues submitted, and the jury's answers, are as follows: "1. Did the defendant P. L. Ledbetter assume and agree to pay the indebtedness to the plaintiff referred to in the complaint? ANSWER: Yes. 2. Did the defendant Katherine H. Ledbetter assume and agree to pay the indebtedness to the plaintiff referred to in the complaint? ANSWER: Yes. 3. What amount, if any, is the plaintiff entitled to recover? ANSWER: $10,738.80, with interest from April 1, 1965."

In accordance with the verdict, the court entered judgment providing "that the plaintiff have and recover of the defendants, jointly and severally, the sum of $10,738.80 with interest thereon from the 1st day of April, 1965, and the costs of this action to be taxed by the clerk." Defendants excepted and appealed.

Brock Barkley for plaintiff appellee.
Kenneth B. Cruse for defendant appellants.

BOBBITT, J. Plaintiff bases her right to recover on this well settled legal principle: Where a purchaser of mortgaged land, by a valid and sufficient contract of assumption, agrees with the mortgagor, who is personally liable therefor, to assume and to pay the mortgage debt, such agreement inures to the benefit of the holder of the mortgage; and the holder of the mortgage can maintain an action at law on such agreement. *Baber v. Hanie,* 163 N.C. 588, 80 S.E. 57, 12 A.L.R. 1518; *Bank v. Page,* 206 N.C. 18, 173 S.E. 312; 4 Corbin on Contracts, § 796.

The general rule is stated in 59 C.J.S., Mortgages § 407, as follows: "A grantee who *with knowledge of its contents* accepts a conveyance which requires him to assume the payment of an existing mortgage becomes personally liable therefor even though he does not sign the deed or was not present when the grantor signed and acknowledged it, and even in the absence of an antecedent agreement to assume, and without entry of possession." (Our italics.) Accord: 37 Am. Jur., Mortgages § 994.

The motion of P. L. Ledbetter for judgment of nonsuit was properly overruled. In addition to the testimony of plaintiff, of Turner and of Jordan, with reference to their dealings with P. L. Ledbetter, there was the direct and positive testimony of James A. Hagerty that, prior to the delivery of the deed, P. L. Ledbetter had agreed to assume and pay Hagerty's debt to plaintiff, and that the deed containing the assumption agreement was delivered by him in person to

P. L. Ledbetter when the sale was consummated. There was no evidence tending to support the *allegations* of P. L. Ledbetter to the effect the transaction was not consummated. Since all the evidence tends to support plaintiff's allegations as to P. L. Ledbetter's agreement to assume and pay Hagerty's note to plaintiff and as to the amount of the unpaid balance thereon, there was no error as to P. L. Ledbetter in the peremptory instructions in plaintiff's favor with reference to the first and third issues.

We consider now whether the motion of Katherine H. Ledbetter for judgment of nonsuit should have been allowed.

"A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven." *Pitt v. Speight,* 222 N.C. 585, 588, 24 S.E. 2d 350, 351, and cases cited. "No presumption arises from the mere fact of the marital relationship that the husband is acting as agent for the wife. There must be proof of the agency." *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 173, 84 S.E. 2d 828, 831. Accord: *Rushing v. Polk,* 258 N.C. 256, 263, 128 S.E. 2d 675, 680; *Norburn v. Mackie,* 262 N.C. 16, 22, 136 S.E. 2d 279, 284; 26 Am. Jur., Husband and Wife § 228; 41 C.J.S., Husband and Wife § 70.

There is no evidence Katherine H. Ledbetter had any part in or knowledge of a transaction in which she was involved in any way as a purchaser. The Ledbetters lived in Concord. There is no evidence Katherine H. Ledbetter ever saw the Charlotte apartment property or that she had knowledge or notice that it was involved in any transaction between Hagerty and her husband. Although her name appears as one of the grantees in the deed, there is no evidence that she had any knowledge or notice of the existence of such deed. The evidence shows the deed was delivered by Hagerty to P. L. Ledbetter. It shows all communications and conversations relating to the transaction were addressed to P. L. Ledbetter. Jordan testified that James A. Hagerty told him the property had been sold to Mr. Ledbetter and that Mr. Ledbetter advised him that *he* (Mr. Ledbetter) had purchased the property. James A. Hagerty testified that "Mr. Ledbetter was told the terms of the $12,000.00 second mortgage and *he* agreed to assume it." (Our italics.) There is no evidence P. L. Ledbetter was authorized to act as agent for his wife in negotiations and transactions relating to said property. The evidence is silent as to when Katherine H. Ledbetter learned of the existence of the Hagerty deed and of the assumption clause therein. There is no evidence she received any benefit from said deed. Nor is there evidence of any fact tending to show her ratification of the transaction.

Plaintiff cites *Corbett v. Corbett,* 249 N.C. 585, 107 S.E. 2d 165,

and cases cited therein. She stresses the legal principles stated in *Corbett* as follows: "Where a deed is executed and recorded, it is presumed that the grantee therein will accept the deed made for his benefit. This is so, although the transaction occurs without the grantee's knowledge. Such presumption will prevail in the absence of evidence to the contrary. (Citations)" The cited cases relate to whether particular deeds were *delivered* so as to vest title in the grantees therein named. None of the deeds contains an assumption clause such as that involved herein.

"A mortgage assumption clause in a deed is not properly a part of the grant, and is not a covenant running with the land, but is a collateral undertaking, personal in nature, and contractual, relating to the consideration, and not relating to land." 59 C.J.S., Mortgages § 403. Accord: 37 Am. Jur., Mortgages § 992.

In *Blass v. Terry,* 156 N.Y. 122, 50 N.E. 953, it was contended that the defendant was obligated to pay the mortgage debt of one Howell to the plaintiffs because "Howell, in conveying a part of the land covered by the mortgage to the defendant, inserted in the deed a clause binding her to assume and pay the mortgage, and that this promise inured to the benefit of the plaintiffs." The plaintiffs offered in evidence the recorded deed containing such assumption clause. O'Brien, J., for the Court of Appeals of New York, said: "The record thus produced proves a grant of certain land therein described to the defendant, and it contains a clause assuming and agreeing to pay the mortgage thereon. But this clause does not prove a personal promise or obligation on the part of the defendant to pay the debt of a third party, in the absence of proof that she actually accepted the deed with knowledge of the assumption clause, or at least under such circumstances that she was bound to know its purport and legal effect. A clause of that character in such an instrument is, properly speaking, no part of the grant. It is a collateral undertaking, personal in its nature, not relating to the land." Again: "There may be constructive delivery of a deed, sufficient to vest title in the grantee, but it does not follow that such a delivery is sufficient to create a personal obligation on his part to pay a mortgage which is a lien on the land. In order to make the instrument effective for that purpose, enough must be shown to at least raise a presumption that it was accepted by the grantee with knowledge of the fact that it was not only a grant of the land, but contained a collateral promise on his part to pay a sum of money to some third party. The record in this case contains no such proof." Accord: *Consolidated Realty Corporation v. Dunlop,* 114 F. 2d 16 (D.C. Cir.); *Ludlum v.*

Pinckard, 304 Ill. 449, 136 N.E. 725, and cases cited; *Fishback v. J. C. Forkner Fig Gardens,* 137 Cal. App. 211, 30 P. 2d 586.

Where a deed contains an assumption clause or other collateral provision purporting to impose a personal liability upon the grantee, it is our opinion, and we so hold, that the mere fact that such a deed has been executed and recorded is insufficient to raise a presumption that the grantee agreed to such collateral contractual provision. Evidence that such grantee had knowledge of such provision and expressly or impliedly assented thereto, or that she ratified such provision after acquiring knowledge thereof, is required before liability may be imposed upon such grantee under the terms thereof. There being no evidence that Katherine H. Ledbetter agreed to assume and pay Hagerty's note to plaintiff or that she ratified the assumption clause in Hagerty's deed to the Ledbetters, her motion for judgment of nonsuit should have been allowed. Hence, as to her, the judgment of the court below is reversed.

We have considered the assignment of error, discussed briefly by defendants, relating to the admission of evidence. Suffice to say, we find nothing in the court's ruling that would justify a new trial as to P. L. Ledbetter or that is of any significance in respect of the liability of Katherine H. Ledbetter.

As to P. L. Ledbetter: No error.

As to Katherine H. Ledbetter: Reversed.

HEZZIE KING, ADMINISTRATOR OF THE ESTATE OF VESTER STAFFORD, JR., v. KEITH SNYDER, ADMINISTRATOR OF THE ESTATE OF WILLIAM DAVID HUMPHREYS.

(Filed 20 January, 1967.)

1. Appeal and Error § 21—

A general exception to an order does not present for review the admissibility or the sufficiency of the evidence to support the findings upon which the order is based.

2. Appeal and Error § 22—

An assignment of error that the court erred in its findings of fact is a broadside assignment and ineffectual to challenge the competency or sufficiency of the evidence.

3. Appeal and Error § 19—

An assignment of error not supported by an exception duly taken and preserved will not be considered.

4. Executors and Administrators § 2—

The clerk of the Superior Court of the county in which a nonresident dies leaving assets in this State has authority to appoint an administrator for the decedent. G.S. 28-1(4).

5. Executors and Administrators § 5; Death § 3—

An administrator appointed in this State who undertakes to defend an action for wrongful death by moving to set aside a default judgment and filing answer is thereafter estopped to deny the validity of his own appointment, and the court correctly denies his motion to dismiss the action for lack of jurisdiction of his person or the estate. The validity of his appointment is not before the court and it is error for the court to find facts in regard thereto.

6. Executors and Administrators § 5—

The validity of the appointment of an administrator may not be collaterally attacked in an action against such administrator, but may be directly attacked by any person in interest, including an administratrix of the decedent appointed in another state, by motion before the clerk of the Superior Court who made the appointment to vacate and set aside the letters of administration theretofore issued by such clerk.

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

In this wrongful death action, summons was issued and complaint was filed on August 16, 1965, and both were served on Keith S. Snyder on August 17, 1965.

Plaintiff alleged his appointment on September 18, 1963, as administrator of Vester Stafford, Jr.; that Keith Snyder was the duly qualified and acting administrator of William David Humphreys; that on September 5, 1963, a Ford car owned and operated by Humphreys, in which Stafford was a guest passenger, was involved in an automobile collision; that Stafford and Humphreys were killed instantly as the result of said collision; that said collision and the death of Stafford were proximately caused by the negligence of Humphreys in specified respects; and that, on account of Stafford's wrongful death, plaintiff is entitled to recover damages in the amount of $10,000.00.

On October 7, 1965, the clerk, allowing plaintiff's motion therefor, entered judgment by default and inquiry.

An answer, verified by Keith S. Snyder, as administrator of the estate of Humphreys, was filed October 7, 1965. Defendant admitted plaintiff's status as administrator of Stafford; admitted he (defendant) had been appointed in Caldwell County, North Carolina, as administrator of the estate of Humphreys; alleged, upon information and belief, that Humphreys was a citizen and resident of the State of Tennessee; and denied all allegations in respect of the alleged actionable negligence of Humphreys.

By order of October 25, 1965, Judge McLean, on motion of defendant, set aside said judgment by default and inquiry. The order finds as facts that defendant's counsel were duly employed to represent him and defend this action; that his counsel, on September 16, 1965, had obtained an extension of time whereby defendant was allowed through October 6, 1965, to file answer; and that his failure to file answer before October 7, 1965, "was due to the mistake, inadvertence and excusable neglect" of his counsel, which constituted excusable neglect. It was ordered that the answer defendant had filed be allowed "as part of the pleadings in this cause and that said case be tried on its merits at such time as same may be reached for trial." Defendant did not except to this order.

On November 1, 1965, defendant, through counsel, filed a motion to dismiss the action "for that the court has not properly acquired jurisdiction over the administrator of the estate of William David Humphreys, deceased; that the court has not properly acquired jurisdiction over the administratrix of the estate of William David Humphreys, and has not acquired jurisdiction over the estate of William David Humphreys."

Hearings on the said motion to dismiss were conducted by Judge McLean in November 1965 and in January 1966. Evidence was offered by plaintiff and by defendant. On January 11, 1966, Judge McLean entered an order which contained, *inter alia,* the findings of fact summarized as follows: Humphreys died intestate in Caldwell County, North Carolina, on September 5, 1963. He was the owner of the Ford car involved in the fatal accident. The car was registered in his name with the Department of Motor Vehicles of North Carolina, which had issued to him a North Carolina license plate for 1963. At the time of his death: Humphreys resided at 101 Resica Avenue, Lenoir, Caldwell County, North Carolina; he had furnished this address to said Department of Motor Vehicles as his "home address"; he was a citizen and resident of Caldwell County, North Carolina, domiciled therein, and was not a citizen and resident and domiciliary of Tennessee; he was separated from his wife, Carolyn Humphreys, who resided in Tennessee. On application of the plaintiff herein, Keith Snyder was duly appointed (July 13, 1965) as administrator of Humphreys, and since his appointment "has been acting as such administrator." Humphreys owned no assets whatsoever in Tennessee upon which any person could administer.

The order states, as conclusions of law, (1) that Humphreys was a resident of and domiciled in Caldwell County, North Carolina, on September 5, 1963; (2) that Keith Snyder was duly appointed and is now acting as administrator of Humphreys, "and the same is true in the answer of the defendant"; and that "the parties hereto are

properly before the court and the court has jurisdiction of the parties hereto."

The order concludes: "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant's motion to dismiss this action be and the same is hereby denied."

Defendant excepted (generally) to said order and gave notice of appeal therefrom.

Seila, Wilson & Palmer for plaintiff appellee.
Townsend & Todd for defendant appellant.

BOBBITT, J. Defendant's general exception to Judge McLean's order does not present for review the admissibility of the evidence on which the findings of fact are based or the sufficiency of the evidence to support the findings. 1 Strong, N. C. Index (and Supplement), Appeal and Error § 22. Assignment of error No. 14 asserts "the Court erred in finding the facts and signing the Order denying defendant's Motion to Dismiss." The broadside assignment is ineffectual as a challenge to the findings of fact or as to the competency or sufficiency of the evidence pertinent thereto. Moreover, "(a)ssignments of error unsupported by an exception duly taken and preserved will not be considered on appeal." *Hicks v. Russell,* 256 N.C. 34, 39, 123 S.E. 2d 214, 218, and cases cited. Hence, we pass, without discussion, assignments of error Nos. 2-12, relating to rulings on evidence.

The remaining assignments of error assert the court erred "in overruling defendant's Motion to Dismiss at the close of the presentation of the record evidence" (Assignment No. 1) and "in overruling defendant's Motion to Dismiss for lack of jurisdiction" (Assignment No. 13).

If the question were properly before Judge McLean for determination, his finding of fact that Humphreys, at the time of his death on September 5, 1963, was a resident of and domiciled in Caldwell County, North Carolina, would be conclusive as to the authority of the Clerk of the Superior Court of Caldwell County to appoint an administrator for the estate of Humphreys. G.S. 28-1(1). It is noteworthy that the Clerk of the Superior Court of Caldwell County would have authority to appoint an administrator of the estate of Humphreys if he were not domiciled in this State at the time of his death but died in Caldwell County leaving assets in this State. G.S. 28-1(4); *In re Administration of Franks,* 220 N.C. 176, 16 S.E. 2d 831.

Defendant did not testify. Evidence offered in his behalf tended to show Humphreys and his wife, Carolyn J. Humphreys, had not

separated; that Humphreys, a textile worker, although he was employed and actually resided in Caldwell County, North Carolina, visited his wife and children about every other week-end (and contributed to their support) in Monroe County, Tennessee, where they resided and where he had been born and reared. Suffice to say, evidence offered by defendant was sufficient to support, but not to compel, a finding that Humphreys, although temporarily residing in Caldwell County, North Carolina, was a domiciliary of Monroe County, Tennessee. Included in the evidence offered by defendant was a copy of letters of administration issued October 7, 1963, by the Clerk of the County Court of Monroe County, Tennessee, to Carolyn J. Humphreys as administratrix of Humphreys. For present purposes, we treat the copy as sufficiently authenticated.

Defendant contends the letters of administration issued October 7, 1963, in Tennessee to Carolyn J. Humphreys, are not subject to attack by plaintiff in this action. He cites and stresses the decisions of this Court in *Tyer v. Lumber Co.*, 188 N.C. 274, 124 S.E. 306, and *Hines v. Foundation Co.*, 196 N.C. 322, 145 S.E. 612. He bases his contention on the legal proposition stated in *Hines* as follows: "It is generally held that a grant of letters of administration which is not void, although it may be voidable, is not open to collateral attack; such attack can be sustained only upon the ground that upon the face of the record, the court granting the letters, and making the appointment, was without jurisdiction."

In *Hines*, Connor, J., cites *Tyer*, discussed below, and also *Holmes v. Wharton*, 194 N.C. 470, 140 S.E. 93; *Batchelor v. Overton*, 158 N.C. 395, 74 S.E. 20; *Fann v. R. R.*, 155 N.C. 136, 71 S.E. 81. In *Holmes* and *Fann*, both wrongful death actions, and in *Batchelor*, a claim and delivery action, it was held that the defendant could not in such action attack (collaterally) the validity of the plaintiff's letters of administration. Accord: *Wharton v. Ins. Co.*, 178 N.C. 135, 100 S.E. 266.

The *Tyer* case cited by defendant (188 N.C. 274) will be referred to as the *Craven County* case. Another *Tyer* case, not cited by defendant, *Tyer v. Lumber Co.*, 188 N.C. 268, 124 S.E. 305, will be referred to as the *Beaufort County* case. Irving Tyer was killed while working for defendant. An administrator was appointed in Beaufort. Subsequently, an administratrix was appointed in Craven. The Beaufort administrator instituted an action in Beaufort, and the Craven administratrix instituted an action in Craven, each seeking to recover damages from defendant on account of the alleged wrongful death of Irving Tyer. In each county, the defendant, by motion addressed to the clerk of the superior court, moved that the

letters of administration he had issued be revoked. In the *Beaufort County* case, the clerk, based on findings of fact, held the Beaufort County administration was valid and denied the defendant's motion; and the judgment of the superior court, which affirmed the clerk's order, was affirmed by this Court. In the *Craven County* case, this Court reversed the judgment of the superior court and held the purported appointment in Craven was invalid, citing the statute now codified as G.S. 28-2 and providing: "The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate." The procedure in each of the Tyer cases was by direct attack in the probate court where the appointment was made. In this connection, see *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240.

In *Hines,* James Hines sustained a fatal injury in Guilford County. An administrator appointed by the Clerk of the Superior Court of Durham County instituted this action for wrongful death. There was a jury trial in which it was found that the widow of decedent had qualified as administratrix in South Carolina and as administratrix had settled the claim for wrongful death and had executed and delivered a release. Recovery was denied on the ground the action was barred by said release. The plaintiff was not permitted to attack in that action the validity of the South Carolina administration. Thus, in *Hines,* an administrator appointed in this State was not permitted to attack collaterally, that is, in the wrongful death action in this State, the appointment in South Carolina of an administratrix with whom defendant had effected a settlement of the wrongful death claim.

The factual situation in each of the cited cases is quite different from that in the present case. Here defendant moved successfully to vacate and set aside a judgment by default and inquiry. He filed answer in which he alleged he was appointed in Caldwell County as administrator of the estate of Humphreys. Then, after the cause was at issue and awaiting trial, he moved to dismiss on the ground his own appointment is invalid. There is a procedure by which an administrator may resign. G.S. 36-9 *et seq.* A person appointed administrator and acting in that capacity in defending a wrongful death action is estopped from asserting therein the invalidity of his own asserted status as such administrator. Whatever the rights of others, we are of opinion, and so decide, that the defendant, whose sole relationship to this action derives from his appointment as administrator by the Clerk of the Superior Court of Caldwell County, cannot attack herein the validity of his own appointment.

No issue or question relating to the Tennessee letters of admin-

istration is raised by the pleadings. Neither plaintiff nor defendant is attacking letters of administration issued in Tennessee. As stated, the sole attack is by defendant administrator upon the validity of his own letters of administration. It is noted that nothing appears in the record to indicate that the Tennessee administratrix has made any settlement of the claim for Stafford's alleged wrongful death or that any demand has been made upon the Tennessee administratrix in connection therewith.

Unquestionably, Carolyn J. Humphreys, as widow or as administratrix under appointment in Tennessee, or any other party in interest, has the right to attack directly defendant's status as administrator before the Clerk of the Superior Court of Caldwell County by motion that the clerk vacate and set aside the letters of administration issued to defendant as void for want of jurisdiction. This procedure was approved in *In re Bane*, 247 N.C. 562, 101 S.E. 2d 369, where a Florida administratrix moved before the Clerk of the Superior Court of Durham County that letters of administration issued by said clerk in Durham County be vacated and set aside on the ground that the residence and domicile of decedent at the time of his death was not in Durham County, North Carolina, but in Orange County, Florida.

Defendant's motion to dismiss should have been denied on the ground he is estopped to challenge the validity of his own appointment. Since the question was not properly before him, it was error for Judge McLean to hear evidence and make findings of fact pertinent to the validity of defendant's appointment as administrator in Caldwell County. Hence, the findings of fact and conclusions of law stated in Judge McLean's order will be stricken therefrom. It is so ordered. However, Judge McLean's order, to the extent it simply denies defendant's motion to dismiss for lack of jurisdiction, is affirmed.

Modified and affirmed.

KORNEGAY *v.* RALEIGH.

ALTON W. KORNEGAY, JAMES L. STOUGH, AND DAVID M. CRENSHAW, AS TAXPAYERS, CITIZENS AND VOTERS IN AND OF THE CITY OF RALEIGH, NORTH CAROLINA, ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS, CITIZENS AND VOTERS OF SAID CITY WHO MAY DESIRE TO JOIN IN THIS ACTION, PLAINTIFFS, v. THE CITY OF RALEIGH, A MUNICIPAL CORPORATION, AND SOUTHEASTERN CABLEVISION COMPANY, A NORTH CAROLINA CORPORATION, DEFENDANTS.

(Filed 20 January, 1967.)

1. Injunctions § 8—

Citizens and taxpayers of a municipality may maintain an action to enjoin the performance of an agreement entered into by the city and a cablevision company authorizing the cablevision company to install and maintain equipment for cablevision within the municipality upon the assertion that the agreement was void because no election was held as required by the municipality's charter, when they allege facts disclosing the possibility of financial loss to themselves as taxpayers for which they would have no adequate remedy at law. Plaintiffs may not maintain the action in their capacity as electors, since if an election were prerequisite to the agreement, the agreement is void and they would not be injured by the denial of the right to vote.

2. Municipal Corporations § 18—

Whether an agreement by a municipality constitutes a franchise or a license depends upon the nature of the rights granted and not the nomenclature employed by the parties.

3. Same—

G.S. 160-2, as distinguished from its charter, empowers a municipality to grant a franchise only to a public utility, though it is not required that the grantee be a public utility within the definition set forth in G.S. 62-3.

4. Same—

The grant by a city to a person, firm or corporation of the right to construct cablevision facilities within the city along and over its streets and public ways is the grant of a right not held by all persons in common and which may be granted by the city only in the exercise of power delegated to it by the sovereign, and therefore such grant is a franchise notwithstanding that the ordinance under which the agreement was made provides that any person, firm or corporation might apply for such right, the city having the right to deny other applications, for any "good cause".

5. Same—

Where a municipal charter prescribes procedure to be followed by the municipality in granting a franchise, including the requirement that the question be submitted to a vote of its citizens, a franchise granted without following the statutory procedure is void.

APPEAL by plaintiffs from *Cowper, J.*, at the September 1966 Assigned, Non-Jury, Civil Session of WAKE.

The plaintiffs, citizens, residents, taxpayers and registered voters of the city of Raleigh, sue to enjoin the defendants from entering

into the performance of and from carrying out any of the obligations or actions required or permitted under a certain "license, special privilege and franchise" granted by the city to Southeastern Cablevision Company, hereinafter called Southeastern, pursuant to the city's Ordinance No. (1964) —256, as amended, and for a judgment declaring such ordinance and the "license, special privilege and franchise" void.

Upon the ground that the complaint does not state facts sufficient to constitute a cause of action, in that plaintiffs do not allege facts showing that they have sustained or will sustain any personal injury or loss by reason of the matters complained of, and further do not allege facts entitling them to any injunctive relief, the superior court sustained demurrers filed by the respective defendants to the complaint.

The complaint alleges that the plaintiffs, suing for themselves and all other persons similarly situated, will be irreparably damaged if the defendants are permitted to carry out such grant in that they, and all other registered voters of the city of Raleigh, will have been deprived of their respective rights to vote "on the grant of such license, right and franchise" to Southeastern. They also allege that they will suffer irreparable damage in their capacities as taxpayers of the city if the city is permitted, pursuant to such ordinance and grant, to relinquish to Southeastern an "interest in the streets, alleys and public ways" of the city without complying with the requirements of the law applicable to such matters. They allege that for these injuries they have no adequate remedy at law.

Attached to the complaint, and incorporated therein by reference, are a copy of the ordinance, as amended, a copy of a resolution of the City Council, and a copy of § 18 of the charter of the city, each of which documents is summarized below.

The complaint alleges that the grant of which the plaintiffs complain was made without submitting to a vote of the qualified voters of the city the question of whether such grant should be made, and without the enactment, as required by the charter of the city, of an ordinance relating to such grant. It is also alleged that, at the time of the grant, Southeastern had not acquired a certificate of public convenience and necessity from the North Carolina Utilities Commission. The ordinance and the grant are alleged to be null and void because: (1) They violate §§ 14 and 18 of the city charter, referred to below; (2) the grant is an attempted grant of an exclusive or separate emolument in violation of Article I, § 7, of the Constitution of North Carolina; (3) the ordinance and grant are an attempt by the city to regulate community antenna television systems beyond the authority of the city; (4) the city has no authority to permit the

use of its streets for community antenna television purposes; (5) Southeastern did not, at the time of the grant, have a certificate of public convenience and necessity issued by the North Carolina Utilities Commission.

The pertinent provision of § 14 of the city charter is that, "No ordinance making a grant * * * of any franchise or special privilege, shall be passed until voted on at (2) regular meetings of the City Council, and no such grant * * * shall be made otherwise than by ordinance."

The applicable provisions of § 18 of the city charter are:

> "No franchise shall be granted by the City of Raleigh until the question has been submitted at a special or general election, to the qualified voters of the city and until a majority of those voting upon the proposition have voted in favor of granting such franchise; * * * and before any such grant of any such franchise or right shall be made, the proposed specific grant shall be embodied in the form of an ordinance, with all the terms and conditions that may be right and proper, including a provision for fixing a rate, fares and charges to be made if the grant provide for the charging of a rate, fares, and charges; * * *"

The pertinent portion of the resolution adopted by the City Council is:

> "That SOUTHEASTERN CABLEVISION COMPANY be and is hereby granted a license to construct and operate a community antenna television system within the City of Raleigh under the terms and conditions set out in City Ordinance No. (1964) — 256, adopted August 3, 1964, as the same may be from time to time amended."

The pertinent provisions of the ordinance are:

> "SECTION 1. That a person, firm or corporation may install and operate a Community Antenna Television System in the City of Raleigh under the conditions set out herein and for that purpose is granted:
>
> "(a) The right and the privilege for a period of fifteen (15) years from the effective date of a license issued pursuant to this ordinance to erect structures in the City of Raleigh and to construct, maintain and operate in, over, and along present and future streets, alleys and public places of the City of Raleigh, towers, poles, lines, cables, necessary wiring and other apparatus for the purpose of receiving, amplifying and distributing

television, electronic, electrical and radio signals, audio and video, to said City and the inhabitants thereof.

* * *

"SECTION 2. The grant herein contained shall be subject to the following conditions:

* * *

"(c) The privileges and rights herein granted by this ordinance shall not be exclusive.

* * *

"(j) That if any streets and sidewalks should be disturbed or damaged in the construction or maintenance of said cable lines and other appurtenances, the same shall be promptly repaired by the grantee at its expense and to the satisfaction of the City of Raleigh.

* * *

"(p) Upon the termination of this special privilege, the grantee shall remove its poles, television transmission and distribution system and other appurtenances from the streets and sidewalks in the City of Raleigh and shall restore such streets and sidewalks to their original condition.

* * *

"(u) Except for a mortgage or assignment to secure a loan or loans to construct and operate said system, grantee shall not sell or transfer its system and the privilege granted herein without first securing approval of the City Council for such sale or transfer.

"(v) In the event any section or part of this ordinance shall be held invalid, such invalidity shall not affect the remaining sections or portions of this ordinance.

"(w) The grantee shall be subject to such taxes as are now or as may be hereafter levied by the City of Raleigh, including, but not limited to, a special privilege tax in such amount as may be determined by the City Council for the use of the public streets * * *

* * *

"SECTION 3. An applicant desiring to install and operate a Community Cable Television System in the City of Raleigh shall file an application with the City Council * * *

"If the City Council should be of the opinion that the application of the applicant is not bona fide; that its financial responsibility is insufficient to secure the performance of the obligations of installing and operating successfully a Community Cable Television System within the City; or for other good

cause that the license should not be issued, it may thereupon deny the application.

"SECTION 4. This ordinance may be amended by the City Council as may be deemed necessary or advisable in the public interest after first giving thirty (30) days' notice to all holders of licenses issued pursuant hereto."

Other provisions of the ordinance deal at length with the regulation of the location of poles and other facilities, the use of poles of other companies with their permission, the quality and extent of the service to be rendered, the rates to be charged subscribers, discrimination between subscribers, revocation for default by the grantee, and various other duties of the grantee and powers of the city.

Johnson, Gamble & Fogel for plaintiff appellants.

Smith, Leach, Anderson & Dorsett for defendant Southeastern Cablevision Company.

Donald L. Smith for defendant City of Raleigh.

LAKE, J. In the appellees' brief the proposed operation by Southeastern is described as follows:

"[I]t must be noted that CATV system does not obstruct or in any manner actually interfere with the use of the street by the public or with an adjoining property owner. The receiving tower and antenna are located on the CATV Company's private property, with the co-axial cables which extend ABOVE the city streets being strung upon the existing pole system of the telephone and power companies. THUS THE CATV CABLES OCCUPY A MINIMAL AMOUNT OF AIR SPACE ABOVE THE CITY STREETS AND WILL IN MOST INSTANCES BE LOCATED BETWEEN EXISTING WIRES OF THE UTILITY COMPANIES. It cannot be said that there is any unreasonable encroachment on the city streets and in fact there is no encroachment at all."

The nature and validity of the grant to Southeastern, and the right of these plaintiffs to attack it in this litigation, must, however, be determined by what the grant authorizes the grantee to do, not by what it presently intends to do or by what operators of such businesses usually do.

The grant in this instance does not restrict Southeastern to the stringing of cables upon existing poles of other companies. It is empowered to construct and operate, in and along all public ways of the city, its own towers, poles, lines and cables, together with all

other necessary apparatus for amplifying and distributing audio and video signals. Thus, the nature and validity of the grant are the same as if there were no other poles and cables now in, over and along the streets and other public ways of the city.

The plaintiffs' right to maintain this action cannot be sustained on their contention that they have been deprived of their right to vote. They do not, of course, contend that they have been denied the right to vote in an election in which others have voted. Their contention is that they have been damaged irreparably because no election has been held. If, as they contend, an election is essential to the validity of a grant by the city of the right purported to be granted to Southeastern, then the alleged grant is not valid, for the demurrer admits no election has been held. In that event, the plaintiffs are in the same position they would occupy if an election had been held and the majority of votes had been cast in opposition to the grant. Thus, the plaintiffs have not been injured in any way by the failure to hold the election. Their status as registered voters of the city does not, therefore, entitle them to maintain this action.

The plaintiffs, as taxpayers, stand in a better position. When we consider that this grant purports to give to Southeastern the right to erect a city-wide system of poles, towers, cables and wires along all the streets of the city, notwithstanding Southeastern's apparent intent to engage in a much less extensive program of construction, it becomes apparent that the construction which this grant purports to authorize may bring about extensive damage to and disturbance of pavements and other street and sidewalk surfaces. Such damage, if it occurs, will have to be repaired at substantial expense. The grant also contemplates that the operation of the proposed business may subject the city to liability to third persons. Part or all of these expenses and liabilities may fall upon the taxpayers of the city, notwithstanding provisions in the ordinance requiring Southeastern to bear them and the agreement by Southeastern to indemnify the city against such losses. This is sufficient to give the plaintiffs, as taxpayers, the right to institute and maintain this action to determine the validity of the grant and to enjoin the exercise of rights thereunder if it be unlawful. *Shaw v. Asheville,* 269 N.C. 90, ... S.E. 2d ....., decided today, and cases therein cited.

The decision in *Angell v. Raleigh,* 267 N.C. 387, 148 S.E. 2d 233, does not bar these plaintiffs from maintaining this action. There, the city had made no grant to anyone under the ordinance. Here, it has and the activity authorized by the grant will be carried on unless the defendants are enjoined from doing so. The plaintiffs have

no adequate remedy at law. It thus becomes necessary in this action to determine whether the proposed activity would be unlawful.

Here, as in *Shaw v. Asheville, supra,* it is not necessary for us to determine, and we do not determine, whether Southeastern, if it carries on a business of the type authorized by this grant, would be subject to regulation by the North Carolina Utilities Commission under the provisions of Chapter 62 of the General Statutes.

The determination of this appeal turns upon whether the rights purported to be granted by the city to Southeastern by the resolution of the City Council constitute a franchise, as that term is used in § 18 of the charter of the city of Raleigh. If so, the demurrer to the complaint should have been overruled, for the complaint alleges and the demurrer admits that the question of whether a franchise for such operation shall be granted has not been submitted to the qualified voters of the city.

Whether a grant of rights by a municipal corporation is the grant of a franchise does not depend upon the status of the grantee but upon the nature of the rights granted. *Shaw v. Asheville, supra.* The status of the grantee is a material factor in determining the validity of a grant of a franchise under the authority of G.S. 160-2, for that statute authorizes municipal corporations to grant franchises only to "public utilities," though it does not necessarily follow that such grantee must be the operator of a business within the definition of "public utility" contained in G.S. 62-3. *Shaw v. Asheville, supra.* Here, the city charter, by implication, authorizes the granting of franchises without limitation as to the status of the grantee.

The grant by a city to a person, firm or corporation of the right to construct a city-wide system of towers, poles, cables, wires, and other apparatus in, along and over its streets and other public ways and to operate such systems for the profit of the grantee is clearly a franchise, for it is the grant of a right not held by all persons in common and which may be granted only by the act of the sovereign or its authorized agent. *Shaw v. Asheville, supra,* and authorities there cited. A franchise need not be exclusive. Indeed, if it is exclusive, an additional question as to its validity arises under the Constitution of North Carolina, Article I, §§ 7 and 31, a question which we do not now need to determine and do not determine.

Though the ordinance of the city of Raleigh expressly provides that the rights purported to be granted to Southeastern "shall not be exclusive," they are, nevertheless, not rights which all members of the public are free to exercise. The ordinance provides that no person may exercise such right within the city without an applica-

tion to and a grant by the City Council, which grant the Council may withhold for any "good cause."

We conclude that the rights which the city attempted to grant to Southeastern constitute a franchise, notwithstanding the fact that the ordinance denominates them a "license." The grant is, therefore, void because the procedure required by § 18 of the city charter for the granting of a franchise has not been followed.

We are not to be understood as holding that the city of Raleigh cannot grant such a franchise to Southeastern, or others properly qualified. Likewise, it is not necessary for us now to determine, and we do not now determine, the authority of the city to impose upon the grantee of such franchise any duty or restriction set forth in any provision of its Ordinance No. (1964) — 256. We hold that the city has undertaken to grant a franchise and, in doing so, has not followed the procedure required by the Legislature in the city charter. If this procedure be deemed by the city unduly burdensome and restrictive, the remedy must be sought from the Legislature.

The plaintiff taxpayers, having no adequate remedy at law for the proposed unauthorized and, therefore, unlawful use of the city streets, are entitled to maintain this action for the equitable relief of an injunction to restrain such activity. The demurrer was, therefore, improperly sustained.

Reversed.

HENRY McWILLIAMS v. GEORGE H. PARHAM, JR.

(Filed 20 January, 1967.)

1. Pleadings § 34—

A motion to strike an entire further answer on the ground that the facts alleged therein are insufficient to constitute a defense is equivalent to a demurrer to such further answer.

2. Master and Servant § 27—

The doctrine of assumption of risk is applicable only when there is the contractual relationship of employee and employer existing between plaintiff and defendant.

3. Games and Exhibitions § 5—

In an action by a caddy to recover for injuries sustained when hit by a golf ball driven by a player following those for whom the caddy was caddying, allegations of the further answer and defense that defendant was enjoying membership privileges of the golf club, even though the allegations be construed that defendant was a member and stockholder in the club,

fail to allege a contract of employment constituting a necessary predicate for the defense of assumption of risk.

4. Master and Servant § 27—

The doctrine of assumption of risk extends only to those risks which are normally incident to the circumstances and does not extend to extraordinary risks or additional hazards.

5. Games and Exhibitions § 5—

It is customary for a golfer to cry "fore" or give other warning of his intent to drive a ball when there are other persons within the probable range of the intended flight of the ball, and the failure to give such warning is negligence, and therefore a player may not assert assumption of risk on the part of a caddy hit by a ball driven by the player without the customary warning, since the caddy cannot be held to have assumed the extraordinary risk of negligent failure of the player to observe the established rules and customs of the game.

6. Master and Servant § 86—

Allegations that defendant was enjoying the privileges of membership in playing on a golf course, even if such allegations be construed to mean that defendant was a member and stockholder of the club, do not show that defendant was an employer of a caddy of preceding players, G.S. 97-10.1, and do not show that defendant was "conducting" the business of the club, G.S. 97-9, and therefore such defendant is not entitled to allege the defense of immunity under the Workmen's Compensation Act in an action by the caddy to recover for injuries resulting when struck by a ball driven by defendant.

ON *certiorari* to review an order of *Morris, J.*, entered at the First May 1966 Assigned Non-Jury Civil Session of WAKE denying a motion to strike portions of the defendant's answer.

This is an action to recover damages for injuries sustained when the plaintiff was struck in the eye by a golf ball driven by the defendant.

The complaint alleges: At the time of the injury, the plaintiff was employed as a caddy at the Carolina Country Club in Raleigh, and was engaged in caddying for two players in a group of four which had just completed their playing of the thirteenth hole upon the golf course of the Club. These players and the plaintiff had thereupon moved away from the thirteenth green toward the fairway of the fourteenth hole, which fairway runs in an opposite direction to and parallel with that of the thirteenth hole. The defendant was then on the thirteenth driving tee, being one of a group of players following immediately after those for whom the plaintiff was caddying. When the plaintiff had walked only a few feet from the thirteenth green, and while he was within the clear view of the defendant, the defendant negligently, and without giving the plaintiff adequate and timely warning, drove a golf ball down the thir-

teenth fairway, which is only 180 yards in length. The ball struck the plaintiff in the eye and caused the permanent loss of the eye, the alleged negligence of the defendant being the proximate cause of such injury.

In his answer in chief, the defendant denies any negligence by him and alleges that the plaintiff had proceeded entirely off the fairway of the thirteenth green and into the "rough" between the thirteenth and fourteenth fairways. He further alleges that the ball driven by him hooked sharply to his left, fell into the "rough," and bounced and struck the plaintiff. These allegations are not involved in the questions now presented for review.

As a first further answer and defense, the defendant pleads contributory negligence by the plaintiff. These allegations are not involved in the questions now presented for review.

For a second further answer and defense, the defendant alleged that, at the time of his injury, the plaintiff was working "in his employment as a caddy *for* the Carolina Country Club"; that he was "working as an employee *of* said Carolina Country Club and said employment was for the use, benefit and enjoyment of persons playing golf on the golf course of said club, including the defendant"; that he was "an experienced caddy employed *by* said club," having been so employed more than 20 years, and that he was thoroughly familiar with the golf course of the Club and with the game of golf, its rules and the hazards and dangers incidental to the game. (Emphasis added.) It is alleged that the risks of such employment were obvious to and well known to the plaintiff and were assumed by him, and that the injury of which the plaintiff complains arose from a risk incident to such employment, which risk he assumed when he entered and continued such employment. This assumption of risk by the plaintiff is specifically pleaded in bar of his right of recovery in this action.

For a third further answer and defense, the defendant alleges that the plaintiff was an employee *of* the Carolina Country Club, a corporation, which operated a golf course in order to provide for the members of the Club and their guests a place of resort for their enjoyment and amusement, and the "plaintiff was an employee of said corporation and was acting within the terms and scope of his employment as a caddy for said corporation, its members and guests, and was acting in furtherance of the business of the corporation at all times alleged in the complaint"; that the plaintiff and the Club had elected to accept and be governed by the provisions of the North Carolina Workmen's Compensation Act, and the Club had procured a policy of Workmen's Compensation insurance. It is further alleged that the North Carolina Industrial Commission issued an

award of compensation and medical benefits to the plaintiff pursuant to the Workmen's Compensation Act, which benefits have been or will be paid to the plaintiff by the Club's insurance carrier. It is alleged that the defendant is immune from liability in this action under the provisions of the Workmen's Compensation Act, and specifically G.S. 97-9 and G.S. 97-10 (now G.S. 97-10.1 to 97-10.3) "for the reason that at the time of said accident defendant was playing golf on the golf course operated by the Carolina Country Club Company and in so doing was engaged in furtherance of the business of the Company."

The plaintiff moved to strike, in their entirety, the second and third further answers and defenses. He alleges that the second further answer and defense does not constitute a defense to the plaintiff's cause of action "because, among other reasons, there is and was no contractual relationship existing between plaintiff and defendant, as evidenced by the pleadings." He contends that the third further answer and defense is irrelevant and does not constitute a defense to his cause of action "because, among other reasons, the defendant was not conducting the business of plaintiff's employer within the meaning of that defense as set forth in Chapter 97, particularly G.S. 97-9, of the General Statutes of North Carolina, as evidenced by the pleadings."

The superior court concluded that the allegations of the second and third further answers and defenses are proper allegations and that proof thereof would constitute a complete bar to the plaintiff's right to recover in this action. It, therefore, overruled the motion in its entirety.

The plaintiff petitioned for *certiorari* to review this denial of its motion to strike, which petition was granted.

Joyner & Howison for plaintiff appellant.
Maupin, Taylor & Ellis for defendant appellee.

LAKE, J. The motion to strike is directed to the entire second further answer and to the entire third further answer for the reason, in each instance, that the allegations therein contained do not constitute a defense to the cause of action alleged in the complaint. The motion is, therefore, equivalent to a demurrer to each such further answer. *Cecil v. R. R.*, 266 N.C. 728, 147 S.E. 2d 223; *Galloway v. Lawrence*, 263 N.C. 433, 139 S.E. 2d 761; *Williams v. Hunter*, 257 N.C. 754, 127 S.E. 2d 546.

In each instance the motion should have been allowed.

The defense which the second further answer purports to allege

is the assumption by the plaintiff of the risk that he would be so injured. It is well established in this jurisdiction that assumption of risk is not available as a defense to one not in a contractual relationship to the plaintiff. *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252; *Gilreath v. Silverman,* 245 N.C. 51, 95 S.E. 2d 107; *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398; *Broughton v. Oil Co.,* 201 N.C. 282, 159 S.E. 321. The distinction between the defense of contributory negligence, which the defendant has alleged in his first further answer and defense, and which is in no way affected by our decision upon the matters now before us, and the defense of assumption of the risk is clearly drawn in *Cobia v. R. R.,* 188 N.C. 487, 125 S.E. 18, and in *Horton v. R. R.,* 175 N.C. 472, 95 S.E. 883.

The defendant, in his brief, recognizing that "the defense of assumption of risk is one growing out of the contract of employment," relies on his allegation in the second further answer that "any injury sustained by the plaintiff while he was in the employment of the Carolina Country Club and the patrons of its golf course as a caddy" was sustained in an employment, the risks incident to which were obvious and well known to the plaintiff. This is a far cry from an allegation that the plaintiff was employed by the defendant or that there was any contractual relationship between them. On the contrary, the defendant's own allegations both in the second and in the third further answer show that the plaintiff's employment was "of" the Club, "by" the Club and "for" the Club. The Club is a corporation. It appears from the answer, itself, that the plaintiff was not caddying for the defendant but for players in a group entirely separate and apart from the defendant and his companions. Nowhere in the pleadings is the relationship of the defendant to the Carolina Country Club set forth. The only reference to this relationship is the admission, in the answer in chief, of the allegation in the complaint that when the event in question occurred, "the defendant was enjoying membership privileges of the Carolina Country Club and was playing golf with another person on said course." Thus, it does not appear that the defendant was even a member of the Club, but if he was a member of the corporation, which employed the plaintiff, this would not make him a party to that contractual relationship. Consequently, it appears upon the face of the answer, itself, that a prerequisite to the defense of assumption of the risk is lacking.

Furthermore, when the necessary relationship between the parties is shown, the doctrine of assumption of risk extends only to those risks which are normally incident to the occupation in which the plaintiff engages. Extraordinary risks, including additional hazards

caused by the negligence of the employer, or of others upon the employer's premises, are not assumed by the employee. See *Cobia v. R. R., supra.*

It is a well recognized and established custom among golfers to give warning by crying "Fore," or some similar exclamation, prior to attempting to drive a golf ball into the vicinity of another person on the course who does not appear to be aware that such a drive is about to be made, whether such other person be another player, a caddy or a spectator. A driven golf ball travels at high speed and can inflict serious bodily injury, as in this instance. To drive a golf ball toward such a person, who is within probable range of the intended flight of the ball, without giving such warning, is negligence. *Boynton v. Ryan,* 257 F. 2d 70; *Miller v. Rollings, Fla.,* 56 So. 2d 137; *Stober v. Embry,* 243 Ky. 117, 47 S.W. 2d 921; *Page v. Unterreiner,* Mo. App., 106 S.W. 2d 528; *Toohey v. Webster,* 97 N.J.L. 545, 117 Atl. 838, 23 A.L.R. 440; *Povanda v. Powers,* 152 Misc. 75, 272 N.Y.S. 619. The plaintiff, whom the answer alleges to have been well acquainted with the customs and rules of the game, was entitled to assume that players in the party following that for whose members he was caddying, would observe such custom. He cannot, therefore, be held to have assumed the risk of injury through the negligent failure of such a player to give warning of his intent to drive a ball into the plaintiff's vicinity, even if the other prerequisites to the application of the doctrine of assumption of risk be present. *Toohey v. Webster, supra; Povanda v. Powers, supra; Getz v. Freed,* 377 Pa. 480, 105 Atl. 2d 102.

It is well known to caddies, and to those who frequent golf courses, that skillful players occasionally, and players of average skill frequently, strike the ball with care and then find, to their dismay, that it "hooks" to the left or "slices" to the right, or otherwise departs substantially from the intended course of flight. As between a caddy and his employer, the caddy may, therefore, be held to assume the risk of injury from such a drive, but he cannot be held to assume, even as to his employer, the risk of injury due to the negligent failure of a player to observe the established rules and customs of the game. *Biskup v. Hoffman,* 220 Mo. App. 542, 287 S.W. 865; *Toohey v. Webster, supra; Povanda v. Powers, supra; Getz v. Freed, supra.*

In the present case, the cause of action alleged in the complaint is one for damages proximately caused by the negligent failure of the defendant to give the customary warning before driving the ball in the direction of the plaintiff, who was then within range of the drive and unaware of the intent of the defendant to drive. Thus, the

second further answer does not state facts which would constitute a defense to this alleged cause of action, even if the answer had alleged a contractual relationship between the parties.

The third further answer purports to allege the defense of immunity to suit by reason of the provision of the North Carolina Workmen's Compensation Act, G.S. 97-9. That statute reads:

> "Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he *or those conducting his business* shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified." (Emphasis added.)

G.S. 97-10.1 provides that if the employee and the employer are subject to and have accepted and complied with the provisions of the Act, the rights and remedies thereby granted to the employee shall exclude all other rights and remedies of the employee as against the employer.

The third further answer alleges that the Carolina Country Club is a corporation and that the plaintiff was an employee of the corporation. As above stated, the pleadings do not show the relationship of the defendant to the corporation. It is merely stated that he was "enjoying membership privileges" of the Club. Assuming this to mean that he was a member of the Club, he would not thereby be the corporation and, therefore, would not be the employer of the plaintiff. Consequently, G.S. 97-10.1 has no application to the right of the plaintiff against this defendant, and G.S. 97-9 confers no immunity upon this defendant unless he was "conducting" the business of the Carolina Country Club when playing golf upon its course.

While in *Essick v. Lexington,* 232 N.C. 200, 60 S.E. 2d 106, this Court held that this statutory provision conferring immunity to suit should be liberally construed, the Court in that case went no further than to hold that the treasurer of a corporate employer and the superintendent of its plant were persons conducting its business within the meaning of this statute. In *Warner v. Leder,* 234 N.C. 727, 69 S.E. 2d 6, Denny, J., later C.J., speaking for the Court, said:

> "We hold that an officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation, and whose acts are such as to render the corporation liable therefor, is among those conducting the business of the corporation, within the purview of G.S. 97-9, and entitled to the immunity it gives; [citations omitted] and that the provision

in G.S. 97-10 [now G.S. 97-10.1] which gives the injured employee or his personal representative 'a right to recover damages for such injury, loss of service, or death from any person other than the employer,' means any other person or party who is a stranger to the employment but whose negligence contributed to the injury. * * * The Legislature never intended that officers, agents, and employees conducting the business of the employer, should so underwrite this economic loss."

In *Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610, and in *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536, we held that the immunity granted by this statute does not extend to an independent contractor, or to the employees of such independent contractor, engaged in work upon the premises of the employer of the injured plaintiff. It would surely follow that the immunity would not extend to a mere patron of the employer's business, even though such patron be also a stockholder, or otherwise a member, of the corporation which owns the business and employs the injured plaintiff.

It follows that neither the second further answer nor the third further answer states facts which, if proved, would constitute a defense to the cause of action alleged in the complaint. The motion to strike should, therefore, have been sustained as to each of these further answers. The matter is, therefore, remanded to the superior court for the entry of an order sustaining the motion to strike from the answer filed by the defendant these portions of it.

Reversed and remanded.

FRANKLIN DRUG STORES, INC., v. GUR-SIL CORPORATION.

(Filed 20 January, 1967.)

1. Pleadings § 12—

A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and all relevant inferences of fact reasonably deducible therefrom, but it does not admit inferences or conclusions of law, and will not be sustained unless the pleading is wholly insufficient or fatally defective.

2. Landlord and Tenant § 1—

An agreement under which one party erects a building on its tract of land and leases the basement of the building to another creates the relationship of landlord and tenant, which relationship governs the rights and liabilities of the parties *inter se* with respect to the leased premises and

also with respect to that portion of the premises over which the landlord retains control.

3. Landlord and Tenant § 7—

The landlord is liable for injuries or damages to a tenant resulting from a defective condition of that portion of the property remaining under the landlord's exclusive control when the landlord has notice of the defect and negligently fails to correct it.

4. Same— Complaint held to allege cause of action against landlord for negligent failure to remedy defect on part of premises over which landlord retained control.

Allegations of facts permitting inferences that plaintiff leased the basement of defendant's building, that defendant installed drains on defendant's property around the building for the purpose of draining surface waters, that the drains were insufficient, resulting in the backing up of surface waters which seeped under the basement floor and through the walls of the basement during heavy rains, that defendant was given notice of the defect and failed to remedy same, and that sometime thereafter, during a particularly heavy rain, water to a depth of almost four feet backed up, and, by its pressure, caved in the rear door, and four feet of water rushed into the leased premises, greatly damaging plaintiff's merchandise, *are held* sufficient to state a cause of action for the alleged negligence of defendant in failing to correct the defect on that part of the premises over which defendant retained control.

5. Same—

Allegations to the effect that on several occasions during heavy rains water seeped to a depth of one or two inches under the doors and through the walls of the basement leased by plaintiff so that plaintiff was forced to keep his goods off the basement floor by platform after prolonged rainfall, *held* not to establish the affirmative defenses of assumption of risk or contributory negligence on the part of plaintiff, precluding his recovery for damages later resulting when the water backed up to a depth of almost four feet, and, by its pressure, caved in the rear door, so that four feet of water rushed into the leased premises.

APPEAL by plaintiff from a judgment entered by *McLaughlin, J.*, 16 May 1966, one-week, nonjury Civil Session of GUILFORD, Greensboro Division, sustaining a demurrer to plaintiff's complaint.

Douglas, Ravenel, Hardy & Crihfield by R. D. Douglas, Jr., for plaintiff appellant.

Frazier & Frazier; Jordan, Wright, Henson & Nichols by William L. Stocks for defendant appellee.

PARKER, C.J. Plaintiff alleges in substance in its complaint: In June, 1963, defendant was the owner of a tract of real estate in the city of Greensboro known as part of the Lawndale Shopping Center, which is described by metes and bounds in the complaint. Plaintiff

and defendant entered into an agreement, under the terms of which defendant agreed to erect a building on its tract of real estate and to lease the basement of the building to plaintiff. Defendant graded its tract of land and erected a building. Defendant installed water lines for drainage at the western end or front of its tract of land, and drains at the rear or eastern end of its tract of land, so that surface water would be artificially channeled from the western end of its tract of land in an easterly direction past the building erected and on to the eastern end of the tract of land, where defendant installed an artificial drain in order that the surface water would be diverted to and into an underground conduit. By virtue of the agreement of lease, defendant was the possessor of the upper tenement, plaintiff was the possessor of the intermediate tenement, and defendant was the possessor of the lower tenement.

On 1 January 1964 plaintiff moved merchandise into the basement of the building for storage, and kept therein merchandise, goods, and supplies which it distributed from time to time to its various retail drug stores in the city of Greensboro. Plaintiff paid the rental required under the agreement.

From time to time after plaintiff went into possession of the basement of this building, it discovered that whenever there was a prolonged rainfall, water accumulated at the rear or eastern end of the building and ran under the back doors of the building onto the floor of the basement, and water came through the side walls of the building. On several occasions plaintiff, through its president and its warehouse manager, urged defendant to take steps to correct the drainage condition to prevent damage to plaintiff's stored goods. Defendant failed to correct this condition, and plaintiff found it necessary to build wooden platforms to keep its goods off the floor when it became wet after a prolonged rainfall.

In the latter part of June, 1965, in consequence of a substantial rainfall, approximately three inches of water accumulated on the floor of the basement, and water dripped from the ceiling onto plaintiff's merchandise, causing damage to plaintiff's merchandise in excess of the sum of $500. Plaintiff again demanded that steps be taken by defendant to correct the drainage from its premises onto plaintiff's premises. The water damage to plaintiff's merchandise was caused by certain pipes placed in the area of the front of the building by the defendant or its servants which were not adequate to take care of the flow of water, and the failure of defendant or its servants to provide an adequate artificial drain at the rear of the premises, which caused the accumulation and collection of surface water.

In mid-July, 1965, a heavy rainfall occurred in the city of

Greensboro, and water accumulated to a depth of almost four feet at the rear of plaintiff's premises. The said surface water surged under the rear doors of plaintiff's premises, and under the pressure of such water the rear door of the basement gave way and four feet of water rushed into plaintiff's premises greatly damaging its merchandise and goods.

Defendant was negligent in that it failed to exercise ordinary care to provide an adequate conduit into which the natural flow of upper waters were channeled, and in that it failed to provide such a conduit as to prevent leakage, seepage, or overflow, which failure caused damage to plaintiff's merchandise and property. Further, defendant was negligent in failing to use ordinary care to prevent an undue accumulation of surface water by its failure to provide an adequate drain to carry off surface water which was artificially channeled and directed to it across defendant's upper premises, past the plaintiff's intermediate premises, and onto the defendant's lower premises, and that such failure of defendant to exercise ordinary care caused the surface water to accumulate and to damage plaintiff's merchandise.

Defendant demurred to the complaint on two grounds: (1) Plaintiff is a lessee and failed to allege facts constituting a breach of any duty owed it as lessee by the defendant lessor; that plaintiff's complaint shows entry into the premises by plaintiff under a lease agreement, and fails to allege any warranty or agreement by defendant regarding drainage of the premises or safety of said premises from rising waters; and that the complaint contains no allegation that there was a defect in the drainage system on the premises which was latent in nature and known to the defendant lessor and of which the plaintiff lessee was unaware. (2) If plaintiff's complaint alleges facts sufficient to state a cause of action, the plaintiff is barred from recovery for that the complaint affirmatively shows upon its face that plaintiff was guilty of assumption of risk and contributory negligence.

Judge McLaughlin entered a judgment sustaining defendant's demurrer to the complaint.

A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and all relevant inferences of fact reasonably deducible therefrom. However, a demurrer does not admit inferences or conclusions of law. A demurrer will not be sustained unless the pleading is wholly insufficient or fatally defective. 3 Strong's N. C. Index, Pleadings, § 12.

It is manifest that the relationship between plaintiff and the defendant is that of tenant and landlord. 51 C.J.S., Landlord and

Tenant, § 1. The terms of the lease agreement are not alleged in the complaint, and if it is in writing, it is not attached to the complaint.

The gravamen of plaintiff's case is injury proximately inflicted upon it by defendant's failure to use reasonable and ordinary care, in that it negligently constructed, maintained, and used a drainage system for surface water upon property under defendant's dominion, possession and control, which was not leased to plaintiff, which caused surface water to accumulate back of the building to such an extent that it rushed into the basement leased to plaintiff and damaged its goods. There is a reasonable inference to be drawn from facts alleged in the complaint that plaintiff had the right of ingress and egress over defendant's property to the basement, but there is nothing in the complaint to indicate that plaintiff had any care for or control over defendant's drainage system.

Where a landlord leases only a portion of the premises to a tenant and retains the remainder under his control, which is the case alleged in the complaint, he is bound to use reasonable and ordinary care in managing the part over which he retains control, and is liable for negligence in respect thereof proximately resulting in injury to his tenant. A landlord is liable for injuries to the property of a tenant because of the defective condition of that property remaining under the landlord's exclusive control, which he negligently fails to correct. *Steffan v. Meiselman,* 223 N.C. 154, 25 S.E. 2d 626; *Longbotham v. Takeoka,* 115 Or. 608, 239 P. 105, 43 A.L.R. 1285, and annotation thereto; *Charlow v. Blankenship,* 80 W. Va. 200, 92 S.E. 318, 1917D L.R.A. 1149; 52 C.J.S., Landlord and Tenant, § 423 d(1) and (7); 32 Am. Jur., Landlord and Tenant, § 684, p. 555.

Steffan v. Meiselman, supra, was an action brought to recover damages for the alleged negligence of defendant in permitting or causing contaminated water to pass from a toilet under his control in an upstairs room owned and occupied by him into the leased premises of the plaintiff underneath, in which the latter operated a restaurant, making the same unfit for occupancy and injuring his business. In its opinion the Court said:

> "In the argument here addressed to the question of nonsuit, and we assume in the hearing below, counsel for the defendant relied strongly on *Leavitt v. Rental Co.,* 222 N.C. 81, and cited cases, which follows the rule adopted in *Fields v. Ogburn,* 178 N.C. 407, 100 S.E. 583; *Duffy v. Hartsfield,* 180 N.C. 151, 104 S.E. 139, and similar cases between landlord and tenant, all of which relate to *repairs on the demised premises* or conditions thereupon for which it was sought to hold the owner or land-

lord liable. That situation does not obtain here. *Steffan* did not rent that portion of the building containing the toilet and had no control of it — on the contrary, it was occupied and was under the control of the defendant. The gravamen of plaintiff's case is injury inflicted upon him by the defendant in the negligent or malicious use of his own property and the instrumentalities thereupon under his control. Defendant's liability, arising from such a source, would not be affected or alleviated by the rental contract in evidence.

"The evidence of plaintiff without doubt entitles him to go to the jury on the question of damage to his premises and property."

Charlow v. Blankenship, supra, was a suit by a tenant to recover damages for injury to the tenant's goods alleged to have been caused by reason of the defendant landlord's negligence in permitting water to leak through the ceiling into the storeroom leased by the tenant. In its opinion the Court said:

"The defendant insists that no recovery can be had for the reason that there is no express covenant in this lease of fitness of the storeroom for any purpose, and the law does not imply such a covenant, and further, that there is no covenant upon the part of the lessor, either express or implied, to make repairs. It is quite true that, in the absence of fraud or concealment on the part of the lessor, there is no implied covenant in a lease that the leased premises are tenantable or fit for the purpose for which the tenant intends to use them. [Citing numerous authorities.] Neither is there any obligation upon the landlord to make repairs to the leased premises during the continuance of the lease in the absence of an agreement to do so. [Citing numerous authorities.]

"But this doctrine has no application to the case presented here. There is no question of fitness of the leased premises, nor is there any claim for damages asserted because of a failure to make repairs upon the leased premises. The contention of the plaintiff is that the defendant has been negligent in the use and care of that part of the building remaining in his control. The tenant of a part of a building has a right to rely upon the owner of the building exercising due and ordinary care in the use of that part of it remaining in his possession. The tenant has no access to any part of the building except what he has leased, and the landlord, as to those parts of the building of which he retains the possession and control, is under obligation to the tenant not to so carelessly or negligently use the same as to

injure his tenant. He must exercise reasonable and ordinary care in the use of his premises, and, if he fail to do so, he is liable to a stranger for an injury to his property resulting therefrom. *Walker v. Strosnider,* 67 W. Va. 39, 67 S.E. 1087, 21 Ann. Cas. 1. Because the injury is suffered by a party who is his tenant does not relieve him from the obligation to pay the damages which result from his negligence. The tenant cannot prevent his landlord from using the part of the premises of which he retains the control as he pleases. He has no authority to go upon them and make any repairs that may be needed to prevent injury to his property, and to say that the landlord in such case is not liable for an injury occasioned by the defective condition of that part of the property remaining under his exclusive control, which he negligently refuses to correct, would be to say that a landlord in a case like this may ruin his tenant by his negligence without any obligation to make reparation."

In *Toole v. Beckett,* 67 Me. 544, 24 Am. Rep. 54, the facts were these: The plaintiff hired the lower portion of a building of the defendant for a store, the upper portion remaining in the possession of the defendant and under his care and control. A rain storm poured a great volume of water between the roof and the chimney down upon the plaintiff's goods, causing some injury. The charge was that the defendant was guilty of negligence, either on account of the original construction of the roof or in the way and manner of maintaining it. The case, both of law and fact, was referred to the court. The Court in its opinion said:

"It is well settled that in a lease of real estate no covenant is implied that the lessor shall keep the premises in repair or otherwise fit for occupation. *Libbey v. Tolford,* 48 Me. 316. But that is not this case. Here the plaintiff had no care or control of the roof and had no right to intermeddle with it. The defendant had such care and control, for the benefit of himself and all his tenants. By implication, he undertakes so to exercise his control as to inflict no injury upon his tenants. If he does not exercise common care and prudence in the management and oversight of that portion of the building which belongs to his especial supervision and care, and damages are sustained by a tenant on that account, he becomes liable for them. He is responsible for his negligence."

Carter v. Realty Co., 223 N.C. 188, 25 S.E. 2d 553, cited and relied on by defendant in its brief, is factually distinguishable. That

case concerned a landlord's duty to his tenant with respect to a common passageway in a house consisting of several tenements.

Construing the complaint liberally, as we are required to do, G.S. 1-151, we are of opinion, and so hold, that while the complaint is not a model for clarity, the complaint is not so wholly insufficient or so fatally defective that it fails to state a cause of action against defendant, and the demurrer should be overruled, unless it affirmatively appears from facts alleged in the complaint that plaintiff as a matter of law is guilty of assumption of risk or contributory negligence, or both, so as to bar any recovery upon plaintiff's part.

Plaintiff alleged in its complaint that when defendant failed to correct this condition, it found it necessary to build wooden platforms to keep its goods off the floor when it became wet after a prolonged rainfall. This cause of action was occasioned by a heavy rainfall that occurred in the city of Greensboro in mid-July, 1965, causing water to accumulate to a depth of almost four feet at the rear of plaintiff's premises, and this surface water surged into the rear doors of the plaintiff's premises and under the pressure of such water the rear door of the basement gave way and four feet of water rushed into plaintiff's premises greatly damaging its merchandise and goods. Plaintiff as tenant took possession of the basement on 1 January 1964. According to the allegations of the complaint the basement had not been flooded with several feet of water until mid-July 1965.

This is said in 52 C.J.S., Landlord and Tenant, § 417 h(2), p. 57:

> "Where the tenant or injured person has knowledge of the defective condition of the premises and continues thereafter to occupy them, or to use the defective portion, he may be considered to have assumed the risk, and in case of injury resulting from such defects, be held guilty of contributory negligence. Recovery will not be allowed where the tenant was aware of the defect causing the injury and the defect was such as to indicate to a reasonable-minded person that use of the defective portion of the premises was apparently and imminently dangerous.
>
> "However, previous knowledge of the defective condition and continued occupancy or use of the premises is not necessarily an assumption of risk or contributory negligence, especially with respect to portions of the premises retained under the control of the landlord."

It is our opinion, and we so hold, that plaintiff has not pleaded itself out of court on the theory of assumption of risk or contribu-

tory negligence. Here we are concerned with pleadings. What the evidence will show remains to be seen.

The judgment sustaining the demurrer was improvidently entered, and is

Reversed.

E. T. WALTON, AS ADMINISTRATOR OF ELLEN LOWDERMILK CLARK, DECEASED, PETITIONER, v. NORA CLARK CAGLE AND HUSBAND, ELSIE CAGLE, MISS IOLA ETHEL CLARK, ZONA CLARK WRIGHT AND HUSBAND, ARTHUR H. WRIGHT, HOBERT RAY CLARK AND WIFE, EVA CLARK, WILLIAM CLYDE CLARK AND WIFE, MRS. WILLIAM CLYDE CLARK, HELEN CAMPBELL BARRIER AND HUSBAND, HOWARD BARRIER, J. M. CAMPBELL, JR., AND WIFE, EUNICE CAMPBELL, CHARLES L. CAMPBELL AND WIFE, MARCELLE CAMPBELL, FRANK CAMPBELL AND WIFE, LARUE CAMPBELL, DOUGLAS RAY CAMPBELL (SINGLE) (MINOR), REBA ALICE CLARK, (SINGLE), KERMIT H. CLARK AND WIFE, MOZELLE CLARK, MELBA E. CLARK, (SINGLE), LOWELL CLARK AND WIFE, JOSEPHINE CLARK, DEFENDANTS, AND WILLIAM MAXTON WRIGHT, ADMINISTRATOR OF THE ESTATE OF ZONA CLARK WRIGHT, WILLIAM MAXTON WRIGHT, INDIVIDUALLY, AND WIFE, FRANKYE M. WRIGHT, LOUISE W. PARKS, AND HUSBAND, RALPH PARKS, MARGARET WRIGHT COX AND HUSBAND, WADE COX, EVERETTE BURTON WRIGHT AND WIFE, JANETTA K. WRIGHT, THURMAN MARSHALL WRIGHT AND WIFE, LOUISE WRIGHT, BARBARA WRIGHT MOLLOY AND HUSBAND, VERNON MOLLOY, RAY WHEELER AND WIFE, DALPHINE WRIGHT WHEELER, ADDITIONAL DEFENDANTS.

(Filed 20 January, 1967.)

1. Judicial Sales § 1—

The court-appointed commissioner to conduct a judicial sale is empowered only to sell the land and distribute the proceeds, and has only such powers as may be necessary to execute the decree of the court, and therefore is not under duty to show the boundaries of the land or the means of ingress and egress to the property, the remedy of a prospective purchaser if he wishes a survey being by motion under G.S. 1-408.1.

2. Judicial Sales § 4—

The doctrine of *caveat emptor* applies to a judicial sale, and while the court has equity jurisdiction to protect the purchaser from imposition because of fraud or mistake, when the evidence discloses that the parties had equal opportunity to discover the facts, that the description set out in the petition for sale was of record for more than a year prior to the bid, and that the purchaser was familiar with the property and did not ask for a survey, such purchaser may not seek relief from his bid on the ground of shortage in acreage or lack of access to the property.

3. Judicial Sales § 7; Tender—

Where the last and highest bidder at a judicial sale is served notice that the commissioner would move that he comply with the terms of his bid, and then gives notice of his refusal to do so, tender of deed to him by the commissioner is not required, since the law does not require the doing of a vain thing.

4. Evidence § 25—

The refusal of the trial court to admit in evidence letters offered by a party will not be disturbed when such party offers no evidence that such letters were genuine or authentic.

5. Judgments § 5—

A judgment in a special proceeding, as well as in a civil action, may be either interlocutory or final.

6. Same; Judgments § 4; Judicial Sales § 7—

Order issued in a judicial sale proceeding that upon refusal of the last and highest bidder to comply with his bid the land should be resold and that the defaulting bidder be held liable for the costs and for any amount that the final sale price is less than his bid, *is held* not a void conditional judgment, since it is unequivocal and the determination of the liability is a simple matter of arithmetic and an administrative duty, and such order is a final judgment deciding the matter on its merits without need for further direction of the court. G.S. 1-339.30(e).

7. Appeal and Error § 18—

Upon the refusal of the last and highest bidder at a judicial sale to comply with his bid, the court may properly order him to file a *supersedeas* bond on his appeal from the court's order of resale and order that he be held liable for costs of resale and any amount by which the final sale price is less than his bid.

8. Judgments § 6—

Jurisdiction over an action is not ended by the rendition of a final judgment, but the court retains jurisdiction for the purpose of execution, for recall of execution, or for the determination of proper credits or the amount due on the judgment.

APPEAL by defendant William M. Wright from *Latham, S.J.*, July-August 1966 Session of RANDOLPH.

Special proceeding to sell real estate to make assets to pay debts.

E. T. Walton, Administrator of the estate of Ellen Lowdermilk Clark, filed his petition for sale to make assets on 31 August 1962. Paragraph 4 of the petition is as follows:

"4. That a description of all the legal and equitable real estate of the decedent and the estimated value is as follows (said real estate being located in Richland Township, Randolph County):

BEGINNING at a rock pile in I. F. Hancock's line; running thence East along said line crossing the branch 34.25 chains to

a stone in Solomon Williams' line; thence North 27 degrees East 27 chains to a stone in Polly King's line; thence West 16 chains to a dogwood; thence South 55 degrees West 1 chain to a stone; thence North 80 degrees West 1.50 chains to a post oak; thence North 40 degrees West 0.75 chains to a stone, formerly a sweet gum; thence West 24.50 chains along Solomon Williams' line to a stone, F. E. Smith and W. A. Smith corner; thence South along said line 24 chains to the beginning, containing 84½ acres, more or less.

The estimated value of said property is $2,500.00."

One of the heirs, Zona Clark Wright, filed an answer denying that it was necessary to sell to make assets. Before trial, Zona Clark Wright died and defendant appellant was appointed administrator of her estate. By order dated 13 February 1965, Wright, individually and as administrator, was made an additional defendant along with other heirs of Zona Clark Wright. As additional defendant, he filed answer on 22 March 1965, admitting "that the real estate described in Paragraph 4 of the petition is correct," and alleging, among other things, the value of the property to be nearer $6,000.00 than $2,500.00. Upon submission of the issues, the jury found that it was necessary to sell the property to make assets, and judgment was entered appointing petitioner E. T. Walton commissioner to sell the real estate described in the petition. After sale and numerous resales, defendant Wright on 11 March 1966 became the last and highest bidder at the price of $5,245.38. The sale was duly confirmed on 15 July 1966. Appellant did not comply with the terms of sale, and, upon motion of petitioner and after due notice, hearings were held before the clerk of superior court, who entered an order of resale as provided by G.S. 1-339.30, taxing appellant with the costs thereof, and further ordering that appellant be charged with any difference between his bid price and the resale price, should it be less. Appellant filed exceptions and appealed to superior court. The appeal was heard by Latham, S.J., who disallowed appellant's exceptions, confirmed the clerk's order of resale, and dismissed the appeal. From this judgment appellant appealed to Supreme Court. The trial court set an appeal bond of $200.00 and a *supersedeas* bond of $2,500.00.

Miller and Beck and Thomas L. O'Briant for petitioner appellee.
Ottway Burton for defendant appellant.

BRANCH, J. G.S. 1-339.30 provides, in part: "(d) When the highest bidder at a public sale of real property fails to comply with his bid within ten days after the tender to him of a deed for the

property or after a bona fide attempt to tender such deed, the judge or clerk having jurisdiction may order a resale. . . . (e) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales."

Appellant contends that the court-appointed commissioner should have shown the boundaries of and the means of ingress and egress to the property sold at judicial sale. This contention is without merit.

"A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz., to sell the land and distribute the proceeds to the parties entitled thereto. He has no authority and can exercise no powers except such as may be necessary to execute the decree of the court." *Peal v. Martin,* 207 N.C. 106, 176 S.E. 282.

In the case of *Johnson v. Lumber Company,* 225 N.C. 595, 35 S.E. 2d 889, an action to restrain the cutting of timber and for damages, the plaintiff alleged that by consent order the clerk appointed a commissioner to sell timber at private sale, allowing not over nine months within which to cut and remove, and that the commissioner reported sale of the timber, allowing twelve months within which to cut and remove same. The Court held: "If the original order of sale was a consent decree, as alleged, the court had no power to change its terms without consent of all parties, except on the ground of fraud or mistake. (Citing cases) And the commissioners could convey only in accord with the terms of the order. (Citing cases) The purchasers were chargeable with notice of the proceeding under which they purchased and were bound by the limitations upon their rights appearing on the face of the record."

The order of confirmation in this cause "authorized and directed (the commissioner) to execute and deliver to the purchaser a good and sufficient deed to said land upon the receipt by said commissioner of the said purchase price, and the funds so received by him be held and disbursed as provided by law and the further orders of this court; and that thereafter the commissioner make his final accounting to this court." The commissioner was without authority to do more.

G.S. 1-408.1 provides: "In all civil actions and special proceedings instituted in the superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned, the clerk may, if, in his opinion, all parties to the action or proceeding will benefit thereby, order a survey of the land involved, appoint a surveyor for this purpose, and fix a reasonable fee for his services, which fee, along with other costs of the survey, shall be taxed as a part of the costs in such action or

proceeding. Any dissatisfied party shall have the right of appeal to the judge, who shall hear the same *de novo.*"

The record does not reveal that appellant at any time by motion, request or suggestion, followed the course which so clearly provides the remedy for his complaint. The statute provides an adequate remedy at law, which the appellant ignored. He should not now be heard to complain that the court did not provide him with the right to survey and thereby establish boundaries.

The court considered the liability of a bidder at a judicial sale in the case of *Eccles v. Timmons,* 95 N.C. 540, where the defendant purchased certain land at commissioner's sale and did not comply with the terms of purchase. Upon motion filed by the commissioner for summary judgment, the defendant set up defense of an imperfect title. Title to the property was set out in the petition and a copy of deed from which title was derived was annexed to the petition. The trial court rendered judgment against the defendant. Upholding this judgment against the purchaser, the Court stated: "It is not a case when, upon the face of the pleadings, a perfect title purports to be sold that is afterwards discovered to be defective, when the Court will relieve and not compel the purchaser to pay for what he does not get. But the true state of the title appears in the averments in the petition itself, so that every bidder may know by examination what estate he will acquire in the land, and his bid must therefore be regarded as his own estimate of the value of what he may buy and the Court may direct thereafter to be conveyed. . . . The petition in the present case truly represents the interests of the parties to the proceeding, and the purchasers, presumed to know the law, buy such as they possess, and therefore ought to pay his bid. . . . (I)t is not material to decide whether a full and perfect title can be transmitted to the appellant, inasmuch as he gets what he bought, and there are no equitable circumstances which entitle him to the relief asked."

In the case of *Smathers v. Gilmer,* 126 N.C. 757, 36 S.E. 153, the executors of the estate of James R. Love contracted to sell a certain tract of land owned by Love to one Welch. Welch in turn transferred his right to Richard Gray. Gray received a deed from the executors of Love for the land, which was described therein by courses and distances, and "containing 500 acres more or less." Upon the death of Gray, his heirs had a commissioner appointed to sell the land, and plaintiff became purchaser of the land, which sale was confirmed by the court. Deed was delivered to him by the commissioners containing the same definite description of courses and distances, "containing 500 acres more or less." Upon discovering that

the land contained only 262 acres, plaintiff brought action against the defendant trustee and administrator of the estate of Love. The evidence showed that the sale from Love's executors to Gray was a solid body of land and not by the acre. After affirming the judgment in favor of the defendant, the Court said:

> "The plaintiff had two opportunities for protection: 1. A simple calculation, according to the definite boundaries, courses and distances, appearing on the record from the day of the registration of Gray's deed for over ten years before he purchased. 2. To require proper covenants in his deed for his protection.
>
> "Failing to avail himself of those means, he purchased at his own risk and subject to the principle of *caveat emptor*. When each party has equal means of information that principle applies, and the injured party is without remedy. If, however, false representations are made, on which the other party may reasonably rely, they constitute a material inducement to the contract, and the injured party has acted with ordinary prudence, courts of justice will afford relief. Ordinarily, the maxim of *caveat emptor* applies equally to sales of real and personal property, and will be adhered to where there is no fraud."

These principles were again recognized in the recent case of *Glass Company v. Forbes*, 258 N.C. 426, 128 S.E. 2d 875, when our Court held that while *caveat emptor* applies to a judicial sale, the court has the power in its equity jurisdiction to protect the purchaser from imposition because of fraud or mistake, and may relieve him of his obligation when the ends of justice so require.

In the instant case the purchaser was a party to the proceeding. He was aware of the description set out in the petition for more than a year prior to his bid. He was familiar enough with the property to verify an answer stating "that the real estate described in Paragraph 4 of the petition is correct" and that the value of the property is nearer $6,000.00 than $2,500.00. He failed to avail himself of statutory remedy for survey. The parties had equal means of information, and there is no evidence of fraud or mistake. According to the record, it was an "arms-length" transaction consisting of an offer to purchase and an acceptance. The appellant is bound thereby.

The appellant complains that there was no tender of deed by commissioner before entry of the order of resale. The commissioner was required by the applicable statute to tender a deed for the property or make "a bona fide attempt to tender such deed." There

was a finding by the clerk that the commissioner had made a bona fide attempt to deliver the deed. The appellant was served with notice on 27 June 1966 that the commissioner would move on 12 July 1966 that appellant comply with the terms of sale. This indicated that the commissioner, who was under order of court to convey upon receipt of purchase price, stood ready, willing and able to comply with the terms of the order. No further tender was necessary when appellant failed to comply, since the law does not require the doing of a vain thing. *Millikan v. Simmons,* 244 N.C. 195, 93 S.E. 2d 59.

Appellant further contends that the trial court erred in refusing to admit in evidence two letters offered by appellant. Defendant offered no evidence as to whether the letters were genuine or authentic. It is well recognized law that before any writing will be admitted into evidence it must be authenticated in some manner, *i. e.,* its genuineness or execution must be proved. Stansbury, North Carolina Evidence, 2d Ed., Ch. XIII, Authentication of Writings, § 195. See also *Arndt v. Insurance Co.,* 176 N.C. 652, 97 S.E. 631.

We do not find merit in appellant's contention that the trial court erred in setting a *supersedeas* bond because there was no judgment against appellant.

A final judgment is one which decides the case upon its merits without need of further directions of the court; an interlocutory order or judgment is provisional or preliminary, and does not determine the issues in the action but directs some further proceedings preliminary to final decree. A judgment in a special proceeding as well as in a civil action may be either interlocutory or final. *Russ v. Woodard,* 232 N.C. 36, 59 S.E. 2d 351.

A conditional judgment is one whose force depends upon the performance or nonperformance of certain acts to be done in the future by one of the parties, and such a judgment is void. *Simmons v. Jones,* 118 N.C. 472, 24 S.E. 114.

The judgment entered by the court is an unequivocal and positive order which determined the rights of appellant Wright as a bidder. It is a final determination of his liability for costs of resale and a final fixing of liability for any difference between his bid and the bid received at the ordered resale. The determination of the amount is a simple matter of arithmetic and a purely ministerial duty.

The court has authority to implement the judgment entered. "An action in court is not ended by the rendition of a judgment, but in certain respects it is still pending until the judgment is satisfied. It is open to motion for execution, for the recall of an execution, to determine proper credits and for other motions affecting the exist-

ence of the judgment *or the amount due thereon.*" (Emphasis ours) *Finance Co. v. Trust Co.*, 213 N.C. 369, 196 S.E. 340.

Appellant's exception to other evidentiary questions has been carefully examined and we find no prejudicial error.

Affirmed.

STATE v. WARREN F. ARSAD.

(Filed 20 January, 1967.)

1. Criminal Law § 87—

Where the State's case is based on evidence tending to show that defendant feloniously entered a home and kidnapped an occupant thereof, and with the kidnapped victim as a decoy, forcibly took an automobile from a passerby, so that the evidence of the whole affair is pertinent and necessary to establish identity of defendant as the perpetrator of the offences, the three indictments for feloniously entering a dwelling, kidnapping, and common law robbery are properly consolidated for trial.

2. Criminal Law § 41—

Where the evidence discloses that defendants, wearing masks, feloniously broke into a dwelling, kidnapped an occupant thereof, and took a car from a passerby for their getaway, it is competent for the State to introduce in evidence disguises, clothing, guns and ammunition, properly identified as being in defendants' possession when they set out on the criminal escapade, and evidence of their respective heights and that they left an accomplice to await them in a car some distance from the scene of the crime, since all the circumstances have a direct bearing in proving identity or guilt.

3. Kidnapping § 2; Burglary and Unlawful Breakings § 4; Robbery § 4—

Circumstantial evidence in this case held sufficient to be submitted to the jury on the question of defendant's guilt of kidnapping, felonious entry into a dwelling, and common law robbery.

4. Criminal Law § 156—

Objection to a long excerpt from the charge, an exception to instructions addressed to separate and distinct legal aspects, and exceptions which fail to point out any specific instruction deemed objectionable, are ineffectual as broadside exceptions.

APPEAL by defendant from *Carr, J.*, March 7, 1966 Session, CUMBERLAND Superior Court.

The defendant was convicted on three felony charges which were consolidated and tried together over defendant's objection. In No. 21487 the indictment charged the felonious entering into the dwelling house of Sergeant McPhail near Fayetteville. In No. 21489 the

defendant was charged with common law robbery in the taking of one white Ford Fairlane automobile from the possession of one John D. Gautier. In No. 21493 he was charged with kidnapping Marie McPhail.

All the offenses are alleged to have been committed on November 6, 1965. The evidence disclosed that all were parts in a connected continuous escapade.

The State's evidence is here summarized: Pfc. Ronald K. Burford testified that on November 6, 1965, he was a member of the U. S. Marine Corps stationed at Camp Lejeune. Sgt. Ernest A. Jones and Pfc. Warren Arsad, the defendant, were members of Echo Company, Marine Corps, Camp Lejeune. About 1:00 p.m. on November 6, 1965, Burford, Sgt. Jones, and Arsad left Lejeune in Jones's automobile for Fayetteville. Jones carried Burford's 45 caliber automatic pistol under his sweater. Arsad had about a box and a half (75) 45 caliber Colt cartridges and put them in the glove compartment of the automobile. Near dark Sgt. Jones stopped on a dirt road near Fayetteville. When he opened the trunk to the automobile, "I saw two shotguns, a pistol, P-38, a little jump gun, a carbine with a broken stock . . . I saw some false faces, at least a mask, a trench coat, a light weight overcoat." The three transferred the weapons, ammunition, clothing, and disguises from the trunk to the back seat. Jones and Arsad put on the top coats, took the other pistol, two of the guns, and left Burford with instructions to wait for an hour and if they failed to return he should go back to camp. He waited for more than an hour, then returned to Camp Lejeune.

While on the stand as a State's witness, Burford identified a number of State's exhibits: "No. 1, my 45 caliber pistol issued to me as a member of the Marine Corps. The last time I saw it on November 6, 1965, Warren Arsad had it stuck down in his trousers. I can identify State's Exhibit No. 2 as the 30 caliber carbine which Sgt. Jones had. I can identify State's Exhibit 3 as the shotgun Arsad had . . . Exhibit 4 as the belt which Sgt. Jones gave Arsad, along with ammunition while we were on this dark road. . . . Arsad strapped the belt around his waist. I can identify State's Exhibit 5 as one of the masks that one of the men had, but I can't remember who had it. I can identify State's Exhibit 6 as the other mask which the men had . . . I can identify State's Exhibit 7 as the gloves both Arsad and Jones had when they left the car the last time . . . Exhibit 8 as one of the coats . . . Exhibit 9 as the ski hoods . . . brought by Jones and Arsad . . . Exhibit 10 as the P-38 pistol Sgt. Jones had in his shoulder holster." All the foregoing items were Marine Corps equipment.

Marie McPhail, age 14, testified for the State. She is the daugh-

ter of Sgt. McPhail and lives with her father, mother, grandmother, brothers and sisters in Hope Mills near Fayetteville. On the night of November 6, 1965, Sgt. McPhail was not at home. About eight o'clock in the evening, witness went to the back porch where she saw two masked and armed men crouched near the steps. They grabbed her, pushed her in the room where they forced her and the other members of the family to lie on the floor, tied them with cords and neckties, and proceeded to search the house. One of the men was short and the other taller. The short one did most of the talking. They disconnected the telephone, took a gun or two and some ammunition belonging to Sgt. McPhail. They broke lamps and upset furniture. They forced Marie McPhail to accompany them to the road near the house where they instructed her to flag a passing automobile. They concealed themselves behind some bushes until John Gautier and a companion, in a white Ford Fairlane, saw Marie and stopped. She was crying. The armed and masked men at gunpoint took the white Ford (valued at $1,200.00). They fired shots at Gautier. They wore clothing as described in detail by Sgt. Burford and by Mrs. McPhail.

The sheriff's office was alerted. Road blocks were set up. Soon a patrol car picked up the white Ford about two and one-fourth miles from the McPhail home, and gave chase. One of the men in the Ford fired on the officer a number of times. Six bullets pierced the windshield. The officer's car was disabled as a result of the bullet holes in the radiator and he lost contact. Other officers gave chase and also engaged in a gun battle in which the fleeing men fired an estimated 50 to 100 shots at the pursuing officers. One of the deputies recognized Jones as one of the two men in the white Ford which temporarily eluded them. A short distance down the road, however, the officers discovered it in the ditch. A search of the nearby woods resulted in the arrest of Jones and Arsad. They were taken into custody about one-quarter of a mile down a dirt road from the abandoned automobile. The officers took from them the several exhibits identified by Sgt. Burford. These were kept and the identification made at the trial.

Mrs. McPhail and Marie McPhail gave descriptions of the way the men were dressed, disguised and armed, which tied in with the other descriptions. Sgt. Burford testified that Sgt. Jones is about five feet nine inches tall and the defendant Arsad three or four inches taller.

The jury returned a verdict of guilty as charged in each of the three cases. In No. 21487 the court imposed a prison sentence of 10 years; in No. 21489 a sentence of 8-20 years to begin at the expiration of the sentence in 21487; and in No. 21493 a sentence of five

years to run concurrently with the sentence in 21487. The defendant was permitted to prosecute his appeal as a pauper. He was represented at the trial and on this appeal by able counsel appointed by the court.

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

Arthur L. Lane for defendant appellant.

HIGGINS, J. The objection to the consolidation of the three cases for trial is not sustained. The felonious entry into the McPhail home, the kidnapping of Marie McPhail, and the forcible taking of the white Ford Fairlane in which the perpetrators attempted to make their getaway were so connected and tied together as to make the three offenses one continuous criminal episode. The evidence of the whole affair is pertinent and necessary to establish the identity of the appellant as one of the guilty parties. The three charges were properly consolidated and tried together. G.S. 15-152; *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; *State v. Combs,* 200 N.C. 671, 158 S.E. 252. Objection based on the consolidation is without merit.

The objections to the admission and exclusion of evidence were properly overruled. The separate facts and circumstances tie in, fit, and complement each other. The several incidents taken together furnish ample proof the appellant was the tall man involved. The evidence of Marie McPhail makes out a case against the short and the tall perpetrators. The disguises prevented her from identifying them as Jones and Arsad. The State, therefore, offered proof of the many related facts and circumstances to establish their identity.

Arsad and Jones were members of the Marine Corps. They possessed clothing, disguises, guns, and ammunition when they left Lejeune in the afternoon of November 6. The guns and equipment were the property of the Marine Corps. Sgt. Burford gave detailed descriptions of these items and specifically identified them at the trial. His testimony discloses that Arsad and Jones possessed this equipment, including the disguises, when they left the witness near the McPhail home shortly before 8:00 p.m. on November 6. These men instructed the witness to wait an hour and if they failed to return he was to go back to camp without them. The meeting failed as a result of their arrest. The officers took the disguises, gloves, arms, and ammunition from Jones and Arsad at the time of the arrest. These articles were produced in court with the information that they were taken from the possession of Jones and Arsad.

The sum total of the circumstances clearly implicate the appellant. Properly admissible are all circumstances which cast a direct,

though feeble light on the ultimate facts in issue (guilt and identity.) *State v. Stone,* 240 N.C. 606, 83 S.E. 2d 543; *State v. Payne,* 213 N.C. 719, 197 S.E. 573; *State v. Lawrence,* 196 N.C. 562, 146 S.E. 395; *State v. Brantley,* 84 N.C. 766. The circumstances which Judge Carr permitted the State to introduce in evidence were properly admissible. Together they make out a case for the jury. *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

The defendant has brought forward 26 exceptions to the charge. In some instances the objection is taken to half a page or more; and frequently a single exception includes instructions addressed to separate and distinct legal aspects of the crimes charged. Such exceptions are broadside. Many others fail to point up any specific instructions deemed objectionable. These likewise are broadside. Nevertheless, as is not unusual in grave cases, we have reviewed the charge. The instructions given to the jury were clear, full, and in accordance with approved appellate procedure.

No error.

LOUISE L. LENTZ v. DR. FRANK A. THOMPSON, JR.

(Filed 20 January, 1967.)

1. Physicians and Surgeons § 11—

A surgeon is not an insurer, and in order to recover for malpractice, plaintiff must offer evidence sufficient to permit a legitimate inference that the surgeon failed to possess the required skill and ability, or that he failed to act according to his best judgment and in a careful and prudent manner in performing the operation in suit, the sufficiency of the evidence being a question of law for the court.

2. Physicians and Surgeons § 16— Evidence held insufficient to show negligence on part of physician in severing accessory nerve during operation.

Where all of the evidence tends to show that defendant was an able, careful and meticulous surgeon, that he was engaged to remove enlarged lymph glands or nodes from plaintiff's neck for pathological test for malignancy, which required that the glands or nodes be removed intact without severing or breaking the outside covering of the diseased nodes, that the nodes were removed intact, together with testimony of plaintiff's own expert that in such operation there was inherent risk of injury to or severance of the spinal accessory nerve, *is held* insufficient to be submitted to the jury on the issue of the surgeon's negligence, notwithstanding the evidence supports an inference that the surgeon severed plaintiff's spinal accessory nerve during the operation.

LENTZ *v.* THOMPSON.

APPEAL by plaintiff from judgment of involuntary nonsuit entered by *Latham, S.J.*, June, 1966 Session, CABARRUS Superior Court.

The plaintiff alleged that the defendant, as her surgeon, undertook to perform an operation for the removal of two enlarged nodes or glands from the left side of her neck. In performing the operation he severed the spinal accessory nerve. She alleged negligence in three particulars: (1) He failed to advise the plaintiff of the hazards of the operation; (2) he failed to locate the nerve in the region of the operation and avoid severing it; (3) after the severance he failed to discover and repair the damage.

The defendant, by answer, admitted he performed the operation on the plaintiff and removed two enlarged malignant glands. He denies that he severed the spinal accessory nerve or that he had any knowledge of any injury to it. He alleged the nerve has no constant anatomical relationship to the enlarged glands and, in their diseased condition, if the nerve was severed, it was so concealed by the surrounding tissue that its presence in the operating area was not discoverable, and any damage to it by the operation was not detected.

The plaintiff called and examined as her expert witnesses Dr. Thompson, the defendant, Dr. Barringer, her family physician, who had advised the exploratory operation, and Dr. Heinig, who performed the exploratory operation one year later and discovered the ends of the accessory nerve imbedded in the scar tissue formed in the healing process after Dr. Thompson's operation.

The defendant called and examined the pathologist, Dr. Williams, who completed the biopsy which disclosed the malignancy of the enlarged glands. The defendant also called Dr. Bailey and Dr. Floyd.

The evidence of the experts for both parties was free from material conflict. All who testified on the subject agreed the removal of the diseased nodes by surgery was required; that the removal process required the utmost care to prevent the breaking or rupturing of the shell or outer covering of the nodes because of the danger of spreading the infection or malignancy to surrounding areas. All agreed that the accessory nerve is very small and its course indefinite and wandering in the area of the operation. Because of the enlargement of the diseased glands the final stages of the removal process required that the gland be lifted up and separated from surrounding tissue without a good view of the bottom of the gland.

The evidence disclosed that the nodes or glands, in their normal condition, are about the size of a pinhead. Those removed by Dr. Thompson were oval in shape, one the size of a "nickel" and the

other the size of a "ten-cent piece." They were imbedded from a half-inch to an inch below the surface of the skin.

The pathologist, Dr. Williams, testified, "These were intact nodes, perfectly removed." "I have observed him (Dr. Thompson) at work in the operating room of Cabarrus Hospital for 16 years. In my opinion he is a very able, capable, and meticulous surgeon."

Dr. Bailey testified: "There is a very definite inherent danger that applies, regardless of the care and skill of the operating physician."

The plaintiff's evidence disclosed that after the operation she had pain in her shoulder and the normal use of her left arm and shoulder became affected. About one year later Dr. Heinig performed an exploratory operation, in the course of which he discovered the ends of the accessory nerve imbedded in the scar tissue developed in the healing process after Dr. Thompson's operation. The severed ends of the nerve were approximately ¼ inch apart. The left shoulder and arm muscles had suffered some atrophy on account of the severed nerve. Dr. Heinig expressed the opinion that the severance occurred at the time of the first operation. He testified on cross-examination: "It is common knowledge in medicine, in an operation for removal of enlarged lymph glands from the posterior cervical triangle of an adult female for biopsy purposes, there is an inherent risk of injury to or severance of the spinal accessory nerve when the operation is performed in accordance with approved medical and surgical practices in the locality of Cabarrus County."

Dr. Barringer, for the plaintiff, testified, "I made arrangements for her to be admitted to the hospital on my service . . . I wanted the surgeon to physically remove the nodes so that the pathologist could help me make the diagnosis. That is all I wanted the surgeon to do."

At the close of the evidence the court entered judgment of nonsuit and dismissed the action. The plaintiff, having preserved her exceptions, appealed.

D. D. Smith, Hobart Morton, Robert L. Warren for plaintiff appellant.

Carpenter, Webb & Golding for defendant appellee.

HIGGINS, J. In passing on the sufficiency of the evidence to go to the jury, we must assume that Dr. Thompson severed the plaintiff's spinal accessory nerve during the operation for the removal of the malignant glands. The evidence permits that finding. Some-

thing more is necessary, however, to establish the defendant's civil liability. All the experts who testified in the case for both parties emphasized the necessity of protecting the covering or shell over the diseased nodes during the removal in order to prevent the spread of infection which a break or leak in the covering would permit. In the removal procedure, therefore, the intact separation of the node from its surroundings requires the pressure to be applied on the surroundings rather than on the body of the node. According to the evidence the surroundings consist of tissues and muscles, and fatty substances which are interlined with blood vessels. These must be cut and sutured. According to the defendant's expert, Dr. Heinig, in performing the biopsy there is "an inherent risk of injury to or severance of the accessory nerve when the operation is performed in accordance with approved medical and surgical procedures."

In order to warrant a jury in finding liability on the part of the surgeon, negligence must be established by the evidence. In order to escape nonsuit, evidence sufficient to permit a legitimate inference of facts constituting negligence must be offered. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356. Ordinarily, the Court must determine as a matter of law whether the evidence in its light most favorable to the plaintiff is sufficient to permit legitimate inference of the facts necessary to be proved in order to establish actionable negligence. *Construction Co. v. Board of Education,* 262 N.C. 295, 136 S.E. 2d 635. "It is the duty of the court to allow the motion (nonsuit) in either of two events: First, when all the evidence fails to establish a right of action on the part of the plaintiff; second, when it affirmatively appears from the evidence as a matter of law that the plaintiff is not entitled to recover." *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234; *Walker v. Story,* 256 N.C. 453, 124 S.E. 2d 113. However, as stated by Barnhill, C.J., in *Kennedy v. Parrott,* 243 N.C. 355, 90 S.E. 2d 754, ". . . where the conduct relied on rests on judgment, opinion, or theory, such as in case of a surgeon performing an operation, the ordinary rules for determining negligence do not prevail. The reason is that when one who possesses the requisite skill and ability acts according to his best judgment and in a careful and prudent manner he is not chargeable with negligence. *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762; *Jackovach v. Yocom,* 237 N.W. 444, and authorities cited. See also, Annos. 26 A.L.R. 1036; 53 A.L.R. 1056; and 139 A.L.R. 1370. . . . Furthermore, proof of an error of judgment and nothing more will not suffice."

In *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861, Lake, J., for the Court, said: "The duty which a physician or surgeon owes his patient is determined by the contract by which his services are

engaged. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356. Ordinarily, he is not an insurer of the success of his treatment of or operation upon the patient and, in the absence of proof of his negligence in treatment of the patient, or of his failure to possess that degree of professional knowledge and skill ordinarily had by those who practice that branch of the medical art and science which he holds himself out to practice, he is not liable in damages even though the patient does not survive the treatment or emerges from it in worse condition than before."

In the instant case the family physician had the plaintiff admitted to the hospital "on my own service," for the purpose of having the enlarged glands removed. He selected Dr. Thompson to perform the surgery. The plaintiff approved the selection. Dr. Barringer testified he wanted the surgeon to "physically remove the nodes so that the pathologist could help me make a diagnosis. That is all I wanted the surgeon to do."

All the evidence shows the defendant is a very able, careful and meticulous surgeon. The pathologist testified: "These were intact nodes, perfectly removed." In this situation the evidence fails to show the surgeon is liable for the unfortunate result. *Galloway v. Lawrence, supra; Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617; *Hunt v. Bradshaw, supra; Hawkins v. McCain,* 239 N.C. 160, 79 S.E. 2d 493; *Wilson v. Hospital,* 232 N.C. 362, 61 S.E. 2d 102; *Buckner v. Wheeldon,* 225 N.C. 62, 33 S.E. 2d 480. The evidence failed to measure up to the standards required by our decisions. The judgment of the Superior Court is

Affirmed.

JUNE F. WELLS v. MARY SUSAN CARROLL JOHNSON.

(Filed 20 January, 1967.)

1. Negligence § 26—

Contributory negligence is an affirmative defense which defendant must plead and prove, G.S. 1-139, and while nonsuit may be entered on the ground of contributory negligence when the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom, nonsuit may not be entered on the issue if it is necessary for the court to rely to any extent upon evidence offered by defendant.

2. Automobiles § 17; Evidence § 3—

The courts will take judicial notice that when a duly installed automo-

bile traffic control signal shows red it means stop, and when it shows green it means go.

3. Automobiles § 33—

A pedestrian, even though he starts to cross an intersection with a favorable traffic light, remains under duty to exercise ordinary care and caution for his own safety; nevertheless he is entitled to assume, and act on the assumption, that a motorist approaching the intersection facing the red traffic signal will obey the law, and is not required to anticipate that a motorist will not comply with the traffic signal.

4. Automobiles § 42k—

The evidence favorable to plaintiff tended to show that plaintiff, a pedestrian, started across an intersection with the green light of the traffic control signal, that when he got some six feet into the street he saw defendant's car approaching some 45 miles per hour a half a block away, that when he saw the car was not going to stop for the traffic light, he "froze" and did not move from the time he saw defendant's car until the time he was hit, *is held* not to disclose contributory negligence as a matter of law on the part of plaintiff but merely to raise the issue of contributory negligence for the determination of the jury.

5. Automobiles § 46—

Where one view of the evidence tends to show that defendant ran through a red traffic signal at an intersection, it is proper for the court to instruct the jury upon the law applicable to such phase of the evidence.

APPEAL by defendant from *Cowper, J.*, March 1966 Civil Session of NEW HANOVER.

This is a civil action brought by plaintiff, a pedestrian, to recover damages for personal injuries allegedly caused as a result of the actionable negligence of defendant in striking him with her automobile driven by her on 8 November 1963 in the intersection of South College and East Boney Streets in the town of Wallace, North Carolina.

The pleadings raise issues of negligence and contributory negligence. The jury by its verdict found the defendant guilty of negligence as alleged in the complaint, the plaintiff free from contributory negligence as alleged in the answer, and awarded plaintiff the sum of $8,500 in damages.

From a judgment in accord with the verdict, defendant appeals.

Hogue, Hill & Rowe by Ronald D. Rowe for defendant appellant.

Aaron Goldberg for plaintiff appellee.

PARKER, C.J. Plaintiff's evidence tends to show the following facts: In the town of Wallace, Boney Street runs generally east and

west, and College street runs generally north and south. The intersection is controlled by a traffic light. Plaintiff is a 25-year-old man, who runs an upholstery shop in the town of Wallace. Defendant is a resident of Wallace, and has been a school teacher for many years. About 5 p.m. on 8 November 1963 plaintiff parked his automobile on the east side of College Street. He got out of his automobile, walked to the intersection of East Boney and South College Streets, and started to cross Boney Street at the intersection. He testified:

> "When I got to the intersection of East Boney and South College Drive, I looked at the light and the light was green and I started to cross the street, and I seen a car coming and I turned around and started back; when I seen she was not going to stop for the red light, I turned around and started back. When I started across the car was about a half block away when I seen it. I watched it for a few seconds and I seen she was not going to stop. I watched it as she came on towards me. I could see it for a half block. I have an opinion satisfactory to myself as to the rate of speed she was going. About 45 miles an hour. As I got six feet into the intersection, I seen her coming and I froze and she hit me and knocked me about — I don't know — from here to that window over there. . . . About 35 or 40 feet."

As a result of being struck by defendant's automobile, plaintiff sustained physical injuries.

Plaintiff testified in substance on cross-examination except when quoted: He saw defendant's automobile about the time he (plaintiff) called Marvin Carter. He was already in the street about six feet when he saw her automobile. He did not proceed any further across the street. He did not turn around and come back. He froze and started to turn around, and she was coming. He was walking about a normal pace. The light was green when he stepped off the curb. Defendant was operating her automobile in an easterly direction on Boney Street within the town limits of Wallace. Plaintiff testified:

> "The light was green for traffic going north on College Street when I crossed the intersection. I did not look back towards the light as I crossed the street. I went about 6 feet. I don't remember whether the light changed from that time or not. It had a caution light. At the time I was hit I was looking towards her. I did say I was looking towards Mr. Carter at one point, when I stepped off the curb. I looked up the street and

seen her coming and I was hit. I was to the east of the stop light. That is correct. I did not see Mrs. Johnson when I stepped off the curb. She was coming towards the east towards me, but I didn't see her until I got six feet into the street.

"I didn't have time to turn around before I was hit. That is the first time I saw her, when she was a half-block up the street. When she was a half-block up the street, I was about six feet from the curb. She was running so fast I couldn't get out of the street. I didn't move from the time I saw her until the time I was hit. I didn't turn around and go back, I tried to turn around. I didn't try to go on across the street. I was already six feet in the street. I started to turn and went to the left. I did not move at all from the time I first saw Mrs. Johnson until the time I was hit. I was looking at her, not the stop light overhead."

Plaintiff testified in substance on redirect examination: When he was injured he was dressed in a white shirt and blue pants. It was broad daylight. There was nothing to prevent a person traveling east on East Boney Street, as it approached South College Street, from having a clear view down the street. As he stood at the intersection of East Boney Street and South College Street and looked westward, he could see a block. There are no obstructions there to prevent anyone from seeing.

Marvin Carter testified in substance, except when quoted: Plaintiff called his name and that is the first time he saw him. At that time plaintiff was coming off the sidewalk or curb into the intersection. He was at a place where pedestrians would walk. About the time plaintiff called him, he saw the car driven by Mrs. Johnson. He testified:

"About that time, this car, Mrs. Johnson, I believe it is, came into my view, which would be to my right from behind the building I was coming up beside of. About that instant, I would say, her brakes were applied. I believe they were, and there was some skidding, and at the same time I was looking at June. June seemed to have frozen. He wanted to do something, but he couldn't do anything, it seemed, and he was struck by the car."

On cross-examination Carter testified in substance: Mrs. Johnson's car traveled about the length of the car before it completely stopped after it struck plaintiff.

Defendant testified in substance, except when quoted: She was driving her automobile east on Boney Street within the town limits

of Wallace to pick up some friends. Her friends lived on Boney Street about 75 feet from the intersection of Boney Street and Callege Street. She testified:

> "Just a block from the intersection, from the west, there was a railroad track, and I was approaching those tracks. I noticed the light turned red. I went very slowly, about 10, as slow as it would go, so that when I got to the intersection, wouldn't have to wait for the red light. About a half block, I guess, before the intersection, the light turned green, and I picked up to 18 or 20 miles an hour, and then started getting ready to stop in the next block.
>
> "As I was in the intersection something darted from the right-hand — right there at me. I began to apply my brakes. I knew that something was hit, hit me, and I stopped immediately, and it was Mr. Wells."

She testified in substance on cross-examination: She could see for one or two blocks eastward. She did not see Mr. Carter or plaintiff on the sidewalk any place before the impact. She knew plaintiff came from the right. She did not blow her horn. She did not see plaintiff after then until he was carried to his home from the hospital. She testified:

> "I did not see him more than once when they carried him home. I did not leave in anger because he told me it was my fault. I did say to him, 'You're trying to make out like I am at fault.' When I told him that he went on the red light and I had the green light, he made that statement that he knew and saw me, but that he thought he had time to make it, but I said, 'Yes, you had the red light and I had the green,' again. He said, 'You were going fast.' "

Floyd Murray at the time of the accident was a policeman in the town of Wallace. He arrived at the scene of the collision here at 5:10 p.m. He investigated the scene. He found impressions from stopping, about five feet, more or less. He saw glass from the headlights of the car about two feet from where the car was stopped. The headlight of defendant's car was broken out, and the rim around the headlight was bent a little.

Defendant assigns as error the denial of her motion for judgment of compulsory nonsuit made at the close of all the evidence.

Defendant states in her brief:

> "The defendant concedes that the plaintiff offered enough evidence to go to the jury on the question of negligence of the

defendant. While the evidence was conflicting, it must be taken in the light most favorable to the plaintiff and would tend to show that the plaintiff stepped into Boney Street when the traffic light facing him was green. The question of whether or not the defendant kept a proper lookout would be for the jury.

"The defendant strenuously contends, however, that the evidence affirmatively shows that plaintiff himself was guilty of contributory negligence, and that the case should have been nonsuited at the close of all the evidence. The defendant's main contention is that even if plaintiff entered Boney Street with a green light, as he claims, that he failed to take proper precautions for his own safety."

Contributory negligence is an affirmative defense which defendant must plead and prove. G.S. 1-139. Nevertheless, the rule is firmly embedded in our adjective law that a defendant may avail himself of his plea of contributory negligence by a motion for a judgment of compulsory nonsuit under G.S. 1-183, when the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360, and cases cited. But the court cannot allow a motion for judgment of compulsory nonsuit on the ground of contributory negligence on plaintiff's part in an action for damages for personal injury, as here, if it is necessary for the court to rely on any part of the evidence offered by defendant. *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316.

Paragraph 4 of the complaint reads as follows:

"That South College Street in the Town of Wallace, North Carolina, runs north and south and is about 40 feet in width from curb to curb; that East Boney Street, in said town, runs east and west and is about 36 feet from curb to curb; that said intersection is governed by an automatic signal device, duly installed and operated pursuant to an ordinance of said Town of Wallace, which controls the movement of all traffic therein — both vehicular and pedestrian — and which was in operation at the times herein set out."

Defendant's answer in paragraph 4 alleges:

"The allegations of paragraph 4 of the complaint are admitted on information and belief."

Defendant's contention that plaintiff was guilty of legal contributory negligence, as alleged in her answer, barring any recovery

of damages by him necessitates an appraisal of plaintiff's evidence and the judicial admissions in defendant's answer.

Plaintiff's evidence and the judicial admissions in defendant's answer tend to show the following facts: That traffic, pedestrian and vehicular, at and in the intersection of College Street and Boney Street in the town of Wallace is governed by an automatic signal device, duly installed and operated pursuant to an ordinance of the town of Wallace, which controls the movement of all traffic therein and which was in operation at the time plaintiff was struck by defendant's automobile. College Street runs generally north and south, and Boney Street runs generally east and west. Defendant was driving her automobile in an easterly direction on Boney Street towards its intersection with College Street, and when plaintiff started to cross Boney Street the traffic light facing defendant at the intersection was red. We take judicial notice of the fact that when a duly installed automatic traffic control signal shows red it means stop, and when it shows green it means go. As he stood at the intersection of East Boney Street and South College Street and looked westward, he could see a block. There are no obstructions there to prevent anyone from seeing. When he got six feet from the curb into the intersection, he looked and saw defendant's car traveling about 45 miles an hour a half a block away. When he saw her car was not going to stop for the red light, he "froze." He did not move from the time he saw defendant's car until the time he was hit. He saw defendant's automobile about the time he called Marvin Carter.

This is said in 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 420, p. 968: "A pedestrian crossing a street intersection with a favorable traffic signal is still required to exercise ordinary care and caution for his own safety. He is under a duty to keep some lookout for approaching motorists and a change in the signal."

"In the absence of notice or knowledge to the contrary, a pedestrian crossing a street or highway on a favorable signal has a right to assume that operators of approaching vehicles will obey the law and will observe and not disregard the signal, and he is not required to anticipate that a motorist will not comply with the traffic signal." 61 C.J.S., Motor Vehicles, § 470 f (3), p. 59.

This is said in 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 420:

> "The view has been taken under the facts involved in numerous cases that the circumstance that one charged with negligence or contributory negligence in connection with an accident between a motorist and a pedestrian at an intersection entered the intersection with the traffic signal in his favor op-

erates, or at least tends, to prevent a holding that he was guilty of negligence or contributory negligence as a matter of law, despite a showing that he was guilty of acts or omissions which might otherwise have justified that conclusion. . . . In many instances, the circumstance that a motorist or pedestrian approached, entered, or proceeded to cross an intersection with a traffic light in his favor has been seized upon by the courts as operating, or at least tending, to free him, as a matter of law, of the charge of contributory negligence. However, under the particular facts involved, it has been recognized that a motorist or pedestrian was guilty of negligence or contributory negligence under the circumstances shown, or at least, was guilty of conduct from which the trier of the facts could find him negligent or contributorily negligent, despite the fact that he approached or entered an intersection with a favorable traffic signal.

* * *

". . . In still other cases it has been held that a finding was justified that no negligence or contributory negligence could be attributed to the motorist or pedestrian because of the insufficiency of the observations made by him as he entered or crossed an intersection with a favorable traffic signal, primarily because of the right of one proceeding with a favorable traffic signal to assume that others will not disregard an unfavorable signal."

See *Kirk v. Los Angeles R. Corp.*, 26 Cal. 2d 833, 161 P. 2d 673, 164 A.L.R. 1, and annotation thereto entitled "Liability for accident at street or highway intersection as affected by reliance upon or disregard of traffic sign, signal, or marking," pp. 8-312.

There is no imperative rule of law requiring a pedestrian *under all circumstances* to look for approaching automobiles before crossing a street or highway. Annot., 79 A.L.R. 1074, where cases from many jurisdictions are cited.

Applying the applicable law, plaintiff's evidence does not show contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom. Whether, under the circumstances shown by the record, plaintiff was guilty or not guilty of contributory negligence was for the jury to determine. The court correctly denied defendant's motion for a judgment of compulsory nonsuit, and submitted the case to the jury.

Defendant assigns as error that the court's instructions to the jury permitted the jury to find that the defendant ran through a red light. Plaintiff's evidence, considered in the light most favorable

to him, would tend to show that defendant ran through a red light. As we understand defendant's brief as quoted above, it in substance concedes this.

We have carefully examined the other assignments of error to the charge of the court and to its failure to charge, and we are of the opinion that they are without merit and raise no new question or feature requiring discussion. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment below will be upheld.

No error.

MATTIE JONES JOHNSON v. WOODROW W. STEVENSON, KATHLENE STEVENSON KAY, AND GRACE STEVENSON.

(Filed 20 January, 1967.)

1. Wills § 8; Judgments § 24; Trusts § 14—

The probate of a will in common form is conclusive as to the validity of the instrument until set aside in a *caveat* proceeding duly instituted, and while the beneficiaries under the will may be held trustees *ex maleficio* for extrinsic fraud which interferes with the right to *caveat* the instrument, the probate may not be collaterally attacked for intrinsic fraud constituting grounds for attack of the instrument by *caveat* proceedings when there is nothing to show that plaintiff's right to attack by *caveat* was interfered with in any manner.

2. Same—

Plaintiff and her brother were the sole surviving children of their parents. The joint will of their parents, which left the property in suit to the brother's children, was probated in common form. Plaintiff sought to hold the beneficiaries as trustees to the extent that she would have been entitled to a share in the property as an heir upon allegations that her brother and his wife secured the execution of the instrument by undue influence. *Held:* The action to establish the constructive trust was a collateral attack on the probate for intrinsic fraud, and demurrer to plaintiff's complaint was properly sustained.

APPEAL by plaintiff from *Olive, Emergency Judge,* July 22, 1966 Civil Session of DAVIDSON.

In this civil action, in which plaintiff seeks a judgment impressing a constructive trust for her benefit on certain realty, the court below entered judgment sustaining demurrer to complaint; and the question presented by plaintiff's appeal is whether the complaint alleges facts sufficient to constitute a cause of action.

The allegations of the complaint, summarized except when quoted, are stated below.

A paper writing dated March 14, 1933, a copy of which is attached to and made a part of the complaint, was executed by Jno. C. Stevenson and his wife, Nannie C. Stevenson, the parents of plaintiff, and purports to be their (joint) last will and testament. Ernest R. Stevenson caused it to be filed in the office of the Clerk of the Superior Court of Davidson County on December 9, 1940; and on December 23, 1940, "the said Ernest R. Stevenson was named administrator C.T.A."

The "purported" will relates solely to the specific realty involved herein. It was devised to three grandchildren, Ted L. Stevenson, Nannie Kathlene Stevenson and Woodrow Wilson Stevenson, subject to a life estate in favor of their parents, Ernest R. Stevenson and his wife, Mable V. Stevenson. Plaintiff is not mentioned in said will as a beneficiary or otherwise.

Jno. C. Stevenson died March 4, 1937. His widow, Nannie C. Stevenson, died May 17, 1940, at which time plaintiff and Ernest R. Stevenson were "the two surviving children of Jno. C. Stevenson and Nannie Stevenson."

The purported will "was secured through the use of undue influence, and was caused to be drawn and executed by the said Ernest R. Stevenson and his wife, now deceased." Jno. C. Stevenson could not write. The signature purporting to be his on the purported will is not his signature. Nannie C. Stevenson was persuaded and induced to make the purported will "so that she could collect her old age pension benefits, and was so informed by the said Ernest R. Stevenson and wife." Ernest R. Stevenson and Mable V. Stevenson, and their children, resided with plaintiff's parents and were supported by plaintiff's parents.

Ernest R. Stevenson died "several years ago." His widow, Mable V. Stevenson, continued "to occupy and use" said realty until her death in November, 1965. Nannie Kathlene Stevenson and Woodrow Wilson Stevenson are defendants. Ted L. Stevenson is now dead. His widow, Grace Stevenson, is a defendant.

"(B)ut for the undue influence" of Ernest R. Stevenson and Mable Stevenson, consisting of "false procurements" and "fraudulent acts" plaintiff "would have shared in the estate of her parents." Defendants occupy, maintain and "otherwise enjoy" said realty "by virtue of their parents' wrongdoing, and rightfully have only that interest which would be theirs by intestacy," and plaintiff, for more than twenty years, has been "wrongfully denied her rightful inheritance."

Plaintiff prayed that the court "impress upon the property in

question a constructive trust for the use and benefit of plaintiff herein to the extent that she may be entitled under the laws of intestacy," for the appointment of a receiver to collect rents, and for the taxing of costs against the defendants.

Plaintiff's appeal is from the judgment sustaining defendants' demurrer to complaint.

Jerry C. Wilson for plaintiff appellant.
Walser, Brinkley, Walser & McGirt for defendant appellees.

BOBBITT, J. Although plaintiff does not so allege in express terms, her allegations, and the exhibits attached to the complaint, clearly imply that the paper writing dated March 14, 1933, was probated in common form on December 9, 1940, as the last will and testament of Jno. C. Stevenson and his wife, Nannie C. Stevenson, before the Clerk of the Superior Court of Davidson County, North Carolina. Plaintiff's brief assumes this to be the fact. The gravamen of her complaint is that defendants hold the legal title they acquired under said will in trust for plaintiff to the extent of her interest as an heir of her parents. Hence, disposition of this appeal requires that this Court accept as fact for present purposes that said will was duly probated in common form on December 9, 1940.

"Under the statute now codified as G.S. 31-19, the order of the Clerk admitting the paper writing to probate constitutes conclusive evidence that the paper writing is the valid will of the decedent until it is declared void by a competent tribunal on an issue of *devisavit vel non* in a *caveat* proceeding." *Holt v. Holt,* 232 N.C. 497, 61 S.E. 2d 448; *Hargrave v. Gardner,* 264 N.C. 117, 141 S.E. 2d 36. "The attack must be direct and by *caveat.* A collateral attack is not permitted." *In re Will of Charles,* 263 N.C. 411, 415, 139 S.E. 2d 588, 591, and cases cited.

Under the provisions of G.S. 31-32, prior to the 1951 amendment (Session Laws of 1951, Chapter 496), plaintiff had seven years from December 9, 1940, to file a *caveat* to said will. Nothing in the record before us indicates she filed such *caveat.*

The only decision cited by plaintiff is *Bohannon v. Trotman,* 214 N.C. 706, 200 S.E. 852, in which this Court affirmed a judgment which, as part of a general family settlement, approved a compromise of the claim plaintiff had asserted in a prior action. In the prior action, *Bohannon v. Trust Co.,* 210 N.C. 679, 188 S.E. 390, this Court, as a basis for approval of an order for examination of an adverse party, held the plaintiff's affidavits alleged facts sufficient to disclose plaintiff had a cause of action. The plaintiff had asserted, *inter alia,* that F. M. Bohannon, plaintiff's grandfather, "had formed

the fixed intention and settled purpose of providing for the plaintiff in the distribution of his estate, and would have carried out this intention and purpose but for the wrongful acts of Laura Webb Bohannon and Maude Bohannon Trotman," who, "by a conspiracy and false and fraudulent representations, deprived the plaintiff of a share in the estate of F. M. Bohannon," by prevailing upon F. M. Bohannon "to change a definite plan which he had made to leave to the plaintiff, either by will or a trust instrument, a large share in his estate." These distinguishing facts are noted: (1) F. M. Bohannon, by reason of said false and fraudulent representations, was induced to abandon his *fixed intention* to settle a large part of his estate on the plaintiff. (2) Since his father was living, plaintiff could not as heir *caveat* his grandfather's will. Moreover, plaintiff would receive nothing from his grandfather's estate in the event it were adjudged his grandfather died intestate.

A factual situation more analogous to that presently under consideration was involved in *Holt v. Holt, supra,* a decision cited and stressed by defendants. In *Holt,* separate actions were instituted by each of two sons of A. F. Holt, Sr., to recover damages on the ground their brothers, the defendants, by means of undue influence they exerted upon him, had induced the father to execute certain conveyances and a will in which the defendants were named as grantees and as devisees. It was held the will could be attacked only by *caveat;* and that, unless and until the will was declared invalid in a *caveat* proceeding, all rights existing in A. F. Holt, Sr., at the time of his death, to attack conveyances he had made, vested in the defendants as beneficiaries under the will. Although the sole relief sought by the plaintiffs was damages for alleged tortious conduct, the thrust of the decision is in accord with the conclusion stated below.

Here plaintiff seeks to establish a constructive trust. "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Cardozo, J., in *Beatty v. Guggenheim Exploration Co.,* 225 N.Y. 380, 386, 122 N.E. 378, 380, quoted with approval in *Atkinson v. Atkinson,* 225 N.C. 120, 127, 33 S.E. 2d 666, 671. "The forms and varieties of these (constructive) trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit." 4 Pomeroy's Eq. Jurisprudence (Fifth Edition), § 1053. This statement is quoted with approval in *Bryant v. Bryant,* 193 N.C. 372, 377, 137 S.E. 188, 190.

The position most favorable to plaintiff is stated by Curtis, J., in *Caldwell v. Taylor,* 218 Cal. 471, 23 P. 2d 758, 88 A.L.R. 1194, as follows: "Since the probate of a will is a matter exclusively within the jurisdiction of the probate court equity may not set aside the probate, but it may declare the beneficiary a trustee for those who have been defrauded. (Citations) And such character of relief is common. The judgment, order, or decree from the effect of which relief is sought cannot constitute a bar to equitable relief. A proceeding for equitable relief is not a collateral attack, and since its sole aim and purpose is to avoid the effect of said judgment, the doctrine of *res judicata* can have no application to such judgment. (Citations)." Even so, a constructive trust engrafted upon a devisee's legal title changes radically the legal significance and consequences of the judgment or decree of probate.

"Where a disposition of property by will or an intestacy is procured by fraud, duress or undue influence, the person acquiring the property holds it upon a constructive trust, *unless adequate relief can otherwise be given in a probate court.*" (Our italics) Restatement, Restitution § 184.

The grounds on which plaintiff seeks to establish a constructive trust were equally available as grounds for direct attack on the will by *caveat.* This right of direct attack by *caveat* gave her a full and complete remedy at law. Hence, plaintiff, on the facts alleged, is not entitled to equitable relief. *Insurance Co. v. Guilford County,* 225 N.C. 293, 300, 34 S.E. 2d 430, 434, and cases cited.

Our research discloses decisions in other jurisdictions recognizing the right of an heir to establish a constructive trust notwithstanding the probate of a will under which such heir is not a beneficiary where it is *alleged and proved* that the judgment or decree of probate was obtained under circumstances constituting *extrinsic fraud, e. g., Caldwell v. Taylor, supra,* and cases cited; *Zaremba v. Woods,* 17 Cal. App. 2d 309, 61 P. 2d 976; *Purinton v. Dyson,* 8 Cal. 2d 322, 65 P. 2d 777, 113 A.L.R. 1230; *Seeds v. Seeds,* 116 Ohio St. 144, 156 N.E. 193, 52 A.L.R. 761; *Jacobsen v. Jacobsen,* 164 Ohio St. 413, 131 N.E. 2d 833. In *Caldwell,* the alleged extrinsic fraud consisted of false and fraudulent representations made directly to the plaintiff after his father's death and causing him to defer filing a *caveat* until after the time limit therefor (six months) had expired. In *Zaremba,* the extrinsic fraud consisted of false and fraudulent statements made in procuring the probate of the will on account of which the heir did not receive notice of the probate proceedings in time to file a *caveat.* In *Purinton,* the extrinsic fraud consisted of the intentional failure of the proponent and executor of the de-

cedent's will to disclose to the probate court the existence, known to him, of a pretermitted heir and to give notice to such heir of the probate proceedings. In *Seeds,* the extrinsic fraud consisted of false and fraudulent statements in procuring the probate and of a false return purporting to show service of notice on the next of kin. In *Jacobsen,* the extrinsic fraud consisted of false and fraudulent representations whereby the defendants obtained from the next of kin certain waivers and by means thereof procured the probate of the will. For other decisions, see Annotation, "Person taking under probate of forged or fraudulent will as trustee *ex maleficio,*" 52 A.L.R. 779 *et seq.*

A judgment can be attacked for extrinsic fraud only by independent action. An attack for intrinsic fraud must be by motion in the cause in which the judgment was rendered. 3 Strong, N. C. Index, Judgments § 24. In *Mottu v. Davis,* 153 N.C. 160, 69 S.E. 63, Walker, J., after observing that "perjury, being intrinsic fraud, is not ground for equitable relief against a judgment resulting from it," states that "the fraud which warrants equity in interfering with such a solemn thing as a judgment must be such as is practiced in obtaining the judgment, and which prevents the losing party from having an adversary trial of the issue." In *Miller v. Bank,* 234 N.C. 309, 67 S.E. 2d 362, in which there is a full discussion and references to numerous prior decisions, Devin, C.J., quotes the following statement from Freeman on Judgments, sec. 1233: "Extrinsic or collateral fraud operates not upon matters pertaining to the judgment itself but relates to the manner in which it is procured." See "Comment Note. — Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud," 88 A.L.R. 1201.

The complaint contains no allegation that fraud of any kind was practiced directly upon plaintiff by her brother or his wife or by any of the defendants herein, either before or after the death of plaintiff's parents, or that any of them practiced any fraud on the plaintiff or on the probate court in connection with the probate of her parents' will. She alleges no fact tending to show her right to attack the will by *caveat* was interfered with in any manner by her brother or his wife or by any other person or circumstance. In short, plaintiff alleges no facts constituting extrinsic fraud as distinguished from intrinsic fraud.

Having reached the conclusion that plaintiff has failed to allege facts sufficient to constitute a cause of action, the judgment of the court below is affirmed.

Affirmed.

CITY OF REIDSVILLE, A MUNICIPAL CORPORATION, v. JOSEPH F. BURTON.

(Filed 20 January, 1967.)

1. Pleadings § 30—

Judgment on the pleadings is proper only when the pleadings fail to present any issue of fact for the determination of the jury, and only the pleadings themselves may be considered in determining the question; therefore, it is error for the court to hear evidence and find facts in support of its entry of judgment on the pleadings.

2. Same; Limitation of Actions § 18—

A judgment on the pleadings in favor of a defendant on defendant's plea in bar of the statute of limitations, is proper when, and only when, all the facts necessary to establish the plea in bar of the statute of limitations are alleged or admitted in plaintiff's pleadings, construing plaintiff's pleadings liberally in plaintiff's favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom.

3. Limitation of Actions § 2—

The statute of limitations does not apply to a municipality in an action by the municipality involving public rights or the exercise of governmental functions, but the statute of limitations applies as a defense to an action by a municipal corporation to enforce private, corporate or proprietary rights.

4. Same; Municipal Corporations § 5— Action held one to recover damages ex contractu and not one to establish street or bridge.

Plaintiff municipality alleged in effect that defendant constructed a bridge a short distance from the city limits in connection with defendant's real estate development, that the bridge did not comply with specifications of the city engineer, that defendant, in order to have the city accept the bridge over the protest of the city engineer, obligated himself in writing to replace the bridge if it collapsed by causes other than ordinary wear and tear within a period of twelve years, that the bridge did collapse within that period, that defendant was notified to make arrangements at once to replace the bridge according to the city engineer's specifications, and that defendant refused to do so. This action was instituted to recover the city's costs in rebuilding the bridge. *Held:* The action is *ex contractu* to enforce a private, corporate or proprietary right of the city, and defendant is entitled to plead the applicable statute of limitations.

5. Limitation of Actions § 4—

A cause of action for breach of contract accrues generally when defendant is liable to an action for such breach, and such cause of action is barred in three years when the parties are not under disability. G.S. 1-15, G.S. 1-52(1).

6. Limitation of Actions § 18—

Where it appears from the complaint of the city that the action is *ex contractu* and that the subject matter arose out of a private, corporate or proprietary right of the city, and it further appears from the city's complaint that the action was not instituted until more than three years after demand upon, and refusal of, defendant to rectify the breach, all

facts necessary to establish defendant's plea of the three year statute of limitations appear from the city's complaint, and judgment on the pleadings in favor of defendant was proper.

APPEAL by plaintiff from *Latham, S.J.,* February 1966 Civil Session of ROCKINGHAM.

The allegations of plaintiff's complaint may be summarily stated as follows:

On 8 October 1957 defendant, in connection with developing certain lots and property on Coach Road situate only a short distance outside the city limits of the city of Reidsville, constructed a bridge known as the Coach Road Bridge. Prior to the construction of said bridge, defendant was notified by plaintiff's city engineer of the specifications and requirements to be met by him in constructing said bridge. [This is admitted as true in the answer.]

Defendant constructed said Coach Road Bridge, but failed and refused to construct it according to the specifications of the city engineer, and after the bridge was completed, the city engineer refused to accept the bridge.

At a meeting of the Reidsville city council, defendant agreed to guarantee the bridge for a period of twelve years, and on 8 October 1957 he signed, executed, and delivered to the city of Reidsville the following letter: "The undersigned, Joseph F. Burton, in consideration of the city's accepting the bridge on Coach Road under protest of the city engineer hereby agrees that he will replace said bridge if it collapses by causes other than wear and tear within a period of 12 years from date."

The Coach Road Bridge collapsed and was condemned, and on 13 January 1961 defendant was notified by the city by letter of its city attorney that the bridge had collapsed and had been condemned, and he was notified to make arrangements to replace the bridge according to the city engineer's specifications at once.

After said bridge had collapsed and been condemned, defendant failed and refused to replace the bridge, though repeated demands were made upon him. Plaintiff rebuilt the bridge between 12 April 1961 and 26 April 1961. The cost of rebuilding the bridge was $2,220.74. Defendant was billed for the cost of rebuilding the bridge in that amount on 26 April 1961, and defendant failed and refused and still fails and refuses to pay the cost of rebuilding said Coach Road Bridge.

Wherefore, plaintiff prays judgment that it recover of defendant the sum of $2,220.74 with interest thereon from 26 April 1961, and for its costs.

In his answer defendant admits he refused to replace the bridge,

and that the city of Reidsville rebuilt the bridge. For a further answer and defense, defendant alleges in substance as follows: Prior to construction of the bridge the specifications for said bridge were altered materially by plaintiff's city engineer, due to the fact that the city engineer had run a sewer line in such a manner that a culvert could not be constructed as originally planned. Upon completion of the bridge the city engineer refused to accept it. In October, 1957, defendant met with the Reidsville city council, and agreed to guarantee the bridge if it collapsed within a period of 15 years from normal wear and tear. At said meeting plaintiff agreed to construct a sign at said bridge which would restrict the load limit to four tons, which it failed and refused to do. Thereafter, and up to the time the bridge collapsed on or about January, 1961, the bridge was used by heavy trucks loaded with brick and other building material weighing from 15 to 20 tons, and in addition was used by heavy equipment owned by the city of Reidsville including a ditch-digging machine weighing approximately 20 tons. The bridge was not constructed to support such heavy loads, and all interested parties, including the city of Reidsville, were aware of this fact. The collapse of the bridge was in no way due to faulty construction or any material variations from the specifications, but was due to the excessive loads which were allowed to cross the bridge because of the fact that the city of Reidsville had not posted a load limit sign restricting the load limit to four tons. On or about 14 February 1961 defendant met with the Reidsville city council, at which time the city council made demand upon him that he, at his own expense, replace the bridge. Defendant informed the Reidsville city council that he had no intention of replacing the bridge. Defendant heard nothing further from the city council of Reidsville until he received a letter from the city attorney dated 20 February 1964, in which a bill was enclosed for the amount of $2,220.74 for replacement of the bridge. This cause of action, if in fact a cause of action exists, arose on or about January, 1961, and the Reidsville city council at its meeting on 14 February 1961 made demand upon the defendant for the replacement of the bridge, and defendant refused to comply with the request. This action was instituted on 4 March 1964, and more than three years had elapsed since plaintiff's cause of action, if any, had accrued, and defendant pleads in bar of any recovery by plaintiff in this action the three-year statute of limitations as provided in G.S. 1-52. Wherefore, defendant prays that plaintiff's action be dismissed and that plaintiff be taxed with the costs.

At the February 1966 Civil Session of Rockingham defendant made a motion for judgment on the pleadings. Judge Latham made seven findings of fact, among which were that the bridge was not a

part of a public way; that three years elapsed from 13 January 1961, the time at which the bridge collapsed and defendant was notified; and that defendant had pleaded the three-year statute of limitations "as provided for in North Carolina General Statutes 1-52 as applied by North Carolina General Statutes 1-30." Whereupon, the court made the following conclusions of law: (1) In the absence of allegations by plaintiff that enforcement of the alleged agreement was sought, the contract between plaintiff and defendant, calling for replacement of the bridge by defendant, did not authorize plaintiff to rebuild the bridge and make any claim against the defendant for reimbursement of the cost of rebuilding the bridge; (2) plaintiff, in attempting to enter into a contract of such nature, involving private property and a private way outside the city limits of the city of Reidsville, was engaged in the exercise of a proprietary function and not a governmental function; (3) the cause of action, if any, arose on 13 January 1961; and (4) "that the three year statute of limitations as provided for in North Carolina General Statutes 1-52 as applied by North Carolina General Statutes 1-30 is properly pled in bar of any recovery by the plaintiff." Whereupon, it was adjudged and decreed by Judge Latham that defendant's motion for judgment on the pleadings is allowed, that plaintiff recover nothing of defendant, and that defendant recover his costs from plaintiff.

From this judgment, plaintiff appeals.

Jule McMichael by Albert J. Post for plaintiff appellant.
Defendant in propria persona.

PARKER, C.J. A judgment on the pleadings is proper only when the pleadings fail to present any issue of fact for the determination of a jury. *Fisher v. Motor Co.*, 249 N.C. 617, 107 S.E. 2d 94; *Waggoner v. Waggoner*, 246 N.C. 210, 97 S.E. 2d 887; *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384; *Jeffreys v. Insurance Co.*, 202 N.C. 368, 162 S.E. 761; 3 Strong's N. C. Index, Pleadings, § 30, and supplement to *ibid*, § 30.

On a motion for judgment on the pleadings it is error for the court to hear evidence and find facts in support of its judgment, since only the pleadings themselves may be considered. *Crew v. Crew*, 236 N.C. 528, 73 S.E. 2d 309; *Remsen v. Edwards*, 236 N.C. 427, 72 S.E. 2d 879. In *Erickson v. Starling, supra*, Ervin, J., said for the Court: "When a party moves for judgment on the pleadings, he admits these two things for the purpose of his motion, namely: (1) The truth of all well-pleaded facts in the pleading of

his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary." The findings of fact by the trial judge upon the motion for judgment on the pleadings are entirely inapposite and must be disregarded.

A judgment on the pleadings in favor of a defendant on a plea in bar of the statute of limitations pleaded by defendant is proper when, and only when, all the facts necessary to establish the plea in bar of the statute of limitations are either alleged or admitted in plaintiff's pleadings, construing plaintiff's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom. *McFarland v. Publishing Co.,* 260 N.C. 397, 132 S.E. 2d 752; *Lockhart v. Lockhart,* 223 N.C. 123, 25 S.E. 2d 465; *Currin v. Currin,* 219 N.C. 815, 15 S.E. 2d 279; *Latham v. Latham,* 184 N.C. 55, 113 S.E. 623; *Ewbank v. Lyman,* 170 N.C. 505, 87 S.E. 348.

It is alleged in the complaint and admitted in the answer that the city of Reidsville is a municipal corporation. It is generally held in this State and in the other States that the statute of limitations is no defense in actions by a municipality involving public rights or the exercise of governmental functions. It is also generally held in this State and in the other States, except as provided otherwise by constitutional or statutory provisions, that the statute of limitations may be interposed as a defense to an action by a municipal corporation to enforce private, corporate or proprietary rights. *Charlotte v. Kavanaugh,* 221 N.C. 259, 20 S.E. 2d 97; 53 C.J.S., Limitation of Actions, § 17(a); 17 McQuillin, Municipal Corporations, § 49.06. See also 34 Am. Jur., Limitation of Actions, § 397.

The construction and maintenance of public streets and of bridges constituting a part thereof are governmental functions of a municipality, and in exercising such governmental functions a municipal corporation is immune from application of the statute of limitations. *Improvement Co. v. Greensboro,* 247 N.C. 549, 101 S.E. 2d 336; *Jenkins v. Henderson,* 214 N.C. 244, 199 S.E. 37; *Pickett v. R. R.,* 200 N.C. 750, 158 S.E. 398; 53 C.J.S., Limitation of Actions, § 17(b).

These facts appear from the fact of the complaint: On 8 October 1957 defendant in connection with developing certain lots and property on Coach Road lying outside the city of Reidsville and only a short distance from the city limits constructed a bridge in connection with the development of said property. It does not appear from the complaint that the defendant constructed this bridge for the use of the public nor that it was maintained by the city nor

that it connected any public streets. Defendant was notified that this bridge constructed by him did not comply with the specifications of the city engineer, and he refused to accept it. It is alleged in the complaint that defendant signed, executed and delivered to the city of Reidsville the following letter: "The undersigned, Joseph F. Burton, in consideration of the city's accepting the bridge on Coach Road under protest of the city engineer hereby agrees that he will replace said bridge if it collapses by causes other than wear and tear within a period of 12 years from date." It is also alleged in the complaint that the bridge collapsed on 13 January 1961 and defendant was notified by the city by letter of its city attorney that the bridge had collapsed, and he was notified to make arrangements to replace the bridge according to the city engineer's specifications *at once,* and that the defendant failed and refused to do so.

The suit in the instant case is an action *ex contractu* to recover the cost of rebuilding the bridge upon a breach by defendant of his contract with plaintiff to replace it. In our opinion, and we so hold, the present action is an action to enforce private, corporate or proprietary rights, and as such the three-year statute of limitations may be interposed as a defense by defendant.

The plaintiff contends the North Carolina Legislature by Chapter 369, 1949 Session Laws of North Carolina, authorized the governing body of Reidsville to regulate and require minimum standards and specifications for subdivisions of real property, and the establishment, dedication, location and dimensions of proposed public streets or other public way within the corporate limits of such municipality or within one mile outside such city limits, and to provide either grading, paving, curbs, gutters, drainage, public sewer or water facilities, etc., and that in replacing the bridge it exercised a governmental function and is immune from the application of the three-year statute of limitations. This contention is untenable.

Generally, an action for breach of a contract must be brought within three years from the time of the accrual of the cause of action, where the parties are not under a disability, which is the case here. G.S. 1-15; G.S. 1-52(1); *Motor Lines v. General Motors Corp.,* 258 N.C. 323, 128 S.E. 2d 413; 3 Strong's N. C. Index, Limitation of Actions, § 4. A cause of action generally accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. 3 Strong *ibid.*

It appears from the face of the complaint that the bridge here

collapsed on 13 January 1961, and defendant was notified to replace the bridge *at once* according to the city engineer's specifications and refused to do so. When defendant failed *at once* to replace the bridge according to the contract, plaintiff was entitled to institute action. The present action was instituted by the issuance of summons on 4 March 1964. G.S. 1-14. All the facts necessary to establish the plea in bar of the three-year statute of limitations alleged in the answer are alleged in plaintiff's complaint. Therefore, the lower court was correct in entering judgment upon the pleadings for defendant. The city's contention that its action only accrued when it had replaced the bridge and sent defendant a bill in the amount of the cost of replacing the bridge is untenable. This disposition of this case makes it unnecessary to discuss or consider any of the other defenses interposed by defendant. *McFarland v. Publishing Co., supra.* The judgment of the lower court is

Affirmed.

DONALD E. MATTHIEU, PLAINTIFF, v. PIEDMONT NATURAL GAS COMPANY, ORIGINAL DEFENDANT, AND WALTER J. DAVENPORT, T/A DAVENPORT HEATING AND AIR CONDITIONING COMPANY, ADDITIONAL DEFENDANT

AND

DONALD E. MATTHIEU AND EVELYN S. MATTHIEU v. PIEDMONT NATURAL GAS COMPANY, ORIGINAL DEFENDANT, AND WALTER J. DAVENPORT, T/A DAVENPORT HEATING AND AIR CONDITIONING COMPANY, ADDITIONAL DEFENDANT.

(Filed 20 January, 1967.)

1. Limitation of Actions § 17—

Upon the plea of the applicable statute of limitations, the burden is upon plaintiffs to show that they instituted their action within the time limited.

2. Limitation of Actions § 4—

A cause of action accrues and the statute of limitations begins to run, in the absence of disability or fraud or mistake, whenever a party becomes liable to an action.

3. Limitation of Actions § 5—

When the basis of the cause of action produces continuing or recurring damages, the cause of action accrues at the time damages are first sustained, the subsequent damages being merely in aggravation of the original damages and not being essential to the cause of action.

4. Limitation of Actions § 15— When there is no representation inducing plaintiff to defer suit, defendant is not estopped to plead statute.

This action was instituted to recover damages resulting from dust and dirt injected into plaintiffs' house by a gas furnace and air conditioner purchased from defendant. Plaintiffs' allegations were to the effect that the defect was obvious from the beginning, that complaints were made to defendant, and that defendant's employees reported no defect could be found in the system but that they would continue to look. *Held:* Plaintiffs' cause of action accrued upon the occurrence of the first damage, and plaintiffs are not entitled to rely upon estoppel of defendant to plead the statute, since defendant consistently took the position that no defect existed and never made any representation that would have led plaintiffs to refrain from suing.

5. Estoppel § 4—

Equitable estoppel must be based upon the existence of a false representation, or the concealment of a material fact, with knowledge, actual or constructive, of the truth, and the other party must have been without such knowledge and free from culpable negligence in failing to discover the facts, and the representation must have been intended or expected to be relied upon and must have been reasonably relied upon to injury.

6. Same—

The purchasers of a furnace and air conditioning unit may not rely upon negligence of the seller in inspecting the installation after complaint when the purchasers have ready access to the means of equal knowledge of the real facts and are culpably negligent in not properly informing themselves, since if the existence of the defects are patently obvious the purchasers may not complain of absence of notice thereof.

APPEAL by plaintiffs from *McConnell, J.*, March 1966 Civil Session of GUILFORD.

Civil action by Donald E. Matthieu to recover for personal injuries allegedly caused by the negligence of defendant Piedmont Natural Gas Company. Separate action by Donald E. Matthieu and wife, Evelyn S. Matthieu, for damages to real and personal property, allegedly caused by the negligence of defendant Piedmont Natural Gas Company. Upon motion of Piedmont, defendant Davenport, an independent contractor, was made an additional defendant in both actions. The two actions were consolidated for trial.

Plaintiffs offered evidence which tended to show the following: Plaintiffs entered into a contract with defendant Gas Company in 1960 whereby plaintiffs purchased from defendant a forced air furnace and air conditioning system to be installed in plaintiffs' home, then under construction. The system was installed in August 1960. Within four to six weeks thereafter plaintiffs began to notice dust and dirt coming through the register into the house, and this condition continued without interruption until December 1964. The male plaintiff stated, "There was no question in my mind that the

dust was coming from the register." Beginning in 1960, and every year thereafter, plaintiffs made complaints concerning this condition to the employees of the defendant Gas Company, and were told by said employees that no defect could be found in the system which would cause the dirt and dust, but that they would continue to look. The contract between plaintiffs and defendant Gas Company contained a one-year warranty but contained no provision for inspection of the system.

The furnace and duct work were under the dwelling. Male plaintiff was under the dwelling monthly to install a filter for the system. Defendant Gas Company's agents were on the premises and under the house on many occasions after the furnace was installed. In December 1964 plaintiffs had the system inspected by an agent of Parker Gas & Oil Company, who purportedly found obvious or readily discernible defects. Evidence was offered concerning male plaintiff's personal injuries to the effect, *inter alia,* that after he had been in the house for a few weeks, every time he would go into the house he would "stop up" and that on occasions he would have to leave the house and go to his office in order to sleep. He told defendant's employees that he was allergic to dirt, dust and mold. There was also evidence that plaintiffs' real and personal property were discolored and damaged because of dust, dirt and mold. These conditions existed continuously until December 1964, when the system was repaired.

On 19 March 1965 plaintiffs commenced their actions, alleging, in the alternative, the following causes of action against the original defendant: (1) breach of warranty in the sale and installation of the heating system, (2) negligent installation of the system, and (3) negligent inspection of the system.

At the close of plaintiffs' evidence, the original defendant moved for judgment of involuntary nonsuit. The motion was allowed and judgment entered. Plaintiffs appealed.

Smith, Moore, Smith, Schell & Hunter and Herbert O. Davis for plaintiff appellants.

McLendon, Brim, Brooks, Pierce & Daniels, Hubert Humphrey and Jerry W. Amos for defendant Gas Company.

BRANCH, J. The sole question presented for decision is: Did the trial judge err in allowing original defendant's motion for nonsuit? It is stipulated by counsel that the cases be consolidated for the purpose of appeal. The plaintiffs have abandoned all causes of action in their complaint except the action for negligent inspection. In filing its responsive pleadings, the original defendant pled the

three-year statute of limitations in bar of plaintiffs' right of recovery. The period prescribed for the commencement of this action is three years from the time the cause of action accrued. G.S. 1-52. Upon this plea the burden is on plaintiffs to show they instituted their actions within this prescribed period in order to repel the motion for nonsuit. *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508.

A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake, none of which are applicable to the instant case. However, the more difficult question is to determine when the cause of action accrues. In the case of *Mast v. Sapp,* 140 N.C. 533, 53 S.E. 350, this Court said: "Where there is a breach of an agreement or the invasion of an agreement or the invasion of a right, the law infers some damage. . . . The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. . . . The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. . . . When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete."

In the case of *Shearin v. Lloyd, supra,* these principles were recognized and applied to a cause of action for malpractice based on the surgeon's negligence in leaving a foreign object in the patient at the conclusion of an operation. The Court held that where there was no fraudulent concealment by the physician, the cause of action could not be maintained more than three years thereafter. See also *Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1.

Conceding a negligent failure by Piedmont to inspect the system in 1960, plaintiffs had an immediate right to sue for all damages which accrued therefrom. Plaintiffs presented evidence that they lived in the dwelling from 1960 until December 1964, and that continuously during this period the conditions complained of existed without interruption. The damage which resulted thereafter was *in aggravation of the original damage* and resulted from the first injury.

" '(P)roof of damages may extend to facts that occur and grow out of injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action.' . . . It is likewise unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued." *Jewell v. Price, supra.*

Plaintiffs contend that defendant is estopped to plead the statute of limitations, and rely particularly on the case of *Nowell v. Tea Co.*, 250 N.C. 575, 108 S.E. 2d 889. *Nowell* is distinguishable from the instant case in that the defendant there admitted the existence of a structural defect, performed work to correct the defect, and told the plaintiffs they had found and made the necessary corrections. The defects concerned were not continuous and patent, being concerned with waterproofing, leaks around the windows, and lack of reinforcement called for in the surfacing of a parking lot. The plaintiffs in the *Nowell* case relied on statements made by the defendants until the defendants changed their position shortly before the three-year statute had run by stating that they would no longer be responsible. In the instant case the situation complained of existed patently and continuously for over a period of four years. Piedmont consistently took the position from the date of first notice that no defect existed and that it never made representations that would have led plaintiffs to refrain from suing or to change their position. Plaintiffs' allegations and proof show they knew some defect existed and therefore could not have been misled by the alleged representations of defendants. Defendant never contended that it had found the trouble and made corrections. In *Nowell v. Tea Co., supra,* it is said: "They relied upon the promise and did not sue while efforts to correct the structural errors were underway. The appellant, by its promise, invited the delay and should not complain that the invitation was accepted." Here, the defendant stated it found no defects, undertook no corrective measures, and seemed to invite suit, if any cause existed. Moreover, there are other reasons why the principles of equitable estoppel recognized by this Court do not apply to the instant facts. Considering the doctrine, this Court in the case of *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824, said: "In order to constitute an equitable estoppel, there must exist a false representation or concealment of material fact, with a knowledge, actual or constructive, of the truth; the other party must have been without such knowledge, or *having the means of knowledge* of the real facts, must not have been culpably negligent in informing himself; it must have been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice. . . . It is a species of fraud which forms the basis of the doctrine, and to prevent its consummation is its object." (Emphasis ours)

Again looking to the facts in the instant case, we observe that the defendant was rendering a gratuitous service in inspecting the system. The defects which plaintiffs alleged to have been found in

December 1964 were defects which were patently obvious to anyone who would look. The evidence shows that one of the plaintiffs was under the house monthly where defects were observable and failed to observe them. It would strain one's credulity to accept the plaintiffs' contention that they lived in a dwelling for four years with a constant and continuous production of large amounts of dust and dirt causing physical illness and property damage, and that both were led to inaction, delay and change of position by defendant's alleged statements. Under such conditions plaintiffs readily had access to the means of equal knowledge of the real facts and were culpably negligent in not properly informing themselves. We can find no species of fraud in defendant's action. Rather, if the doctrine of equitable estoppel is based on the application of the golden rule to everyday affairs of men, the defendant in this case has more than heeded the compulsion of fair play. *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114.

Plaintiffs' actions were not commenced within three years from the date their cause of action accrued.

There is yet another ground upon which the judgment below must be sustained. Plaintiffs' cause of action is for negligent inspection. "To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach. . . . Plaintiff's action is in tort. Even so, the duty owed by defendant to plaintiff arises from and is determined by the relationship subsisting between them." *Petty v. Print Works,* 243 N.C. 292, 90 S.E. 2d 717. In the event the defendant had gratuitously made inspection in 1960 and found the system in a defective condition, its duty would have been to report that the system was defective. This the plaintiffs already knew, or should have known. To fail to advise plaintiffs of something they already knew, or should have known, would not constitute a breach of duty.

"When a person has knowledge of a dangerous condition, a failure to warn him of what he already knows is without significance." *Petty v. Print Works, supra.*

In the case of *Driver v. Snow,* 245 N.C. 223, 95 S.E. 2d 519, the plaintiff sought to recover damages under implied warranty for injuries resulting from the explosion of a secondhand stove. Affirming judgment of involuntary nonsuit, the Court said: " 'Implied warranty cannot extend to defects which are visible and alike within the knowledge of the vendee and vendor, *or when the sources of information are alike open and accessible to each party.*' " (Emphasis ours) This case does not involve the doctrine of negligent inspection, but it does strongly enunciate a simple principle that

is applicable to the present facts; that is, no one needs notice of what he already knows.

Plaintiffs' evidence is insufficient to support a jury-finding that the plaintiffs were damaged because of negligent inspection by defendant.

For reasons stated, the judgment of nonsuit is

Affirmed.

RALPH D. MORRIS AND WIFE, ANNIE JO MORRIS v. RICHARD F. AUSTRAW AND WIFE, JEAN A. AUSTRAW.

(Filed 20 January, 1967.)

1. Ejectment § 1— Breach of condition of lease is not basis for summary ejectment when lease does not provide forfeiture or right of re-entry.

Breach of a condition in a lease that lessee should not use or permit the use of any portion of the premises for any unlawful purpose or purposes, without provision in the lease automatically terminating the lease or reserving the right of re-entry for breach of such condition, cannot be made the basis of summary ejectment, and provision in the lease that should the landlord bring suit because of the breach of any covenant and should prevail in such suit, the tenant should pay reasonable attorney's fees, does not constitute a provision automatically terminating the lease for breach of such condition or preserve the right of re-entry. G.S. 42-26.

2. Same—

The remedy of summary ejectment is restricted to those cases expressly provided for by G.S. 42-26, and where the landlord in summary ejectment fails to bring his rights within the statute, nonsuit is proper.

APPEAL by defendants from *Martin, S.J.*, 7 February 1966 Session of BUNCOMBE.

This is an action in summary ejectment. On 3 January 1966 the male plaintiff, pursuant to G.S. 42-28, made an oath in writing before W. E. Creasman, a justice of the peace in Buncombe County, stating that the defendants entered into the possession of a piece of land in said county known as 948 Tunnel Road, Asheville, North Carolina, as a lessee of plaintiffs; that the term of the lease entered into between plaintiffs as landlord and defendants as tenants expired on 31 December 1965; that the defendants as tenants in possession of said real estate hold over after their term has expired; and that plaintiff asks to be put in possession of the premises, and

also to recover $9.67 per day for occupation of the premises since 31 December 1965 to the date of surrendering possession of the said premises to plaintiffs. The said justice of the peace on 3 January 1966 issued a summons requiring the defendants to appear before him at 50 Court Plaza within ten days to answer the affidavit. On 3 January 1966 the affidavit and the summons were served by a constable upon defendants. On the return day both parties appeared in the court of Flake Moffitt, a justice of the peace in Asheville Township, Buncombe County, to whom the case had been removed. After hearing evidence offered by both plaintiffs and defendants, justice of the peace Moffitt entered judgment dismissing the cause. From such judgment plaintiffs appealed to the superior court, where this case was heard *de novo* by Judge Martin.

At the trial before Judge Martin, plaintiffs were allowed to amend their affidavit by adding thereto that the defendants' lease has been forfeited by a breach of the covenant therein that the premises should not be used for any unlawful purpose or purposes. Before Judge Martin, plaintiffs and defendants waived trial by jury and stipulated and agreed as to the facts, of which we copy below those that are material for a decision of this case:

"1. The paperwriting marked as Plaintiffs' Exhibit 1 constitutes the written lease between the parties.

"2. That thereafter the defendants went into possession of the demised property, and have been in continuous possession of said property until this date.

"3. That on November 10, 1964, the defendants sent a letter identified as Defendants' Exhibit 1, to the plaintiffs, said letter being prepared and signed by Henry C. Fisher, as attorney for the defendants.

"4. That the plaintiffs received said letter identified as Defendants' Exhibit 1, and a copy of said letter was received by Johnson Realty Company, realtor acting as agent for the plaintiffs in the rental of the demised property to the defendants.

"5. That after the receipt of the Defendants' Exhibit 1, the defendants continued to make regular payments of rental called for in Plaintiffs' Exhibit 1, said payments being received by the plaintiffs and the defendants remained in possession of said demised premises.

"6. That on November 8, 1965, the defendant, Richard F. Austraw entered a plea of guilty to the offense of violation of Title 21, Sections 331 and 333, of the United States Code, and Judgment was entered by the Honorable Wilson W. Warlick,

United States District Judge for the Western District of North Carolina, Asheville Division, on November 8, 1965, a copy of the charges, plea and Judgment being certified and marked as Plaintiffs' Exhibit 2 in this proceeding. That on November 9, 1965, the plaintiffs wrote a letter to the defendants, said letter being identified as Plaintiffs' Exhibit 3, and that said letter was received by the defendants on November 12, 1965, receipt for said letter and registration certificate being attached to Plaintiffs' Exhibit 3 and made a part thereof.

"7. That after the mailing and receipt of plaintiffs' Exhibit 3 the defendants remained in possession of the demised premises and continued to tender regular payments of the rent for said premises to the plaintiffs. That the plaintiffs accepted the rental payment for December, 1965, but rejected and returned the tender of the rental for said premises for the month of January, 1966.

* * *

"11. That the plaintiffs became aware of the charge alleged against the defendant, Richard F. Austraw sometime during August, 1965.

"12. That the plaintiffs are the owners in fee of the demised property, and also own other property adjoining the demised property and that a part of this additional space has been occupied by the following persons for the following approximate periods of time:

"Dr. Robert W. Holmes, DDS, five years.

Dr. E. Kent Rogers, DDS, four years.

Dr. J. M. Sloan, MD, four years.

Dr. Harry Summerlin, MD, less than one year,

said professional offices and the demised premises being all one building unit.

"13. That the Beverly Hills Pharmacy, 948 Tunnel Road, Asheville, N. C., mentioned and referred to in Plaintiffs' Exhibit No. 2, is the same property as the demised property described in Plaintiffs' Exhibit No. 1."

Judge Martin entered a judgment wherein he made the following conclusions of law, based upon the stipulated and agreed facts:

"1. That the defendants have forfeited any and all rights accruing to them under and by virtue of the lease dated December 11, 1959, between the plaintiffs and the defendants and which said lease is referred to as Exhibit 1 in the Stipulations in this cause, and that the plaintiffs are entitled to the posses-

sion and enjoyment of the said premises described in the said Exhibit 1.

"2. That the plaintiffs are entitled to the immediate possession of the premises described in said Exhibit 1 of the Stipulations and known and designated as 948 Tunnel Road, Asheville, North Carolina, and the defendants have no further rights in and to the possession and enjoyment of said premises."

Based upon the agreed and stipulated facts and his conclusions of law, Judge Martin's judgment adjudged and decreed as follows:

"1. That the defendants vacate the premises referred to herein and designated as 948 Tunnel Road on or before the 15th day of May, 1966, and

"2. That the plaintiffs have and recover of the defendants the sum of Nine and 67/100 Dollars ($9.67) per day from and after the 31st day of December, 1965, until such date as the defendants fully and finally vacate the said premises.

"3. That the plaintiffs have and recover of the defendants the costs of this action to be taxed by the Clerk."

From this judgment, defendants appeal to the Supreme Court.

Uzzell and DuMont by William E. Greene and Robert E. Harrell for defendant appellants.

Williams, Williams and Morris by William C. Morris, Jr., for plaintiff appellees.

PARKER, C.J. Defendants assign as errors each of Judge Martin's two conclusions of law, each of the three matters adjudged and decreed in the judgment, and the entry of the judgment.

The written lease between the parties referred to in the first paragraph of the stipulated and agreed facts is set forth in fourteen pages in the record. The basis and scope of summary ejectment in actions between the landlord and tenant are established by G.S. 42-26. Defendants' brief states that the first question involved is: "Did Richard F. Austraw's violation of 21 U.S.C. 331 and 333 constitute a forfeiture of all appellant tenants' rights under the terms and conditions of their lease with appellee landlords?" Plaintiffs' brief states likewise. It seems clear from the stipulated and agreed facts and the first identical question stated in the briefs of the parties that the only section of G.S. 42-26 which could possibly fit the facts stipulated and agreed to is subsection 2, which provides: "When the tenant . . . has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased."

Paragraph 1(a) of the lease between the plaintiffs as landlord and the defendants as tenants provides, *inter alia:* "Tenant shall not use or permit the use of any portion of said premises for any unlawful purpose or purposes." The lease or contract of rental disclosed in the record before us contains no provision automatically terminating the estate for breach of provisions of the lease that "tenant shall not use or permit the use of any portion of said premises for any unlawful purpose or purposes," nor does such contract or lease reserve the right of re-entry for breach of the quoted provisions of the lease. Appellees in their brief contend:

> "Section 16(b) of the lease clearly contemplates in unmistakable language that suit might be brought by the Landlord for possession of the premises in the event of the breach of *any covenant* that may be set forth in the lease. The language of the lease is as follows: 'In case Landlord should bring suit for the possession of the premises, for the recovery of any sum due hereunder, *or because of the breach of any covenant herein.*' This clearly indicates that it was the intention of the parties that the landlord might bring suit for possession of the premises if any covenant or promise in the contract was broken."

Paragraph 16(b) of the lease reads as follows:

> "In case Landlord should bring suit for the possession of the premises, for the recovery of any sum due hereunder, or because of the breach of any covenant herein, or for any other relief against Tenant, declaratory or otherwise, or should Tenant bring any action for any relief against Landlord, declaratory or otherwise, arising out of this lease, and Landlord should prevail in any such suit, Tenant shall pay Landlord a reasonable attorney's fee which shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment."

Except in cases where G.S. 42-3 writes into a contract of a lease of lands, when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee, *Ryan v. Reynolds,* 190 N.C. 563, 130 S.E. 156, a breach of the conditions of a lease between a landlord and tenant cannot be made the basis of summary ejectment unless the lease itself provides for termination of such breach or reserves the right of re-entry for such breach. *Dees v. Apple,* 207 N.C. 763, 178 S.E. 557; 2 Strong's N. C. Index, Ejectment, § 3.

This is said in 32 Am. Jur., Landlord and Tenant, § 848:

> "Generally, unless there is an express stipulation for a forfeiture, the breach of a covenant in a lease does not work a forfeiture of the term. Moreover, the settled principle of both law and equity that contractual provisions for forfeitures are looked upon with disfavor applies with full force to stipulations for forfeitures found in leases; such stipulations are not looked upon with favor by the court, but on the contrary are strictly construed against the party seeking to invoke them. As has been said, the right to declare a forfeiture of a lease must be distinctly reserved; the proof of the happening of the event on which the right is to be exercised must be clear; the party entitled to do so must exercise his right promptly; and the result of enforcing the forfeiture must not be unconscionable."

We do not agree with appellees' contention that the provisions of paragraph 16(b) of the lease automatically terminate the tenants' estate for breach of the provisions of the lease that "tenant shall not use or permit the use of any portion of said premises for any unlawful purpose or purposes," and that such provisions of paragraph 16(b) of the lease reserve the right of re-entry to plaintiffs. Appellants' assignments of error to Judge Martin's two conclusions of law are good and are sustained.

The second and last question presented in the brief of each party is: "Are appellee landlords entitled, under the terms and conditions of the lease in question, to the present possession of the premises described in such lease?" Considering the stipulated and agreed facts and what has been said above, the answer to the question is, No.

The remedy by summary proceedings in ejectment is restricted to those cases expressly provided by G.S. 42-26. The proceeding should be dismissed as in case of nonsuit. *Howell v. Branson,* 226 N.C. 264, 37 S.E. 2d 687.

The judgment below is

Reversed.

STATE v. JERRY ARNOLD FUQUA.

(Filed 20 January, 1967.)

1. Criminal Law § 71—

The findings of fact by the court upon the *voir dire* in regard to the circumstances under which defendant allegedly made the confession sought to be introduced in evidence are conclusive on appeal when supported by competent evidence, but whether such facts support the conclu-

sion of the court that the confession was freely and voluntarily made is a question of law reviewable on appeal.

2. Same—

Where the State's evidence, without contradiction, is to the effect that the officer to whom defendant allegedly confessed stated prior to the confession that if defendant wanted to talk to the officer the officer would be able to testify that defendant had talked to the officer and was cooperative, *is held* to disclose a promise by the officer having the natural tendency to arouse in defendant a hope for a lighter punishment if he confessed, tainting the confession and rendering it incompetent.

APPEAL by defendant from *Bickett, J.,* June 1966 Criminal Session of ALAMANCE.

Defendant Jerry Arnold Fuqua, Richard May and Floyd May were respectively charged with breaking, entering and larceny by bill of indictment returned by the Grand Jury of Alamance County at the June 1966 Criminal Session of Alamance. All three defendants entered pleas of not guilty.

The State's evidence tended to show that the shop of Carolina Cotton Shops, Inc., was broken into and a box containing cash and checks of the approximate value of $305.00 was taken during the night of 26 January 1965.

W. J. Cook, at that time a police officer in the town of Mebane, testified on *voir dire* and in the absence of the jury substantially as follows, except where quoted: That he visited Richard and Floyd May in their cells at the Orange County jail at about 1:00 o'clock a.m. on 15 March 1965, and after obtaining statements from them he talked with Jerry Fuqua in a room of the Durham County jail during the afternoon of 15 March 1965; that most of defendant's statements consisted of "filling in" and "yes" and "no" answers to repetition by the officer of statements made by Richard May and Floyd May. In response to question of counsel, officer Cook gave the following pertinent testimony:

"Q. Did you make any statement to him relative to warning him of his rights?

A. Yes sir.

Q. What statement did you make to him?

A. I advised him that he did not have to talk to me unless he wanted to and he had the right to counsel and anything he said could be used for or against him in court.

Q. Did you promise him anything?

A. No sir, no more than what I told the other boys, I would be able to testify they cooperated in the case.

Q. Did you threaten him in any way?

A. No sir.

Q. Did you ask whether or not he wanted you to contact any lawyer?

A. No sir.

Q. You said, Mr. Cook, you didn't promise him anything, but you did say if he would tell what he knew about it you would testify he had been cooperative?

A. Yes, sir, I told him if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative.

Q. On this particular thing he is charged with here, you said you advised him of his rights to have counsel, but you didn't tell him whether the court would appoint him a lawyer, did you?

A. No, sir."

Officer Cook further testified that in his opinion defendant was not under the influence of any kind of drugs.

Clyde Junior Allen was called by the defendant and testified to the effect that he was in the cell beside the defendant on 15 March 1965, and that during the morning prior to the questioning by officer Cook the defendant had eaten part of a medicated stick of nose inhaler, and that in his opinion defendant was not in a sober condition at the time he talked to officer Cook.

Defendant did not take the witness stand during the *voir dire* examination.

At the close of the *voir dire,* the court made the following finding:

"The statements made to Mr. W. J. Cook by Mr. Jerry Arnold Fuqua in Durham in the Durham County Jail were made freely and voluntarily and without fear or reward or hope of reward, and after having been fully advised by said W. J. Cook of his rights to remain silent, of his right to counsel, and that anything he might say could be used for or against him in court, and that no inducement was made to Mr. Fuqua. The court further finds as a fact that Mr. Fuqua freely and wilfully and intelligently waived his rights to counsel, and the court further finds as a fact that the defendant Fuqua was not under narcotics, drugs or other medication at the time. . . ."

The jury returned and officer Cook testified over objection and in presence of the jury that appellant stated to him:

"He said on January 26, 1965, sometime around midnight, twelve o'clock, that they drew up the plans for this break in at Junior's home. They left there by walking and went to the old

Ice Plant Road and went to the building. That Richard May helped him up to the window and he removed the pane from the glass and raised the window. That he went inside the building and that he had to — he found the box in the second box that he looked in, and he said he saw another box — money box in there, but he picked it up and shook it and nothing rattled and he didn't take it, that he came back out, closed the window and that they went to — back to Junior's home and they tore the box open with a claw hammer and they divided the money. He and Junior got $60.00 apiece while Richard and Floyd got $45.00 apiece, that they burned the checks. That he went to the pond the next day and stood on the bank of the pond and threw it into the water."

The jury returned a verdict of guilty as charged in the bill of indictment. From the judgment imposed, defendant appeals.

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

Herbert F. Pierce for defendant.

BRANCH, J. Appellant assigns as error the ruling of the court below that the confession allegedly made by defendant to officer Cook was voluntary.

"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. . . . 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 conclusive 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. Gray,* 268 N.C. 69, 150 S.E. 2d 1. *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847.

However, "What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence

is a question of law, and the decision of the judge in the court below can be reviewed by this Court; so, what evidence the judge should allow to be offered to him to establish these facts is a question of law. So, whether there be *any evidence* tending to show that confessions were not made voluntarily, is a question of law. But whether the evidence, if true, prove these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit or not, and in case of a conflict of testimony which witness should be believed by the court, are questions of fact to be decided by the judge; and his decision cannot be reviewed in this Court, which is confined to questions of law." *State v. Andrew,* 61 N.C. 205; *State v. Whitener,* 191 N.C. 659, 132 S.E. 603; *State v. Woodruff,* 259 N.C. 333, 130 S.E. 2d 641.

The trial court properly excused the jury and heard evidence on *voir dire* as to whether defendant's statement was voluntary, giving defendant opportunity to testify and offer evidence.

It is admitted that officer Cook made statements, or failed to make statements, on which defendant relies in order to show that his confession was involuntary. Therefore, we need not consider whether the trial judge properly found facts in order to conclude that the confession was voluntary, since there was no conflict in the pertinent testimony offered on the *voir dire. State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841.

This Court must, however, decide as a matter of law whether the circumstances of this case rendered the confession inadmissible.

Speaking to the subject of free and voluntary confession in *State v. Roberts,* 12 N.C. 259, Henderson, J., said:

> "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breath of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

And in the same case Taylor, C.J., said: "(A) confession obtained by the slightest emotions of hope or fear ought to be rejected." The principles enunciated in this landmark case have been recognized

by this Court in the cases of *State v. Livingston,* 202 N.C. 809, 164 S.E. 337; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Barnes, supra; State v. Gray, supra.*

In the case of *State v. Woodruff, supra,* the defendant, who was being held on charges of forgery, volunteered to assist the sheriff in the solution of certain murders if the sheriff would use his influence to help him. The evidence reveals that the sheriff came to suspect the defendant was involved in the murders and told him that "he certainly would try to help him" if he confessed. The Court held that the evidence was insufficient to support the conclusion that the confession later made by the defendant was voluntary and that the admission of such confession was prejudicial error.

Where a defendant charged with murder, while imprisoned in the county jail, was induced to confess by the sheriff's promise that if he told the truth the sheriff would do whatever he could for him, it was held that the confession was involuntary and was inadmissible in evidence. *People v. Gonzales,* 136 Cal. 666, 69 P. 487.

In *Couley v. State,* 12 Mo. 462, it appeared that the defendant, accused of burglary, was induced to confess by the officer who arrested him. The officer told defendant "that he would not appear against him if he would confess." The Court held that testimony of a confession thus induced should have been excluded from the jury.

In *United States v. Kurtz,* 26 Fed. Cas. 826 (C.C. D. of C.) defendant was arrested by two constables on a charge of stealing goods and was told by the constables that if he would tell where the goods were, they would do what they could for him. The court rejected the confession as to the goods as being involuntary.

In the instant case the police officer while questioning the defendant, then in jail custody, said to defendant: "That if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." This statement by a person in authority was a promise which gave defendant a hope for lighter punishment. It was made by the officer before the defendant made his confession, and the officer's statement was one from which defendant could gather some hope of benefit by confessing. The total circumstances surrounding the defendant's confession impels the conclusion that there was aroused in him an "emotion of hope" so as to render the confession involuntary.

The uncontradicted evidence shows that the confession of defendant was not freely and voluntarily given within the meaning of our decisions, and it is incompetent as a matter of law.

We do not deem it necessary to discuss the merit of the defendant's other assignments of error, since there must be a

New trial.

VERNON COBLE v. CHARLES A. REAP.

(Filed 20 January, 1967.)

1. Pleadings § 12—

A demurrer admits for its purposes the truth of factual averments well stated and all relevant inferences of fact deducible therefrom, but it does not admit inferences or conclusions of law.

2. Pleadings § 17—

Demurrer to the jurisdiction may be entered at any time, even in the Supreme Court on appeal, but such demurrer will be sustained when, and only when, the defect of jurisdiction appears on the face of the complaint.

3. Appeal and Error § 3—

Judgment sustaining a demurrer and dismissing the action is immediately appealable.

4. Actions § 8—

Where a party has his election to sue on contract or in tort, and the allegations, construed in the light most favorable to plaintiff, are sufficient to allege an action for conversion by the seller of property which the seller had sold plaintiff, the court will respect plaintiff's election for the purpose of sustaining jurisdiction.

5. Sales § 3—

Where the purchaser makes a part payment under an agreement to pay the balance of the purchase price when the purchaser picks up the articles sold, whether title passes at the time of part payment depends upon the intention of the parties, and title will be held to have passed at that time unless it is apparent that it was the intention of the parties that the payment of the balance of the purchase price, or some other requirement, was a condition precedent to the transfer of title.

6. Courts § 4; Pleadings § 17; Trover and Conversion § 1— Allegations held to allege conversion by seller of articles sold to purchaser.

Plaintiff's allegations were to the effect that he purchased specified items of personalty from defendant and made a partial payment under agreement that he would pay the balance of the purchase price when he picked up the articles, that defendant thereafter sold the personalty to a third party, to plaintiff's actual damage in the amount of $70. *Held:* The complaint was sufficient to allege a cause of action in tort for conversion, and defendant's demurrer to the jurisdiction on the ground that the action was *ex contractu* and within the exclusive original jurisdiction of a justice of the peace, should have been overruled. G.S. 7-63, G.S. 7-121, G.S. 7-122.

7. Appeal and Error § 19—

An assignment of error not supported by an exception is ineffectual.

APPEAL by plaintiff from *Gambill, J.*, 28 March 1966 Criminal Session of STANLY.

Plaintiff commenced this civil action in the Superior Court of

Randolph County by the issuance of summons on 12 August 1965. On the same date he filed in the Superior Court of Randolph County a complaint, which alleges in substance: Plaintiff is a citizen and resident of Randolph County, North Carolina, and defendant is a citizen and resident of Stanly County. On 28 December 1964 plaintiff purchased from defendant a planer, bits, and other miscellaneous parts appertaining thereto for an agreed price of $100. At the time of purchase plaintiff paid defendant the sum of $20, with a balance of $80 to be payable when the planer, bits, and other miscellaneous parts appertaining thereto were to be picked up by plaintiff a short time thereafter. A few days after the sale, plaintiff received a letter from defendant indicating he had found a purchaser for the property he had sold to plaintiff for the sum of $135 and had sold the property to such new purchaser, and defendant in his letter purported to refund to plaintiff the $20 plaintiff had paid him. Despite persistent and repeated demands for the planer to be produced and delivered to plaintiff and for damages for the wrongful conversion of said planer by defendant, defendant has failed and refused to either deliver the planer to plaintiff or to pay damages to plaintiff. The fair market value of this property when defendant sold it to plaintiff was $150, though plaintiff purchased it from defendant for a bargain price of $100. After selling this property to plaintiff for $100, defendant actually sold it to another purchaser for $135. The willful act of defendant in conveying the property of plaintiff after title had been transferred by defendant to plaintiff amounted to a willful conversion of the property of the plaintiff, for which he is entitled to have body execution issued against defendant for any judgment he may secure in this action. By reason of the willful conversion of this property, plaintiff is entitled to recover of defendant actual damages in the sum of $70 and punitive damages in the amount of $1,000.

Wherefore, plaintiff prays judgment that he recover from defendant the said planer, bits, and other miscellaneous parts appertaining thereto; that if this property is not delivered by defendant to plaintiff, that plaintiff recover judgment of defendant for the sum of $150, the reasonable market value of said property less a credit of $80 still due, for a net recovery of $70 actual damages, plus interest, and that he recover of defendant punitive damages in the amount of $1,000, and that body execution issue against defendant for any such judgment as plaintiff may recover for the willful conversion of his property.

On 27 August 1965, prior to the time defendant had filed an answer and prior to the time for defendant to answer said complaint had expired, plaintiff amended his complaint, in which he eliminated

in his prayer for relief the request that the property sold to him by defendant be delivered to him.

On 3 September 1965 Judge Walker, upon defendant's special appearance before him to make a motion for a change of venue of this action from Randolph County to Stanly County, entered an order removing this action from the Superior Court of Randolph County to the Superior Court of Stanly County for trial. Plaintiff did not except to this order, so far as the record before us shows. This order was received in the office of the clerk of the Superior Court of Stanly County on 8 September 1965.

On 9 September 1965 Joe H. Lowder, clerk of the Superior Court, granted a request of defendant to extend the time 20 days and until 3 October 1965 to file answer.

On 29 September 1965 defendant demurred to the complaint on the ground that it appears from the complaint that the alleged claim of plaintiff is a difference between $135 and $100, or a net alleged claim of $35, and for such claim of $35 the court of a justice of the peace has original jurisdiction, and therefore in this matter the Superior Court does not have original jurisdiction.

On 28 March 1966 Gambill, judge presiding over the 28 March 1966 Criminal Session of Stanly, heard the demurrer. Judge Gambill entered a judgment in which, after reciting that it is alleged in the complaint that defendant is indebted to plaintiff by reason of contract in the sum of less than $200 and it is provided in G.S. 7-121 that a justice of the peace shall have exclusive jurisdiction over such actions, he adjudged and decreed that the demurrer be sustained and that the action be dismissed.

From the judgment sustaining the demurrer, plaintiff appeals.

Gerald C. Parker for plaintiff appellant.
Charles H. McSwain for defendant appellee.

PARKER, C.J. Plaintiff assigns as error the judgment sustaining the demurrer to his complaint that a justice of the peace has exclusive jurisdiction over the subject matter of the action, and dismissing the action.

It is hornbook law in this jurisdiction that a demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and all relevant inferences of fact deducible therefrom, but it does not admit inferences or conclusions of law. 3 Strong's N. C. Index, Pleadings, § 12.

An objection that the court has no jurisdiction over the subject matter of the action may be raised by a demurrer to the complaint at any time, even in the Supreme Court on appeal. G.S. 1-127;

Williams v. Cooper, 222 N.C. 589, 24 S.E. 2d 484. A demurrer to a complaint on the ground that the court has no jurisdiction of the subject matter of the action will be sustained when, and only when, such defect appears upon the face of the complaint. *Richardson v. Richardson,* 261 N.C. 521, 135 S.E. 2d 532; 1 McIntosh, N. C. Practice and Procedure, 2d Ed., § 1184. From the judgment sustaining the demurrer to his complaint and dismissing his action, plaintiff has a right to appeal immediately to the Supreme Court. 1 McIntosh, N. C. Practice and Procedure, 2d Ed., § 1198.

G.S. 7-63 reads in relevant part: "The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court." G.S. 7-121 reads in relevant part: "Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except — 1. Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars." G.S. 7-122 reads: "Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars."

G.S. 1-151 reads: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties."

The question presented to us is whether the cause of action alleged in the complaint can be fairly treated as based in tort.

Mitchem v. Pasour, 173 N.C. 487, 92 S.E. 322, was an action commenced in the Superior Court by a landlord against his tenant, alleging the tenancy, the nonpayment of rent, and a conversion of the crops raised on the land, amounting to $134.16. In the Superior Court a judgment was entered dismissing the action for want of jurisdiction upon the ground that it was an action in contract and within the jurisdiction of a justice of the peace. The judgment dismissing the action was reversed. The Court in its opinion said:

> "The uniform rule under our system of pleading is to construe the allegations liberally in favor of the pleader, with a view to substantial justice between the parties, and 'when the action can be fairly treated as based either in contract or in tort, the courts, in favor of jurisdiction, will sustain the election made by the plaintiff;' and further: 'If the complaint is so worded that under the liberal procedure of The Code it could have been construed to be either an action on an express or implied contract, or either *in tort* or contract, or as a common-law action or one under the statute, the Court will sustain the jurisdiction.'" (Citing voluminous authority.)

See also *Roebuck v. Short,* 196 N.C. 61, 144 S.E. 515; *Furniture Co. v. Clark,* 191 N.C. 369, 131 S.E. 731.

In *Asher v. Reizenstein,* 105 N.C. 213, 10 S.E. 889, the Court held that the Superior Court had jurisdiction of an action for damages for the conversion of a horse where the amount claimed was $125.

Defendant appellee contends: "Since the title to the property had never passed to the plaintiff, the title still being in the seller (defendant), there could be no wrongful conversion of the property. The action is upon contract and a Court of the Justice of the Peace has exclusive original jurisdiction." With that contention we do not agree.

In *Shearin v. Indemnity Co.,* 267 N.C. 505, 148 S.E. 2d 560, it is said:

> " 'The effect of a part payment with respect to the transfer of title depends primarily on the terms of the contract and the intention of the parties, and also whether, as between the parties, anything still remains to be done with reference to the subject matter of the sale.' 77 C.J.S., Sales, § 266(b). 'Property may be delivered with the understanding that title thereto shall not pass until the performance of some condition, and such understanding or intention is given effect as between the parties.' 46 Am. Jur., Sales, § 433, p. 603."

This is said in *Teague v. Grocery Co.,* 175 N.C. 195, 95 S.E. 173:

> "On the present record, there are facts in evidence tending to show that this transaction was an executed contract of sale, having reference to designated and specific pieces of property, and if these facts should be accepted by the jury, it is well understood that present physical delivery of the property is not necessary to the transfer of the title but that the same passes according to the intent of the parties as expressed in the contract between them, and further, that, in the absence of specific agreement on the question, the presumption is that the title passed at the time of the purchase and without such delivery."

This is said in 46 Am. Jur., Sales, § 449:

> "Although the actual payment of the price or part thereof by the buyer in case of a sale of specified or identified chattels is a circumstance tending to show that it is the intention of the parties that the title pass, this circumstance is not controlling. The payment of the price or a part thereof does not necessarily operate to transfer the title to the buyer if anything further

remains to be done by the seller to the subject matter of the sale before delivery."

This is said in Vold, The Law of Sales, 2d Ed., p. 144:

"There may be an unconditional contract to sell identified goods which are then in a deliverable state. If so, unless a different intention appears, the property interest passes to the buyer when the deal is made.

"Neither mere postponement of delivery, nor mere postponement of payment, nor both, show a contrary intention."

The factual averments well stated in the complaint and all relevant inferences of fact deducible therefrom by a liberal construction are sufficient to show plaintiff purchased from defendant a planer, bits, and other miscellaneous parts appertaining thereto for an agreed price of $100; that plaintiff paid defendant the sum of $20 with a balance of $80 to be payable when this property was to be picked up by plaintiff a short time thereafter; that the fair market value of this property when defendant sold it to plaintiff was $150, though plaintiff purchased it from defendant for a bargain price of $100; that this was a sale of specified and identified goods which were then in a deliverable state; and that a reasonable inference to be drawn from these alleged facts is that upon the payment by plaintiff to defendant of the sum of $20 this transaction was an executed contract of sale, and that it was the intention of the parties that the title to this property should pass to the buyer upon the payment of $20 of the purchase price. The complaint alleges a willful conversion of this property by defendant when he sold it to a stranger for the price of $135, and prays that plaintiff recover from defendant the sum of $70 as actual damages. It is our opinion, and we so hold, that this action can be fairly treated as based on the tort of conversion, and that the Superior Court has jurisdiction.

Defendant's second and last assignment of error is that the court erred in entering an order removing the case from Randolph County to Stanly County for trial. Plaintiff did not except to the order for change of venue. This assignment of error has no exception to support it, and is ineffectual to bring up for review the order for change of venue. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; 1 Strong's N. C. Index, Appeal and Error, § 19.

In our opinion, the election of jurisdiction made by plaintiff should be upheld, and the judgment sustaining the demurrer and dismissing the action was erroneously entered, and is

Reversed.

PERRY CLAY WILLIAMS v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 20 January, 1967.)

1. Insurance § 47.1—

In order for plaintiff insured to recover under an uninsured motorist provision of a policy he must show that he was legally entitled to recover damages from the owner or operator of an uninsured automobile for bodily injury caused by accident arising out of the ownership, maintenance or use of the uninsured automobile.

2. Pleadings § 12—

A demurrer admits for its purposes all facts well pleaded in the complaint, and the allegations of the complaint must be taken as true and liberally construed in favor of the pleader.

3. Insurance § 3—

While an insurance policy must be construed according to its terms in the absence of ambiguity, when there is ambiguity the policy will be construed in favor of coverage, and nontechnical terms will be given their ordinary meaning in the absence of evidence tending to show a contrary intent.

4. Same—

A policy of insurance will be construed as a whole with the purpose of giving effect to the intention of the contracting parties, and each word and clause will be given effect if possible by any reasonable construction.

5. Insurance § 47.1—

In this action on a clause of a policy providing coverage for injury to plaintiff insured caused by accident arising "out of the ownership, maintenance, or use" of an uninsured automobile, the allegations were to the effect that plaintiff, while underneath an uninsured vehicle, raised on blocks, making repairs, was injured when the owner removed a front wheel and the car fell or rolled upon plaintiff. *Held:* Repairs are a necessary incident to maintenance, and the allegations bring plaintiff within the coverage of the policy.

APPEAL by plaintiff from *Bone, E.J.*, 9 April 1966 Assigned Session of WAKE.

Civil action to recover under a policy of liability insurance.

Plaintiff instituted this action on 26 April 1965 and, in substance, alleged: That at the time he received the injury complained of he was married to Margaret Bissett Williams, and that he and his said spouse were residents of the same household. At said time there was in force a family automobile and comprehensive liability policy issued by defendant to plaintiff's spouse, which policy contained an "uninsured motorists insurance endorsement." Plaintiff, a mechanic, at the request of one James Harris Singletary, went to premises used by Singletary for the purpose of repairing an auto-

mobile belonging to Singletary. Upon arrival, he found the car up on blocks. After inspecting the blocks and satisfying himself that the automobile was secure, plaintiff crawled under the automobile to commence his work. While plaintiff was under the automobile, Singletary carelessly and negligently raised the automobile and removed the left front wheel, and as a result the automobile fell or rolled on plaintiff, causing serious bodily injury.

Singletary did not have liability insurance on the automobile, and plaintiff brought this action to recover under the uninsured motorists endorsement in the policy issued by defendant to plaintiff's spouse.

The policy contained, *inter alia*, the following:

INSURING AGREEMENTS

"I. Damages for Bodily Injury and Property Damage Caused by Uninsured Automobiles

To pay all sums which the Insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of:

(a) bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', sustained by the Insured;

. . . . .

caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile.

. . . . .

"II. Definitions

(a) Insured. With respect to the bodily injury coverage afforded under this endorsement, the unqualified word 'insured' means:

(1) The named Insured and, while residents of the same household, his spouse and the relatives of either.

. . . . .

(c) Uninsured Automobile. The term 'uninsured automobile' means:

(1) with respect to damages for bodily injury and property damage an automobile with respect to the ownership, maintenance or use of which there is, in the amounts specified in the North Carolina Motor Vehicle Safety and Financial Responsibility act, neither (i) cash or securities on file with the North Carolina Commissioner of Motor

> Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, applicable to the accident with respect to any person or organization legally responsible for the use of such automobile; . . ."

Defendant demurred upon the ground that the facts alleged did not state a cause of action, for that they were not within the coverage provided by the policy. Judge Bone entered judgment sustaining the demurrer and dismissing the action. Plaintiff appealed.

Vaughan S. Winborne for plaintiff.
Bailey, Dixon & Wooten for defendant.

BRANCH, J. G.S. 20-279.21 (b)(3) in pertinent part provides: "No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of § 20-279.5, under provisions filed with and approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; . . ."

"In North Carolina today all insurance policies covering loss from liability arising out of the ownership, maintenance, or use of a motor vehicle are, to the extent required by G.S. § 20-279.21, mandatory. All which insure in excess of the compulsory coverage are voluntary policies to the extent of the excess." *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654. Plaintiff's prayer for recovery is within the limits of the compulsory coverage.

The insured, in order to be entitled to the benefits of the endorsement, must show (1) he is legally entitled to recover damages, (2) from the owner or operator of an uninsured automobile, (3) because of bodily injury, (4) caused by accident, and (5) arising out of the ownership, maintenance, or use of the uninsured automobile.

It is well settled that a demurrer admits, for the purpose of testing the sufficiency of the pleadings, all facts well pleaded in the complaint. If the facts alleged in the complaint, taken as true, and liberally construed in favor of the pleader, are sufficient to state a

cause of action, the demurrer should be overruled. *Glover v. Brotherhood,* 250 N.C. 35, 108 S.E. 2d 78. For the purpose of this decision, it is admitted that Singletary is the owner of an uninsured automobile, and that plaintiff received bodily injuries caused by the accident alleged. Therefore, to decide whether the plaintiff has alleged facts sufficient to legally entitle him to recover damages, we must determine if the injury arose out of the "ownership, maintenance, or use" of the motor vehicle. In making this determination, the same rules of construction apply in construing uninsured motorists coverage as apply in construing a standard liability insurance policy. "The purpose of the statute making uninsured motorist coverage compulsory, it has been said, is to give the same protection to a person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability insurance policy." 7 Am. Jur., 2d, Automobile Insurance, § 135, p. 461.

"Insurance policies must be given a reasonable interpretation and where there is no ambiguity they are to be construed according to their terms. *Huffman v. Insurance Co.,* 264 N.C. 335, 141 S.E. 2d 496. Where there is ambiguity and the policy provision is susceptible of two interpretations, of which one imposes liability upon the company and the other does not, the provision will be construed in favor of coverage and against the Company. *Mills v. Insurance Co.,* 261 N.C. 546, 135 S.E. 2d 586. . . . In the construction of contracts, even more than in the construction of statutes, words which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage. In the construction of contracts the purpose is to find and give effect to the intention of the contracting parties, if possible." *Insurance Co. v. Insurance Co.,* 266 N.C. 430, 146 S.E. 2d 410.

This Court has not heretofore ruled on a factual situation involving the maintenance or repair of an automobile in connection with coverage under the uninsured motorist provisions of a liability policy. However, we find where other jurisdictions have defined the conditions under which an insured shall be liable on policies employing the terms, "ownership, maintenance or use." In the case of *Morris v. Surety Co.,* 322 Pa. 91, an action on a policy of liability insurance protecting insured from loss arising out of damages by reason of the "ownership, maintenance or use" of described vehicles, where an employee of the assured, while in the act of hammering into place the rim of a wheel on truck covered by the policy, caused

injury to the plaintiff, the Pennsylvania Court held that the policy covered damages to the plaintiff, saying:

> "The four terms employed in the policy defining the conditions under which the insurer was to be liable cover a wide and comprehensive field. Each of these terms, "ownership, maintenance, manipulation or use," is general in nature and covers situations which cannot be defined beforehand with exactness. . . . There may be occasions, in fact, when the meanings of these terms overlap and when more than one would cover the same situation. But it is a well-settled rule of construction that no word in a contract is to be treated as surplusage or redundant if any reasonable meaning consistent with the other parts can be given to it. . . . As we view this policy, each of these terms was intended to cover situations distinct and separate from those covered by any other term. Distinctions between them and particularity of application appear in other cases. . . .
>
> "The word 'maintenance' used in this policy covers all acts which come within its ordinary scope and meaning. To maintain means to preserve or keep in an existing state or condition and embraces acts of repair and other acts to prevent a decline, lapse or cessation from that state or condition. . . . In a wide variety of situations the word 'maintain' has been taken to be synonymous with 'repair'. . . . Here the act which gave rise to the injury for which a judgment was recovered took place while an employee of the assured was in the act of repairing an essential part of the car and, under the circumstances, was expressly within the term of the policy specified as 'maintenance.' "

In the case of *Fire Insurance Co. v. Insurance Co.*, 275 N.Y.S. 47 (affirmed in 267 N.Y. 576, 196 N.E. 587), defendant's policy agreed to indemnify for loss sustained "as a result of the ownership, maintenance, or use" of a certain automobile. Plaintiff brought action on the policy, pleading that while engaged in doing maintenance work on his automobile, defendant's insured carelessly caused a bucket of gasoline used by him in said work to spill on the floor and spread to a stove used for heating the garage, causing damage to plaintiff's insured's property. The defendant moved for judgment on the complaint on the ground that on its face it did not state facts sufficient to constitute a cause of action. The New York Court held that the facts pleaded constituted a cause of action.

Blashfield Automobile Law and Practice, Vol. 7, § 314.2, pp. 558-559, states:

> "Where the insurance company undertakes by the policy to indemnify the owner of the automobile forming the subject matter of the insurance against claims for damages on account of bodily injuries accidentally suffered by any person by reason of the ownership, maintenance, or use of the vehicle, its obligation is not limited to claims for damages by reason of injuries occurring while the insured himself is personally using or operating the car, but extends to all claims of the nature indicated, that is, all those which are made against him by reason of his ownership or maintenance of the car which produces the accidental injuries in question. *The repair of the vehicle is included in its maintenance within such a provision.*" (Emphasis ours)

A contract is to be construed as a whole and each clause and word must be considered with reference to the other provisions of the agreement and be given effect if possible by any reasonable construction. *Robbins v. Trading Post*, 253 N.C. 474, 117 S.E. 2d 438. Thus, the terms "ownership, maintenance and use" should not be treated as mere surplusage. They were placed in the policy in order to cover situations distinct and separate from any other term.

The key word on this appeal is "maintenance." Webster's New International Unabridged Dictionary defines "maintenance" as "The labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep." Giving the word its common, daily, nontechnical meaning, the facts alleged come within the coverage of the policy.

Moreover, if there were ambiguity in the policy which requires interpretation as to whether the policy provisions impose liability, the provisions would be construed in favor of coverage and against the company. *Insurance Co. v. Insurance Co., supra.*

Reversed.

SAM C. CARR v. THE GOOD SHEPHERD HOME, INC.

(Filed 20 January, 1967.)

1. Vendor and Purchaser § 1—

Where the vendor offers in writing to sell described realty at a stated price, payable in yearly installments, a verbal acceptance of the offer by the purchaser is sufficient to constitute an option enforceable by the purchaser.

2. Frauds, Statute of § 6b— Memorandum signed by vendor must relate to agreement to sell adduced by purchaser's evidence.

Plaintiff's original complaint alleged that defendant gave plaintiff an option to purchase certain real estate at a stated price, payable in yearly installments, and by amendment alleged that defendant thereafter agreed to permit plaintiff to sell certain of the lots and that defendant would credit the proceeds of sale to plaintiff's contract. Plaintiff offered in evidence a memorandum signed by defendant sufficient to support the agreement originally alleged, but introduced no written memorandum of any agreement signed by defendant to accept the purchase price paid by third persons, as alleged in the amendment and supported by plaintiff's evidence. Defendant pleaded the statute of frauds. *Held:* Plaintiff may not recover on the agreement alleged in the amended complaint in the face of defendant's plea.

3. Same—

Upon the plea of the statute of frauds by defendant in defense to an action on an option to sell realty, plaintiff may neither enforce the agreement nor recover damages for loss of a bargain. G.S. 22-2.

APPEAL by plaintiff from *McKinnon, J.*, May-June 1966 Civil Session of BRUNSWICK.

Civil action to obtain specific performance of a contract to convey land, or, in the alternative, damages.

The action was instituted on 21 September 1964. At the trial plaintiff introduced as Exhibit "A" the following letter from Reverend E. V. Dunn, past president of defendant's board of directors:

"The Good Shepherd Home, Inc.
Box 171
Lake Waccamaw, N. C.
February 28, 1958

Mr. Sam Carr
Long Beach Trading Co.
Long Beach, N. C.
Dear Sam,

In reference to our conversation of Tuesday February 18th 1958 at your home concerning the sale property owned jointly by the Good Shepherd Home and W. B. McLean.

This property consists of Blocks No. 101A, 102, 103, 104 which front on the ocean and Davis Creek on the back.

I have been trying to get in touch with Mr. McLean but he has been away from home and has not called me as yet; however, I do have his permission to execute sale of the property at the price which I quoted you — $15,000.00. This to be payable to the Good Shepherd Home at the rate of one-third (⅓) down and the balance due at the rate of one-third of the sale price each year thereafter. This would mean that there would be $5000.00 paid to us by March 28th 1958 another $5000.00 due by March 28th 1959 and the balance of $5000.00 due on March 28th 1960.

As you know we are a little pushed right now for capital and if you can close the deal at an earlier date it really help us.

Hope to see you soon and will be down to see you as soon as I see Mr. McLean or either hear from you. May God bless you and yours.

Your friend in CHRIST
Ed Dunn
Rev. E. V. Dunn, Pres. & Dir.
The Good Shepherd Home, Inc.
Lake Waccamaw, N. C."

Plaintiff testified at the trial that upon receipt of the letter he called Rev. Dunn and, in pertinent part, told him: "I had received his letter and that it was satisfactory; that I had two prospects for getting him the money, and that it was acceptable and agreeable on my part." Thereafter, the following transactions took place: (1) Plaintiff negotiated a sale of lots 11 and 12 in Blocks 103 and 104 to Charles A. Leach and wife for a purchase price of $3,500, and pursuant thereto defendant executed deed to the Leaches on 26 July 1958. (2) Plaintiff negotiated a sale of lots to William L. Simmons and wife, and on 26 July 1958 defendant and William L. Simmons and wife entered into a contract for the purchase and sale of lots 3, 4, 5, 6, 7, 8, 9 and 10 in Blocks 103 and 104. By the terms of said contract Simmons was to pay $500 cash; $3,500 on or before December 1, 1958; $4,000 on or before 1 December 1959; and $4,000 on or before 1 December 1960. Simmons was to receive a deed for lots 9 and 10 in Blocks 103 and 104 upon making payment in the amount of $3,500, and the remainder of the lots upon payment of the balance of the purchase price in the amount of $8,000. (3) By deed dated 1 December 1958 defendant conveyed to Simmons lots 9 and 10 in Blocks 103 and 104. (4) By deed

dated 11 November 1959 defendant conveyed to Fred Cook and wife part of the lots described in the contract of purchase and sale with Simmons. Simmons testified that he sold the lots to Cook, although the record shows that the deed to Cook was executed by the defendant as grantor. (5) By deed dated 20 January 1964 defendant conveyed to Simmons and wife all the remaining lots enumerated in the contract with Simmons. Later, Mr. Dunn advised plaintiff that when Simmons had complied with his contract plaintiff would get his settlement, he would get the property he was supposed to get.

Defendant received $15,500 as a result of the transactions set out above. None of the lots described in Exhibit "A" have been conveyed to plaintiff, and plaintiff has received no compensation for negotiating said sales. Defendant's attorneys offered plaintiff the sum of $1,550, which he refused.

Plaintiff contends he is entitled to have defendant deed to him all lots described in Exhibit "A" which have not been conveyed to Leach, Simmons and Cook and to recover the sum of $500, which plaintiff contends is an overpayment in the alleged contract.

In its responsive pleadings the defendant, *inter alia*, pleaded the statute of frauds and the three-year statute of limitations.

At the close of plaintiff's evidence, upon motion duly made, judgment as of nonsuit was allowed. Plaintiff appeals.

Frink and Gore and E. J. Prevatte for plaintiff.
Herring, Walton, Parker & Powell for defendant.

BRANCH, J. The decisive question on this appeal is: Did the trial judge err in granting defendant's motion for nonsuit?

"In order to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract. It must embody the terms of the contract, names of vendor and vendee, and a description of the lands to be conveyed, at least sufficiently definite to be aided by parol." *Smith v. Joyce*, 214 N.C. 602, 200 S.E. 431. See also *Elliott v. Owen*, 244 N.C. 684, 94 S.E. 2d 833. The writing relied on by plaintiff was sufficiently definite to show the essential elements of a valid contract. " 'A written option offering to sell, at the election of the optionee, can become binding on the owner by a verbal notice to the owner. . . .' " *Burkhead v. Farlow*, 266 N.C. 595, 146 S.E. 2d 802.

This Court held in the case of *Hudson v. Cozart*, 179 N.C. 247, 102 S.E. 278: " 'The doctrine is fundamental that either of the parties seeking a specific performance against the other must show,

as a condition precedent to his obtaining the remedy, that he has done, or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms.' . . . 'The party seeking aid of the court, as actor, must not only show that he has complied with the terms so far as they can and ought to be complied with at the commencement of the suit, he must also show that he is able, ready, and willing to do those other acts which the contract stipulates for as a part of its specific performance.'" Here plaintiff has not shown that he has complied with the terms of the written memorandum or that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to the terms of the written memorandum. He has sought to show by amendment to his complaint another *oral* agreement between the plaintiff and the defendant which departs from the essential terms of the written memorandum. The amendments to plaintiff's complaint are as follows:

> "THREE. That immediately upon receiving the proposal from the defendant, plaintiff advised the defendant of his acceptance of the proposed contract, and did then obtain from defendant an agreement giving the defendant the option of either paying in cash as stated in the proposal or selling certain of the lots and using the proceeds from the sale or sales, as the needs might require, to pay the purchase price.
>
> "FOUR. That, acting with the full cooperation and knowledge of the defendant and in conformity with said contract and agreement as set out above in Paragraph Three, plaintiff negotiated a sale of Lots 11 and 12, Block 104, and Lots 11 and 12, Block 103, with Charles A. Leach and wife, Edith C. Leach, at and for a total purchase price of Three Thousand Five Hundred ($3,500.00) Dollars; that said purchase price was paid by Charles A. Leach and wife and plaintiff directed the defendant to make a deed direct to Charles A. Leach and wife, which was done by deed dated 26 July, 1959, and thereafter recorded in Book 138 at Page 195, Records of Brunswick County; that plaintiff did not retain any part of the purchase price, but rather had the total amount applied to the contract of purchase between him and the defendant, as referenced above; that by following through with the deed of conveyance to Charles A. Leach and wife and by acceptance of the purchase price from said sale negotiated by plaintiff with Charles A.

Leach and wife, as referenced above, the defendant did then and there ratify the contract with plaintiff."

The record does not reveal that any evidence was offered by the plaintiff to prove the subsequent agreement alleged in paragraph Three of his amended pleadings.

The plaintiff cannot recover on the agreement which he alleged in his amended complaint and which he attempted to prove by the introduction of certain written instruments because there is no written note or memorandum signed by the defendant which his allegations in the amended complaint or his evidence tends to establish.

In the case of *Keith v. Bailey,* 185 N.C. 262, 116 S.E. 729, the owner of land entered into a contract with defendant by a written memorandum agreeing to convey lands. The defendant failed to purchase the lands and the plaintiff brought action for damages. At the trial the plaintiff testified to a parol agreement which did not correspond with the written memorandum, but was inconsistent with its terms. Holding that the plaintiff was not entitled to recover, the Court said: "The plaintiff cannot recover on the memorandum or receipt (even if it be otherwise sufficient), because it does not embody the entire contract, nor on the agreement to which he testified at the trial, whether considered independently of or in connection with the receipt, because in either event is there no written note or memorandum signed by the party to be charged and embracing all the essential terms of the contract which the evidence tends to establish."

"It is settled law in North Carolina that an oral contract to convey or to devise real property is void by reason of the statute of frauds (G.S. 22-2). . . . Upon a plea of the statute, it may not be specifically enforced and no recovery of damages for the loss of the bargain can be predicated upon its breach. . . . Where the pleadings raise the question of the statute of frauds, that defense is not waived by a failure to object to the parol evidence on the trial." *Pickelsimer v. Pickelsimer,* 257 N.C. 696, 127 S.E. 2d 557. The defendant pleaded the statute of frauds, thereby preventing the enforcement of oral contract to convey.

The written memorandum on which plaintiff must depend in order to make out his case is the letter dated February 28, 1958, addressed to the plaintiff. Plaintiff's attempted proof constitutes an essential variance and departure from the terms of this written memorandum.

For reasons stated, the judgment of the court below is

Affirmed.

STATE v. THOMAS LEE REDDISH.

(Filed 20 January, 1967.)

1. Criminal Law § 38; Automobiles § 72—

Where there is evidence that defendant remained some 40 minutes at the scene of the accident before he was taken to the hospital, with no evidence from any member of the crowd that gathered that defendant was intoxicated or even had the odor of alcohol about him, testimony by a patrolman that some hour and fifty minutes after the accident he smelled the odor of alcohol on defendant while defendant was in the hospital, is insufficient to permit an inference that defendant was under the influence of intoxicants at the time of the accident.

2. Negligence § 31—

Civil negligence is not enough to establish criminal responsibility, but culpable negligence must be predicated upon such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and while the wilful, wanton, or intentional violation of a safety statute constitutes culpable negligence, a mere unintentional violation of such statute alone does not.

3. Automobiles § 59—

The evidence tended to show that defendant and deceased were traveling west in the right lane of a four-lane highway, that defendant attempted to pass at a point where the exit to the right permitted a traveler to leave the four-lane highway and enter another highway, that deceased intended to turn off to his right, and that the right front of defendant's car struck the left rear of deceased's car, resulting in fatal injury. There was no evidence that deceased gave any signal of his intent to turn or slow down, and no sufficient evidence to show that defendant was exceeding the maximum speed limit or that he was intoxicated. *Held:* The evidence is insufficient to sustain a verdict of manslaughter.

APPEAL by defendant from *Hobgood, J.*, August, 1966 Criminal Session, ORANGE Superior Court.

The defendant, Thomas Lee Reddish, was indicted, tried, convicted, and sentenced for the crime of manslaughter. The charge grew out of a rear-end collision between the 1952 Chevrolet which William Wyatt Overman was driving west on Interstate 85, and a red Ford in which the defendant Reddish was following in the same direction. Interstate 85 is a dual lane, or divided highway. The north section is a concrete strip, 24 feet wide, consisting of two lanes, both for west-bound traffic. An asphalt shoulder nine feet wide joins the outside lane. The similar south section is for east-bound traffic. The asphalt shoulder joins the south traffic lane.

The fatal accident occurred at 8:10 a.m. on November 26, 1965, at the point in Orange County where the exit from I-85 enters U. S. 70. Approaching this exit going west, Interstate 85 is straight and

slightly downgrade for approximately half a mile. Two eye-witnesses to the accident testified for the State. Mr. John M. Dunn was driving eastwardly on the south section at 55-60 miles per hour. When he was about 400 feet away he saw the two vehicles involved in the accident. The defendant's Ford was about 10 feet behind the Overman Chevrolet. Both were in the north lane. "(I)t [the Reddish Ford] was traveling approximately 60 miles per hour. When he got up to the back of Mr. Overman's car it appeared like he was going to pass. . . . When the impact happened . . . the Overman car went up the bank [to the right] . . . and turned over. The Reddish car . . . came across the median . . ." and stopped in the south lane for east-bound traffic. When the Overman car hit the bank and turned over, Overman was thrown out and fatally injured. The right front of the Reddish Ford hit the left rear of the Overman Chevrolet.

Another eye-witness, Mrs. Barbara Latta, had entered the south section of Interstate 85 from U. S. 70 and was driving eastwardly at 50 to 55 miles per hour. "I observed a 1965 red Ford belonging to Mr. Reddish coming down, headed west towards Greensboro, and he was traveling at a high rate of speed. And he came down and he went to pass Mr. Overman and he hit him on the left rear bumper and again on the left side. . . . Mr. Overman was fixing to turn off to go on 70. . . . I don't know whether the Reddish car was to the south of the center line when the cars collided." She was about 200 feet away when she first saw the vehicles. After the accident she observed the defendant about the scene of the accident and he was still there when she left. The patrolman had not arrived.

Highway Patrolman Kirby investigated the accident and testified as a State's witness. He arrived at the scene of the accident at 8:40 a.m. There were pressure marks from the point of impact extending 377 feet to the Reddish Ford which had crossed the median and had come to rest in the south lane for east-bound traffic. "I talked with the defendant Reddish . . . at Duke Hospital at around 10:00 a.m. He had some head injuries that the doctor was working on . . . I believe taking stitches in his scalp." The witness stated he "smelled the odor of alcohol on or about the defendant at the time."

At the conclusion of the State's evidence, the defendant moved for a directed verdict of not guilty, rested without introducing evidence, and renewed the motion. In both instances the court declined to allow it, and the defendant took exceptions. The jury returned a verdict of guilty. From a judgment of imprisonment for 18 months, the defendant appealed.

T. W. Bruton, Attorney General, William W. Melvin, Assistant Attorney General, for the State.

Blackwell M. Brogden for defendant appellant.

HIGGINS, J. Although he has other assignments of error, the defendant places his chief reliance on No. 5 which challenges the sufficiency of the evidence to survive his motions to dismiss. The challenge requires us to determine, as a matter of law, whether the State offered evidence sufficient to permit a legitimate inference of defendant's guilt.

The State's evidence discloses that both the deceased and the defendant were driving their automobiles westwardly on Interstate 85. The defendant attempted to pass the deceased at a point where the exit to the right permitted a traveler to leave 85 and enter U. S. 70. Mrs. Latta, for the State, testified, "Mr. Overman was fixing to turn off to go on 70." Necessarily, he could make the turn at a relatively slow speed. The law obligated him to signal his intent to turn and to slow down so a following motorist could govern himself accordingly. Did Mr. Overman give any signal? There was no evidence. Mrs. Latta said she did not know whether the Reddish car was south of the center line when the cars collided. She was the witness closest to the scene. The defendant had a legal right to pass to the left. He failed to give himself sufficient passing room. This was a miscalculation but insufficient to show a wanton, wilful, and reckless indifference to the rights of other travelers on the highway.

Was the defendant violating the speed law? What was the maximum on 85 for passenger vehicles? The Highway Commission has authority upon proper findings to post a maximum at 65 miles per hour. There is no evidence either way as to whether the Highway Commission had exercised its prerogative and posted a speed limit. This may be noted, however. The State's witness, Mr. Dunn, stated he was driving at 55 or 60 miles per hour. Ordinarily, one will not admit, especially in court and under oath, that he was driving 60 if the limit is 55. Mr. Dunn estimated the defendant's speed at 60. Mrs. Latta said he was speeding — a conclusion. She did not offer an opinion as to his speed. In fact, her opportunity to judge speed is not established by the evidence.

After the accident the defendant, though injured himself, remained at least 40 minutes before he was taken to the hospital. A crowd had gathered. There was no evidence of liquor or the smell of alcohol about him — and certainly no evidence that he was intoxicated. The Highway Patrolman, at least an hour and 50 minutes after the accident "smelled the odor of alcohol *about* the defendant"

while he was in the hospital undergoing treatment for his head injuries. The evidence is not sufficient to permit an inference the defendant was under the influence of liquor at the time of the accident, or at the time the witness saw him.

Civil negligence is not enough to establish criminal responsibility. *State v. Phelps*, 242 N.C. 540, 89 S.E. 2d 132; *State v. Becker*, 241 N.C. 321, 85 S.E. 2d 327; *State v. Cope*, 204 N.C. 28, 167 S.E. 456. "Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Roop*, 255 N.C. 607, 122 S.E. 2d 363. "The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of a statute, such violation standing alone does not constitute culpable negligence." *State v. Hancock*, 248 N.C. 432, 103 S.E. 2d 491.

The evidence in this case, when tested by the foregoing rules, is insufficient to sustain a verdict of manslaughter. The court committed error in denying the motion for a directed verdict of not guilty.

Reversed.

IN THE MATTER OF HOMER DURANT TRUITT, A MINOR, BY AND THROUGH HIS MOTHER, NIKKA H. TRUITT

AND

IN THE MATTER OF DARRELL C. TRUITT.

(Filed 20 January, 1967.)

1. Animals § 4—

Under the 1933 amendment to G.S. 67-13, applicable to Forsyth and Guilford Counties, the appeal to the Superior Court from the denial by the County Commissioners of a claim for injuries inflicted by a dog is *de novo*.

2. Same—

Injury inflicted by a dog, whether caused by a playful or angry animal, may be made the basis of a claim under G.S. 67-13.

3. Same; Taxation § 7—

The tax levied on the owner or keeper of a dog over six months of age, G.S. 67-5, has been declared valid and constitutional, and its validity perforce extends to the expenditure of the funds, it being the purport of the statute that the funds raised by the tax should be used for school pur-

poses subject to valid claims, established in the manner provided by the Act, for injuries and damages caused by dogs.

4. Statutes § 4—

Constitutionality of a statute will be presumed until the contrary clearly appears.

5. Infants § 5—

Payment of a claim asserted on behalf of an infant should be made to the infant's duly appointed guardian.

APPEAL by Guilford County from *Crissman, J.*, June 13, 1966 Civil Session (High Point Division) GUILFORD Superior Court.

This proceeding involves two claims filed before the Board of Commissioners of Guilford County for injury caused by a dog owned by Mrs. Wanda B. Williams: (1) Homer Durant Truitt, age five years, suffered an eye injury; (2) Darrell C. Truitt, father, paid, or obligated himself to pay, medical expenses for treating the injury. The infant's claim was filed by his mother.

Gary Truitt, older brother of the injured boy, described the manner in which his brother was injured: "As to what happened as we were leaving this area . . . my sister was in front of me, and I was in front of Homer. Then I heard him scream, and I turned around and seen *(sic)* the dog coming down from his face. The dog's paws were on his chest. The dog was a big brownish-white collie. . . . When . . . I heard Homer scream . . . I didn't see his face because he had his back turned . . . There was a scar under his eye — a scratch." The dog had been around the children for some time. The nature of the injury — a single perforation above the pupil and a tear downward, continuing as a scratch on the lower eyelid, would seem to indicate the injury was caused by a claw rather than by a tooth; and the dog was friendly and playful rather than otherwise. This view is supported by the older brother's statement the dog had his paws on Homer's chest when Homer screamed.

Dr. W. B. Donald testified: "Examination at that time revealed a . . . perforating laceration of the left eye. . . . It tore down across the front of the eye; it entered just above the outer edge of the pupil, and it tore all the way across the clear window in the front of the eye." The injury severely impaired the function of the eye.

At the conclusion of the hearing, the Board of Commissioners of Guilford County ruled that the claims should be denied in their entirety. The claimant gave notice of appeal to the Superior Court. The clerk to the Board of Commissioners certified the record to the Superior Court.

After the appeals were docketed in the Superior Court a pre-

trial conference was held by Judge Crissman. The Board of Commissioners insisted that the statute which provides for payment violates the provisions of the North Carolina Constitution. "(T)his statute prescribes a use of tax money for something that would not be considered a necessary expense. It is not for the general public; it is for a specified individual, as distinguished from benefiting the general public." The Board of Commissioners entered a demurrer *ore tenus.*

By stipulation, Judge Crissman agreed to postpone his ruling on the constitutional question until after a trial of the issues of damages. The hearing was *de novo.*

After the trial the jury awarded the infant $5,000.00 and the father $1,300.00 expenses for medical treatment. The court entered judgment that Guilford County pay the awards and costs out of the dog tax fund. As a part of the judgment, the court entered the following:

> "Upon consideration of arguments of counsel for the plaintiff and counsel for Guilford County, it is ORDERED that Guilford County's motion to dismiss the plaintiff's action for the reason that G.S. Sec. 67-13 is violative of the Constitution of North Carolina, be, and the same hereby is overruled."

The Board of Commissioners excepted and appealed.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter, Ralph Walker for appellant Guilford County, respondent.

Schoch, Schoch & Schoch by Arch K. Schoch, Jr., for claimant appellee.

HIGGINS, J. The General Assembly, by G.S. 67-5, has provided every owner or keeper of a dog over six months of age shall pay an annual license or privilege tax of $1.00 or $2.00 depending on the sex of the dog. G.S. 67-13 provides: "The money . . . shall be applied to the school funds: Provided, it shall be the duty of the county commissioners . . . upon satisfactory proof of such injury, including necessary treatment, if any, and all reasonable expenses incurred, the said county commissioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this Article. . . ."

Of the several amendments to G.S. 67-13, only Ch. 547, Session Laws of 1933, applicable to Forsyth and Guilford Counties, is material to the present controversy. This amendment gives a claimant the right of appeal from the Commissioners to the Superior Court, "as in cases of appeals from a justice of the peace." Hence

the trial in the Superior Court is *de novo* and not on the record. *Belk's Department Store v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897.

The dog tax is assigned to the county school fund: *Provided,* when complaint is made of injury to any person by any dog (including cost of treatment), and the amount of the damage is established in the manner provided by the Act, the county commissioners "shall order the same paid out of any moneys arising from the tax on dogs . . ." The meaning seems obvious that the school fund gets the dog tax subject to valid claims for injury and damage caused by dogs when the same have been established in the manner provided by the Act. Hence, the tax money is earmarked as the source, and the only source, out of which payment of claims may be made. Whether the injury was caused by a playful or an angry act on the part of the dog would be without significance. The injury was caused by the dog in either event.

A levy of a license or privilege tax on dogs has been held valid in many decisions of this Court: *Mowery v. Salisbury,* 82 N.C. 175; *Newell v. Green,* 169 N.C. 462, 86 S.E. 291; *Board of Commissioners v. George,* 182 N.C. 414, 109 S.E. 77; *McAlister v. Yancey County,* 212 N.C. 208, 193 S.E. 141; *White v. Commissioners of Johnston County,* 217 N.C. 329, 7 S.E. 2d 825. The taxing act having been held valid and its main objective being to create a fund to pay damage caused by dogs, is not the purpose valid? Any amount left over after the payment of damage claims which have been determined and satisfied shall go to the school fund. Since the levy for the stated purpose has been declared valid and not in contravention of the State Constitution, it seems clear the validity extends to the expenditure of the funds for the stated purpose. Constitutionality will be presumed until the contrary clearly appears. *Milk Commission v. Galloway,* 249 N.C. 658, 107 S.E. 2d 631.

A number of other states have passed acts levying a license tax on dogs for the benefit of a fund out of which to pay damages caused by dogs. All appear to have been held valid. *McQueen v. Kittitas County,* 198 P. (Wash.) 394; *McGlone v. Womack,* 129 Ky. 274, 111 S.W. 688, 17 L.R.A. 855; *Randall v. Patch,* 118 Me. 303, 108 A. 97, 8 A.L.R. 65; *Hofer v. Carson,* 203 P. (Ore.) 323; *State v. Anderson,* 234 S.W. (Tenn.) 768; *Mountain Timber Co. v. State of Washington,* 243 U.S. 219.

We call attention to the record which fails to show the legal authority by which the mother asserts the claim in behalf of the infant. Both parties, however, have treated the case on the theory that the parties are proper and the claim properly before the court. *Morris v. Gentry,* 89 N.C. 248. Of course, the Board of Commis-

sioners may pay the claim into court where it will be paid only on a showing of right to receive it. Payment of the infant's claim should be made to a duly appointed guardian.

No error.

HAROLD WAYNE BROWN, ADMINISTRATOR OF THE ESTATE OF JEFFREY HAROLD BROWN, DECEASED, V. RANDOLPH HOSPITAL, INC., DR. CHARLES W. STOUT, WANDA R. BUNTING, HELEN BUNCH, ELAINE CAUDLE, LINDA RICHARDSON, MACIE PRILLMAN, KATE HAMMILL, NURSE VAN HOY AND DR. GEORGE JOHNSTON.

(Filed 20 January, 1967.)

Bill of Discovery § 1—

Where the application for the adverse examination of defendants in an action to recover for negligence in the treatment of a hospital patient is too sweeping in not confining the request to the examination of defendants in regard to their diagnosis, treatment and procedures in the care of the particular patient and the hospital records relating thereto, the order for the examination is properly vacated, but plaintiff is properly given an opportunity to file an amended petition for an examination of the defendants within proper limits. G.S. 1-568.9, G.S. 1-568.10.

APPEAL by plaintiff from *Brock, S.J.*, September 19, 1966 Session, RANDOLPH Superior Court.

The plaintiff instituted this civil action by summons dated July 16, 1965. He filed a petition for an order to examine the defendants for information upon which to file his complaint. The application stated the purpose of the action is to recover damages for the wrongful death of Jeffrey Harold Brown (age 4½ years) who was admitted to the defendant Hospital for the removal of his tonsils and adenoids on January 28, 1965, and died in the hospital the following day. The individual defendants are employees of the hospital.

The Clerk issued an *ex parte* order for the examination and appointed a commissioner to conduct it at the Courthouse in Asheboro where the hospital is located and where the individual defendants reside. The Sheriff served the order on all parties sought to be examined.

After service of the order all defendants appeared before the Clerk and moved that the order for the examination be vacated as being entirely too broad in scope, alleging the plaintiff already had first-hand information not only of what took place, but had been given copies of the hospital records. The Clerk, after hearing, va-

cated the order for the examination and allowed the plaintiff 20 days in which to file his complaint. He appealed to the Superior Court. After hearing, Judge Brock entered this order:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the order entered in this cause by the Clerk of Superior Court on the 11th day of October, 1965, shall be and the same is hereby affirmed; and it is further ORDERED that this cause shall be remanded to the Clerk of Superior Court and the plaintiff shall have twenty days from and after the entry of this order, if he be so advised, to file an amended application for an order for the adverse examination of the defendants."

The plaintiff excepted to the order entered by Judge Brock and appealed to this Court.

Eugene H. Phillips for plaintiff appellant.

Jordan, Wright, Henson & Nichols by Perry C. Henson for defendant appellees.

HIGGINS, J. The Clerk's first order *(ex parte)* authorized the plaintiff to examine the individual defendants and two others with respect to the matters set forth in the rather long and detailed petition. After hearing, on the defendants' motion the Clerk entered a second order vacating, *in toto,* the order for examination. On appeal, Judge Brock sustained the Clerk's second order but remanded the cause to the Clerk with leave granted to the plaintiff "to file an amended application," if so advised. The plaintiff elected to appeal rather than to amend his application.

Implicit in Judge Brock's order is his view that the plaintiff is entitled to examine the defendants, but not to the sweeping extent requested in the petition, and allowed by the Clerk's first order. These examples show the scope of the examination requested:

> "(e) As to the whereabouts and activities of each of the defendants from 11 o'clock a.m. January 29, 1965, until 3:40 o'clock that afternoon."
>
> "(f) As to the procedures, customs, practices, devices, methods or standards that any of the defendants either recognize, follow or use in examining, caring for, operating on, treating or observing patients that have difficulty with their tonsils and adenoids and are operated on for their removal and in recording the various developments that occur or conditions that exist in such cases, . . ."

We concur with Judge Brock that the plaintiff should have opportunity to file an amended petition and obtain such information as is contemplated by G.S. 1-568.9 and G.S. 1-568.10.

The plaintiff is entitled to examine the doctors, nurses, and employees of the hospital who were present or participated in the diagnosis, treatment, operative, and post-operative procedures employed in the care and treatment of Jeffrey Harold Brown from the time he entered the hospital, and their relation to the cause of his death. The plaintiff is entitled to examine the records kept by the hospital relating thereto.

Because of the type of examination requested, we concur with the Clerk and Judge Brock that the first order should be set aside. The Clerk made no provision for an amended petition. Judge Brock's order does make provision for the filing of a proper amended application before the Clerk. In the event the plaintiff, by proper amended petition, obtains another order for the examination, the Clerk will grant him an extension of time for filing the complaint. The statutory procedures above referred to, as well as the following cases, support the position the Court now takes: *Griners' & Shaw, Inc., v. Casualty Co.*, 255 N.C. 380, 121 S.E. 2d 572; *Cates v. Finance Co.*, 244 N.C. 277, 93 S.E. 2d 145; *Nance v. Gilmore Clinic*, 230 N.C. 534, 53 S.E. 2d 531.

The order from which the plaintiff appeals provides a method (amended petition) by which the plaintiff may obtain all the information necessary to prepare his complaint. The order entered by Judge Brock is

Affirmed.

CLIFTON E. BROWN AND WIFE, SOPHIA BROWN, v. M & J FINANCE CORPORATION.

(Filed 20 January, 1967.)

Mortgages and Deeds of Trust § 38—

Where plaintiffs' evidence is to the effect that defendant instituted foreclosure proceedings to their damage, that they had never owed and did not owe defendant any amount, and the *femme* plaintiff testifies that she had signed no deed of trust upon which the purported foreclosure was based, and neither plaintiff is asked whether he or she signed the note and deed of trust bearing their names which defendant introduced in evidence, nonsuit should not be granted, plaintiff's evidence being sufficient, notwithstanding discrepancies and contradictions, to permit the inference that they never signed and delivered to anyone the note and deed of trust upon which the foreclosure was based.

APPEAL by plaintiffs from *Shaw, J.*, 7 March 1966 Session of FORSYTH.

Civil action to recover actual and punitive damages for an alleged wrongful advertising of their home for sale under a deed of trust.

From a judgment of compulsory nonsuit entered at the close of plaintiffs' and defendant's evidence, plaintiffs appeal.

Buford T. Henderson for plaintiff appellants.
W. C. Holton for defendant appellee.

PARKER, C.J. Plaintiffs allege in their complaint and defendant admits in its answer in substance the following: Plaintiffs were the owners and in the rightful possession of a tract of land on which their home was situated in Forsyth County. Defendant caused Leslie G. Frye to advertise their home for sale at public auction to the highest bidder at the courthouse door of Forsyth County at 12 o'clock noon on 14 August 1962; that the advertisement for this sale was posted at the courthouse door in Winston-Salem on the public bulletin board in the hallway of the first floor of the courthouse, and notices of the advertisement were published in a newspaper in Winston-Salem with a wide circulation for four successive weeks. Plaintiffs' Exhibit No. 2 is a paper writing entitled "Notice of Sale of Real Estate." This notice states in part:

> "Under and by virtue of the authority conferred upon the undersigned by a certain deed of trust executed by Clifton E. Brown and wife Sophia Brown on the 10th day of January, 1962, to Leslie G. Frye, Trustee, said deed of trust being recorded in the office of the Register of Deeds of Forsyth County in deed of trust book 842 at page 199, and default having been made under the terms of the said deed of trust, the undersigned trustee will sell at public auction to the highest bidder at the courthouse door of Forsyth County, North Carolina, the following described real estate: [The description of the real estate is identical with the description of the land upon which plaintiffs' house is situated as alleged in the complaint.]
>
> * * *
>
> "This the 10th day of July, 1962.
>
> Leslie G. Frye, Trustee"

The oral testimony of Sophia Brown and of Clifton E. Brown is in substance: They had never owed defendant anything and do not owe defendant anything now. The *femme* plaintiff testified that

she had signed no deed of trust upon which this purported sale was based. They saw the notice posted in the courthouse that their home was advertised for sale. They employed a lawyer, and the sale was stopped.

Leander Hill, a witness for plaintiffs, testified in substance: He was trying to sell them a house. Plaintiffs did not have a sufficient amount of money to make a down payment on another house, and they were going to mortgage their home place to get a sufficient amount of money to make a down payment. He noticed in the paper that their home was being foreclosed. He told Mrs. Brown she could not get a loan on her home because it was being foreclosed. At that time she did not know it.

Defendant's evidence in substance was: In 1962 James D. Myers was manager of the branch office of defendant in Winston-Salem. On 5 April 1962 defendant purchased a note and deed of trust securing the note from Twin City Aluminum — Salem Aluminum Company for $1,000. The note was assigned to defendant with full recourse. The amount of the note secured by the deed of trust was $1,313.28. Plaintiffs' names appear on the note and the deed of trust securing the same. The tract of land conveyed to Leslie G. Frye, trustee, in the deed of trust was the tract of land in Winston-Salem upon which plaintiffs' house was situated. The note was payable in 36 months at $36.48 per month. The first payment was due on the note on 10 May 1962, and no payment was made. Defendant called upon plaintiffs to make the payments on their note, and they refused. When plaintiffs did not pay, defendant started a foreclosure on 14 August 1962. Defendant's check purchasing the note at the price of $1,000 was made payable to Salem Aluminum Company and Jimmy Hammett, and was dated 4 April 1962. When defendant started to foreclose, Mr. Hammett was out of town. When he got back to town, he paid the defendant off in the amount of $1,050. In the record, on the deed of trust appear these words:

"PAID AND SATISFIED IN FULL
JUNE 1, 1964
"Drawn by SALEM ALUMINUM COMPANY
"Leslie G. Frye By James W. Hammett, Owner"

Plaintiffs allege in their complaint "that the defendant had no lien or interest in the home of the plaintiffs, which it advertised for sale, and had no right whatsoever to cause the plaintiffs' home to be advertised for sale, and that the advertising by the defendant, its agents, servants and employees, was wrongful. . . ." The oral testimony of Sophia Brown and of Clifton B. Brown was in substance that they had never owed defendant anything and do not owe de-

fendant anything now. The *femme* plaintiff testified that she had signed no deed of trust upon which this purported sale was based. It is true that plaintiffs' Exhibit No. 2, "Notice of Sale of Real Estate," which was most probably prepared by the trustee in the deed of trust, states in substance that the foreclosure sale advertised was under and by virtue of the authority conferred upon the trustee by a certain deed of trust executed by Clifton E. Brown and wife Sophia Brown on the 10th day of January, 1962. Defendant's counsel asked no questions on cross-examination of either the male or the *femme* plaintiff. He might have asked them if they had signed the note and deed of trust that the defendant offered in evidence, but he did not do so. There are discrepancies and contradictions in plaintiffs' evidence and in their Exhibit No. 2 as to whether they signed the note and deed of trust in the instant case. "Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court," *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, and do not justify nonsuit. *Keaton v. Taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93. Defendant has no evidence that the plaintiffs signed the note and deed of trust; its evidence is merely that plaintiffs' names appear on the note and the deed of trust securing the same.

This is said in *Worley v. Worley,* 214 N.C. 311, 199 S.E. 82:

> "It has been uniformly held that where the mortgage authorizes a sale upon failure to pay the notes or bonds secured, or the interest thereon, or any part of either at maturity, the mortgagee has the right to foreclose upon failure of payment of any installment of interest when due, . . ."

A mortgagor is entitled to recover damages attributable to the mortgagee for a wrongful advertising or foreclosure of the mortgage. *Worley v. Worley, supra;* 59 C.J.S., Mortgages, § 491.

The evidence for both sides in the record before us is meager. However, considering plaintiffs' evidence in the light most favorable to them, and giving them the benefit of every reasonable inference to be drawn therefrom, it would permit a jury to find that plaintiffs never signed and delivered to anyone the note and the deed of trust in the instant case, and consequently it is sufficient to survive the challenge of a motion for judgment of compulsory nonsuit and to carry the case to the jury for them to decide whether or not plaintiffs executed and delivered to another the note and deed of trust here.

The judgment of compulsory nonsuit, which plaintiffs assign as error, was erroneously entered, and is

Reversed.

MRS. ANNIE V. TERRELL v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 20 January, 1967.)

1. Insurance § 26—

Evidence and stipulations to the effect that insurer issued and delivered the life policy to insured, that premiums were paid on said policy, and that proof of death was duly submitted, *held* to make out a *prima facie* case precluding nonsuit unless plaintiff's own evidence establishes an affirmative defense duly alleged by insurer.

2. Insurance § 17—

Insurer may not contend that nonsuit should have been entered because plaintiff's own evidence disclosed that insured did not reveal a fact material to the risk when the defense of fraud, misrepresentation or concealment is not pleaded by insurer.

3. Insurance § 26—

The burden of proof is upon insurer to establish its affirmative defense in accordance with its allegations.

4. Pleadings § 28—

Proof without corresponding allegation is ineffectual.

5. Trial § 35—

Where an affirmative defense is not available to a defendant because such defense was not pleaded, the trial court's instruction that such defense was not involved in the case is a correct statement of a matter of law, and does not constitute an expression of opinion by the court as to the facts, the weight of the evidence, or the credibility of the witness.

6. Trial § 37—

Defendant's objection to a statement by the court of a contention of plaintiff on the ground that the statement omitted an essential fact, will not be sustained when immediately thereafter the court supplies the omission so that, when read contextually, the statement of the contention is without prejudicial error.

7. Insurance § 26; Evidence § 35—

Where the issue is whether insured was insurable under the company's rules and regulations at the time of the delivery of the policy in suit, it is not error to exclude insurer's testimony that at such time insured was not insurable, since a witness may not give an opinion on the very question to be decided by the jury.

8. Appeal and Error § 41—

The exclusion of testimony cannot be prejudicial when the same witness has just testified to facts with substantially the same meaning.

9. Insurance § 26—

Where plaintiff's evidence is conflicting as to whether insured on the date of the delivery of the policy was insurable according to insurer's rules and standards, an issue of fact is raised for determination by

the jury, and insurer is not entitled to nonsuit on such affirmative defense.

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

APPEAL by defendant from *Latham, S.J.*, July 1966 Civil Session of DURHAM.

Civil action by plaintiff as beneficiary to recover under the terms of a whole life insurance policy issued to her husband by defendant.

On 14 October 1963 plaintiff's husband, Matthew Marion Terrell, executed an application to defendant insurance company for a whole life insurance policy in the amount of $5,000.00. The application contained the following provision:

> "(2) That except as otherwise provided in the attached receipt bearing the same number as this application, the insurance herein applied for shall not take effect until a policy therefor is delivered to me and the first premium paid, while the proposed insured (and the applicant for the applicant's waiver of premium benefit provisions, if any,) *is insurable according to the company's rules and standards for such policy.*" (Emphasis ours)

The application was forwarded by the local agent to defendant's home office. On 17 November 1963, the insured, an Army Reserve officer, suffered an illness in the nature of a seizure or collapse while on a military exercise, and was immediately taken to Watts Hospital, Durham, North Carolina, where he was treated and released on the same day. Insured entered Veterans Administration Hospital on 20 November 1963 and remained there until his discharge on 2 December 1963. Insured's application was approved at the home office of defendant, and on 20 November 1963 policy was mailed to the local agent for delivery. The local agent delivered the policy to insured on the same day he returned from the hospital, at which time insured made the first quarterly premium payment. Insured thereafter made two other quarterly premium payments. He died on 26 June 1964. The death certificate listed cause of death as an epileptic seizure. Proof of death of insured was duly given defendant company.

The evidence tends to show that defendant was not aware of the illness and hospitalization of insured which occurred between execution of application and delivery of policy. Defendant did not furnish insured with a copy of its "rules and standards."

Dr. Amos Carl Gipson, Jr., insured's attending physician, by

deposition testified to the effect that insured was admitted to the Veterans Administration Hospital following a seizure or epileptic attack; that insured remained in the hospital from 20 November 1963 until 2 December 1963, and underwent extensive tests and examinations. He stated: "The only abnormality we could detect was an abnormality on the glucose tolerance test. . . . and we didn't feel that this necessarily represented diabetes. The other tests were within normal limits. . . . At the time he left the hospital it was our feeling that we were unable to establish any definite pathological diagnosis other than, as I have mentioned, the glucose tolerance. . . . His neurological examination was also within normal limits, except that he did have a slight decrease in biceps reflex on the left. . . . I would say simply he was nervous, and anxious and afraid he might be about to suffer some loss of income."

Defendant did not allege fraud, concealment or misrepresentation in its answer, but did allege that on the date of delivery of the policy deceased was uninsurable according to defendant's rules and standards for the policy applied for by him.

The following issue was submitted to and answered by the jury as indicated: "Was the deceased, Matthew Marion Terrell, insurable according to The Life Insurance Company of Virginia's rules and standards on the date of the delivery of the policy on December 2, 1963? Answer: Yes."

Judgment was entered upon the verdict. Defendant appealed.

E. Carter Harris and C. Wallace Vickers for plaintiff.
Bryant, Lipton, Bryant & Battle for defendant.

BRANCH, J. It is stipulated by counsel that policy No. 1034585, executed by defendant on the life of Matthew Marion Terrell, was delivered to him by defendant's agent on 2 December 1963, that premiums were paid on said policy, and that proof of death was duly submitted. This makes out a *prima facie* case, and nonsuit is improper except where plaintiff's evidence establishes defendant's affirmative defense. *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E. 2d 614. Appellant contends that nonsuit should have been granted because deceased did not reveal that he had suffered an attack and seizure of epilepsy after the application for and before delivery of the policy. Conceding that the propositions set forth in *Butler v. Insurance Co.*, 213 N.C. 384, 196 S.E. 317, *Wells v. Insurance Co.*, 211 N.C. 427, 190 S.E. 744, and *Gilmore v. Insurance Co.*, 205 N.C. 251, 171 S.E. 57, and other cases cited in this connection by defendant are correct, the record reveals that defendant did not plead the defense of fraud, misrepresentation or concealment.

Since plaintiff's evidence did not make out an affirmative defense for defendant, the burden of proof is upon defendant to show such defense as would avoid the policy, *Rhinehardt v. Insurance Co., supra,* and in making out its defense, it must be made according to its allegations. The court cannot take notice of any proof unless there is a corresponding allegation. *Fox v. Hollar,* 257 N.C. 65, 125 S.E. 2d 334.

According to its pleadings, defendant seeks to avoid liability solely on the ground that deceased was uninsurable according to defendant's rules and standards for the policy when delivered on 2 December 1963, and defendant's proof of its defense must correspond with its allegations.

Thus the court correctly denied defendant's motion for judgment as of nonsuit. For the same reasons defendant's assignment of error as to the failure of the court to explain the law applicable to the case, based on Exceptions 15, 16, 17 and 18, is overruled.

We find no error in the court's instruction that there was no fraud involved in the case. The defense of fraud is not available to the insurer unless specially pleaded. *King v. Insurance Co.,* 258 N.C. 432, 128 S.E. 2d 849. The court's statement did not express an opinion as to the facts, the weight of the evidence, or the credibility of the witness. It was a correct statement of a matter of law.

Appellant contends that the trial judge erred in giving plaintiff's contentions and in that he gave contentions that were not supported by the evidence.

"Error in stating the contentions of a party must ordinarily be brought to the trial court's attention in time to afford opportunity for correction. But where the statement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection." Strong: N. C. Index, Vol. 4, Trial, § 37, p. 344. Appellant did not in apt time request further or different instructions as to the contention. It argues that the court's statement that plaintiff contended that defendant had failed to prove "that the deceased was uninsurable" was prejudicial error because it had not included "according to defendant's rules and standards." In the same paragraph the court used this language: ". . . but that it was not an epileptic attack and was not a convulsion, was not such an occurrence or condition as would render the deceased uninsurable *under any of the company's rules and regulations.*" (Emphasis ours) Reading the court's statement of contentions contextually, we find no prejudicial error.

The defendant called R. T. Tavnner, its Assistant Vice-President and Manager of Underwriting, as a witness. While being ques-

tioned by defendant's counsel, he testified that the company would have declined to issue the contract because of its regulations had it known that deceased had suffered a convulsion or epileptic attack between the date of the application and the date of delivery. Mr. Tavnner was then asked if Terrell had suffered a convulsion or epileptic attack after the date of the insurance application, "was Mr. Matthew Marion Terrell insurable according to the rules and standards of the Company on the second day of December, 1963?" Plaintiff's objection to this question was sustained. Had the witness been permitted to answer, his answer would have been: "He would not have been insurable." The trial court correctly sustained the objection. "A witness will not be allowed to give his opinion on the very question to be decided by the jury." *Ponder v. Cobb*, 257 N.C. 281, 126 S.E. 2d 67. Moreover, the witness had just testified to facts with substantially the same meaning. Thus the sustaining of the objection could not have been harmful error.

There was conflicting evidence as to whether deceased was insurable according to the Life Insurance Company of Virginia's rules and standards on the date of the delivery of the policy — December 2, 1963. This raises an issue of fact which was submitted to the jury upon evidence and a charge free of prejudicial error. The jury answered the issue in favor of plaintiff.

No error.

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

STATE v. CHESTER GODWIN.

(Filed 20 January, 1967.)

1. Burglary and Unlawful Breakings § 9—

The burden is upon the State to show that defendant had in his possession an implement or implements of housebreaking enumerated in the statute or coming within the term "implements of housebreaking" within the meaning of the statute, and that such possession was without lawful excuse, in order to sustain a conviction of defendant for that offense. G.S. 14-55.

2. Same; Burglary and Unlawful Breakings § 8—

A pistol is not an "implement of housebreaking" within the purview of G.S. 14-55.

3. Burglary and Unlawful Breakings § 9—

Evidence tending to show that defendant was a passenger in a car in which implements of housebreaking were found without any evidence that defendant had any control whatsoever over either the automobile or the implements of housebreaking found therein, and no evidence in respect to when, where, or under what circumstances defendant entered the automobile, or disclosing his relationship or association with the driver thereof, *is held* insufficient to be submitted to the jury in prosecution of defendant for possession of implements of housebreaking without lawful excuse.

APPEAL by defendant from *Armstrong, J.*, 29 August 1966 Criminal Session of GUILFORD (Greensboro Division).

Criminal prosecution on an indictment charging defendant on 18 February 1966 with feloniously having in his possession, without lawful excuse, two pry bars, one brace and bit, one saw, one .32-caliber automatic pistol, three flashlights, cotton and leather gloves, and ladies' hose, implements of housebreaking. G.S. 14-55.

Defendant is an indigent and was represented by his court-appointed attorney, E. L. Alston, Jr. Plea: Not guilty. Verdict: Guilty as charged in the indictment.

From a judgment of imprisonment for not less than three years nor more than five years, defendant appeals.

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

Alston, Alexander, Pell & Pell by E. L. Alston, Jr., for defendant appellant.

PARKER, C.J. The State's evidence shows the following facts: Before 4 a.m. on 18 February 1966, Lt. E. C. Arrington, of the Guilford County sheriff's department, with an officer in the car with him, was patrolling on Whitsett Road, about two miles from Mt. Hope Church, looking for a 1962 white Chevrolet automobile for which he had an "alert." About 4 a.m. as he was sitting at an intersection about two miles from Mt. Hope Church, a 1962 white Chevrolet automobile passed his patrol car going east on Whitsett Road. He gave chase at a speed of 85 miles an hour with a blue light flashing on top of his patrol car and stopped the Chevrolet in approximately a mile from where it passed him. He saw two occupants in the front seat of the Chevrolet. The road was rather crooked, and going around the second curve the driver threw something out of the automobile. When the Chevrolet pulled to the right and stopped, he got out of his patrol car and proceeded to it. He knew its driver, Charles Holt, and he knew the passenger in it, who was Chester

Godwin, the defendant here. Holt owned the Chevrolet. Holt said he did not have a driver's license. When he was talking to Holt, who had stepped out of the Chevrolet, he noticed an end of a barrel of a pistol protruding from beneath the body of defendant. He asked him to step out of the car, and he dropped his hands down in his lap. Arrington told him, "Don't reach for that pistol you are sitting on or I'll shoot you." He drew his pistol on defendant. Defendant raised his hands and said, "I'm not going to shoot anybody," and got out of the automobile and came around to the back of it. After defendant got out of the automobile, Arrington saw a .32-caliber Standish automatic pistol where he had been sitting. Arrington saw in the front of the automobile a hand lantern, two flashlights, some gloves, and a pair of ladies' hose. He saw in the back of the automobile a quantity of meat packaged in clear cellophane wrappers, groceries, and beer. The groceries and meat were of the value of about one hundred dollars, and the meat was marked with Winn-Dixie price stickers. The magazine of the automatic pistol was loaded, but there was no bullet in the barrel. He carried Holt and defendant to the sheriff's department, and the officer with him drove the Chevrolet there. A warrant was obtained for Holt for driving an automobile without a license, and a warrant for defendant for carrying a concealed weapon.

Paul H. Gibson, an employee of the sheriff's department of Guilford County, shortly after 8 a.m. on 18 February 1966, found a 1962 white Chevrolet automobile parked in the parking lot behind the courthouse. It was in the custody of the sheriff's department. He saw in the Chevrolet from the outside a large quantity of meat, groceries, and beer, and in the front of the automobile some packages of men's underwear, some flashlights, gloves, and ladies' hose. While he was in the parking lot, two or three officers came up and opened the trunk of the Chevrolet. He saw in the trunk a brace and bit and pinch bar, and a sock and a screwdriver. Another screwdriver was found in the glove compartment. The bit was rusty and dirty. The brace was also rusty, particularly the working parts. The metal part of the screwdriver was also rusty.

Holt is a plumber, and works at his trade.

Defendant introduced no evidence. He assigns as error the denial of his motion for judgment of compulsory nonsuit of the State's case made at the close of the State's evidence.

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. Morgan,* 268 N.C. 214, 150 S.E. 2d 377; *S. v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315.

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 quoted above, and (2) that such possession was without lawful excuse. *S. v. Morgan, supra; S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456. In the *Boyd* case 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.

The Chevrolet automobile, when it was stopped by Lt. E. C. Arrington about 4 a.m. on 18 February 1966, was being driven at the time by its owner, Charles Holt, a plumber by trade, who works at his trade. At the time defendant was a passenger in the Chevrolet, and was sitting on the front seat. There is no evidence in respect to when, where, or under what circumstances defendant entered the Chevrolet. Nothing is shown respecting defendant's relationship or association with Holt. On the record before us he was a mere passenger in the Chevrolet. When the Chevrolet was stopped, Lt. Arrington saw in the front of the automobile a hand lantern, two flashlights, some gloves, and a pair of ladies' hose, and in the back of the automobile a quantity of meat packaged in clear cellophane wrappers, groceries, and beer, and an automatic pistol beneath defendant. Obviously, a pistol is not an "implement of housebreaking" within the intent and meaning of the section quoted above from G.S. 14-55. About 8 a.m. on 18 February 1966 the trunk in the back of this Chevrolet was opened when it was in the custody of the sheriff's department parked in a parking lot behind the courthouse, and there was found in the trunk a brace and bit, a pinch bar, a sock, and a screwdriver, and another screwdriver was found in the glove compartment. There is no evidence that defendant had any control whatever over either the automobile or the articles in it specified above, except probably the pistol. The evidence in the record before us does not support the hypothesis of joint possession by defendant and Holt of the articles found in the car.

What is said in *S. v. Ferguson,* 238 N.C. 656, 78 S.E. 2d 911, is relevant and controlling here. In that case evidence disclosing that nontaxpaid intoxicating liquor was found unconcealed on the floor board back of the front seat of the automobile is sufficient to be submitted to the jury as to the guilt of the driver and of the passenger in the car in whose name the vehicle was registered, but as to other passengers in the car it is insufficient in the absence of any

evidence of joint possession or control of the automobile or the non-taxpaid liquor found in it. In that case the Court said:

> "However, we are constrained to the view that the evidence does not make out a *prima facie* case against Pringler Ferguson. The evidence is silent in respect to when, where, or under what circumstances Pringler Ferguson entered the car. Nothing is shown respecting his or her relationship or association with the other occupants of the car — it does not even appear whether Pringler Ferguson is male or female. On this record he or she was a mere passenger in the automobile. That is not enough. To hold a mere passenger, knowledge of the presence in the automobile of contraband whiskey is insufficient. *S. v. Meyers, supra* [190 N.C. 239, 129 S.E. 600]. See also *S. v. Ham, ante,* 94, 76 S.E. 2d 346. The evidence must be sufficient to support an inference of some form of control, joint or otherwise, over the automobile or the liquor. *S. v. Meyers, supra;* 48 C.J.S., Intoxicating Liquors, Sections 222 (b), 281, 346 and 376. There is no evidence that Pringler Ferguson had any control whatsoever over either the liquor or the automobile. The evidence does not support the hypothesis of joint possession of the liquor. See *S. v. Lee,* 164 N.C. 533, 80 S.E. 405."

After a careful study of the evidence, we are of the opinion, and so hold, that the evidence in the record before us merely raises a suspicion or conjecture in respect to defendant's guilt as charged in the indictment, and the case should not have been submitted to the jury. *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. The Attorney General with his customary frankness states in his brief that the State's evidence is "admittedly weak."

The denial of defendant's motion for judgment of compulsory nonsuit is

Reversed.

MATTIE LEE KIDD v. CHESTLY (NONE) BURTON.

(Filed 20 January, 1967.)

1. Automobiles § 41f—

Plaintiff's evidence to the effect that her car was being driven at a speed of about 10 miles per hour, that the driver gave the signal for a right turn for some 125 feet before attempting to make a right turn into a driveway, and that defendant, operating a following automobile, struck

the right side and rear of plaintiff's car, *held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Trial § 26—

Allegations that defendant drove his automobile into the right side and rear of plaintiff's vehicle, with evidence that defendant struck plaintiff's vehicle as plaintiff's vehicle was making a right turn from the highway into a private driveway, that plaintiff's vehicle was damaged on its right side and rear and that defendant's vehicle was damaged on the left side and front, *held* not to disclose material variance between allegation and proof, since plaintiff's allegation, liberally construed, cannot be restricted to allegation that defendant's car was driven directly against the rear of plaintiff's car.

3. Automobiles § 10—

A motorist is not precluded from making a turn unless such movement is absolutely free from danger, and whether a motorist making a right turn from a highway into a private driveway could reasonably assume he could make such movement in safety, after having given proper signal of his intention to turn, is ordinarily a question for the jury in an action involving collision between the turning vehicle and a following car.

4. Automobiles § 42h— Evidence held not to disclose contributory negligence as matter of law in turning right into driveway.

Plaintiff's evidence to the effect that the driver of her car made a right turn from the highway into a private driveway and that her vehicle was struck by defendant's following car, without evidence that the driver of her car failed to make such turn from the righthand side of the highway, G.S. 20-153, and that the driver of her car looked to his rear and gave the statutory signal before making the turn, *is held* not to disclose contributory negligence as a matter of law on the part of plaintiff's driver, plaintiff's driver not having crossed the line of travel of a vehicle either meeting or overtaking him, and whether he could reasonably assume he could make the turn in safety being a question for the jury under the circumstances disclosed by plaintiff's evidence.

APPEAL by plaintiff from *Braswell, J.*, February 14, 1966 Civil Session of PERSON.

Tort action to recover for damage ($750.00) to property resulting from a collision of automobiles.

On July 5, 1965, at approximately 12:30 p.m., a Ford Mustang owned by plaintiff and operated by her son, Barry Kidd, and an Oldsmobile, owned and operated by defendant, were proceeding in a northerly direction along Rural Paved Road No. 1721 (Moriah Road). A private driveway extended east from said road to plaintiff's home. West of said road, across from said private driveway, was a service station operated by Barry's father.

Plaintiff alleged in substance, except when quoted, the following: Barry "gave a signal indicating his intention of making a right-hand turn into said private driveway." Defendant drove his car "into the right rear and right side" of plaintiff's car. The colli-

sion and damage to plaintiff's car were caused solely by the negligence of defendant in that defendant: Did not keep a proper lookout; drove recklessly; followed plaintiff's car too closely; failed to keep his car under proper control; operated his car while under the influence of intoxicating liquor; and failed "to regard the right-hand turn signal of the plaintiff's agent."

Defendant, in his answer proper, denied all allegations as to his negligence. For a further answer and defense, defendant alleged in substance, except when quoted, the following: As defendant approached the location of said service station and private driveway, Barry, traveling in his left lane, passed defendant's car and was headed toward the entrance to said service station; and that Barry, "without giving a turn signal of any description, pulled his car from the left lane of travel into an abrupt right-hand turn toward the entrance to his home and, in so doing, abruptly placed his vehicle directly across the lane of travel being followed by the defendant who had neither time nor opportunity to avoid colliding with the plaintiff's vehicle." Defendant alleged Barry was negligent in that he failed to exercise due care and caution; failed to keep a proper lookout; attempted to make a right-hand turn in front of following traffic without signaling his intention to do so and without ascertaining that he could do so in safety; and attempted to make a right-hand turn from his left-hand lane of travel. Defendant alleged such negligence of Barry, as agent of plaintiff, was the sole proximate cause, or at least a contributing proximate cause, of the collision and resulting damage.

At the conclusion of plaintiff's evidence, the only evidence, the court, allowing defendant's motion therefor, entered judgment of nonsuit. Plaintiff excepted and appealed.

Ramsey & Long for plaintiff appellant.
Charles B. Wood for defendant appellee.

BOBBITT, J. The only question presented is whether the court erred in granting defendant's motion for judgment of nonsuit.

The rules for testing the sufficiency of the evidence to withstand a motion for nonsuit need not be repeated. Reference is made to *Lewis v. Barnhill,* 267 N.C. 457, 461, 148 S.E. 2d 536, 540, and cases cited.

Barry's testimony tended to show the Ford was struck by defendant's car in the manner stated below when, at a speed of about ten miles per hour, Barry was beginning to make a right turn into said private driveway and that, for a distance of 125 feet, he had given a signal of his intention to make such right turn. There was

no *evidence,* as distinguished from *defendant's allegations,* to the contrary. There was ample evidence to support a finding as to defendant's actionable negligence.

Defendant contends nonsuit was proper on either of two grounds, namely, (1) that there is a fatal variance between plaintiff's allegations and proof, and (2) that plaintiff's evidence discloses that Barry, plaintiff's agent, was contributorily negligent as a matter of law.

Defendant contends the evidence is at variance with plaintiff's allegation that defendant "drove his automobile into the right rear and right side" of plaintiff's Ford. There was evidence tending to show the Ford "was damaged on the right side and to the rear" and that the Oldsmobile "was damaged to the left side and to the front"; that the Oldsmobile knocked the Ford "slantwise"; that the Oldsmobile, passing to the right of the Ford, crossed the entrance to the private driveway and stopped some 10-20 feet north of said driveway, partly in the ditch on the east side of said road; and that the Ford, after the collision, was in the road, wholly or partially in the lane for northbound traffic, in front of the entrance to said private driveway.

Plaintiff's allegation must "be liberally construed with a view to substantial justice between the parties." G.S. 1-151. Moreover, variance, if any, between plaintiff's allegation and proof cannot "be deemed material, unless it has actually misled defendant to his prejudice." G.S. 1-168. It would be unreasonably restrictive to interpret plaintiff's allegation as an allegation that the front of defendant's car was driven directly against the rear of plaintiff's Ford. Suffice to say, we perceive no material variance between plaintiff's allegation and her proof. In this connection, see *Dennis v. Albemarle,* 242 N.C. 263, 269-270, 87 S.E. 2d 561, 567; *Wilson v. Bright,* 255 N.C. 329, 121 S.E. 2d 601; 4 Strong, N.C. Index, Trial § 26.

With reference to the alleged (contributory) negligence of Barry: Barry testified that, looking south from the entrance to said private driveway, one could see a car for a distance of 300 feet; that, when he was 125 feet south of the private driveway and began to signal for his right-hand turn, he looked back and saw that no car was approaching from the rear; that defendant came up behind him; and that, when he (Barry) was "a car length from the driveway," he saw defendant's car, the right side of which was "on the shoulder."

Defendant contends Barry, in attempting to make a right-hand turn, failed to approach the intersection of said road and said private driveway "in the lane for traffic nearest to the right-hand side of the highway," and in so doing violated G.S. 20-153. The *evi-*

dence, as distinguished from *defendant's allegations,* is insufficient to constitute a basis for this contention.

Defendant contends Barry was contributorily negligent in that, in violation of G.S. 20-154, he attempted to make a right-hand turn from a direct line without first seeing that such movement could be made in safety. Barry, in making such right-hand turn, was not crossing the line of travel of a vehicle that was either meeting or overtaking him. It was for the jury to determine whether he should have reasonably anticipated that the operation of any other vehicle might be affected by such movement. In *Cowan v. Transfer Co.* and *Carr v. Transfer Co.,* 262 N.C. 550, 138 S.E. 2d 228, Moore, J., speaking for the Court, said: "Whether, under such circumstances, he could reasonably assume that he could make the movement in safety is a question for the jury. A motorist is not required to ascertain that a turning motion is absolutely free from danger. *Lemons v. Vaughn,* 255 N.C. 186, 120 S.E. 2d 527; *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1." In *Cowan-Carr,* it was contended that Carr, operating Cowan's truck, made a *left turn* across the path of defendants' overtaking tractor-trailer without first ascertaining that such movement could be made in safety. Here (as in *Cowan-Carr*) the evidence, when considered in the light most favorable to plaintiff, does not establish contributory negligence as a matter of law.

It is unnecessary to review the evidence in greater detail. Suffice to say, the conclusion reached is that the evidence was sufficient to require submission to the jury on the issues raised by the pleadings. According to defendant's allegations, plaintiff's car was operated by Barry in a manner entirely different from that described in plaintiff's evidence. Defendant will have opportunity to offer evidence to support these allegations. The judgment of nonsuit is reversed.

Reversed.

GUY C. EVANS v. TRANSPORTATION INSURANCE COMPANY.

(Filed 20 January, 1967.)

1. Insurance § 29—

A policy provision for benefits for continuous confinement within doors will be construed as descriptive of the extent of the illness or injury rather than a limitation upon insured's conduct, and benefits under the clause will not be denied for visitations by insured to his physician, or walks ordered by his physician, or any other purpose not negating the seriousness of his illness and the totality of his disability.

2. Same—

Plaintiff's evidence was to the effect that he suffered a heart attack resulting in total disability and confinement for a period of over a year, that thereafter he continued to follow a strict routine of exercise, rest and medication, but that occasionally he also took automobile rides, went out for lunch at a restaurant, drove himself on short trips, and went to the movies. *Held:* The evidence is insufficient to entitle insured to the benefits provided in the policy for necessary and continuous confinement within doors, or to waiver of premiums for such disability, but only to the benefits provided in the policy for nonconfining illness.

3. Tender—

The refusal of a legally sufficient tender does not extinguish the principal debt or obligation.

APPEAL by plaintiff from *Parker, J.*, January 17, 1966 Civil Session of PITT.

Action on a policy of health and accident insurance.

On October 21, 1952, defendant issued to plaintiff its policy No. 9T 8532, which was renewed annually thereafter. Part IV of the policy, "Monthly Sickness Indemnity," provides:

> "Indemnity will not be paid under this Part for any period of disability during which the Insured is not under the regular care and attendance of a legally qualified physician, surgeon or osteopath other than himself.
>
> "A. Total Disability and Confinement. When, as the result of sickness and commencing while this policy is in force, the Insured is wholly and continuously disabled and prevented from engaging in each and every occupation or employment, the Company will pay the Monthly Indemnity stated in the Schedule for the period the Insured lives and is so disabled and necessarily and continuously confined within the house. Confinement shall not be terminated by reason of the transportation of the Insured, at the direction of his doctor, to or from a hospital or a doctor's office for necessary treatment. . . .
>
> "B. Total Disability and Non-Confinement. When, as the result of sickness and commencing while this policy is in force or immediately following a period of total disability for which indemnity is payable under Paragraph A of this Part, the Insured is wholly and continuously disabled and prevented from engaging in each and every occupation or employment although not confined within the house, the Company will pay one-half the Monthly Indemnity stated in the Schedule for the period of such disability not to exceed three consecutive months as the result of any one sickness."

Plaintiff suffered a severe myocardial infarction (heart attack) on May 14, 1962. Since then he has been under the regular care and attendance of a legally qualified physician, and he has not been able to engage in any gainful occupation or employment. Under Part IV-A of its policy, defendant paid to plaintiff the monthly indemnity of $300.00 during the period of May 14, 1962, through June 28, 1963. After that date, however, defendant refused to pay further under Part IV-A. Instead, it tendered to plaintiff $450.00 ($150.00 for three months), the total benefits provided under Part IV-B. Plaintiff refused the tender and, on April 1, 1964, brought this suit to recover benefits under Part IV-A at $300.00 a month for the period from June 28, 1963, through March 31, 1964, a total of $2,720,00. Plaintiff also seeks to recover $312.00, the sum of 1962 and 1963 premiums, which, he alleges, he paid by mistake.

Upon the trial, plaintiff's evidence tended to show: At the time of his heart attack, plaintiff, a traveling salesman, was approximately 60 years old and a resident of Greenville. He owned and supervised two small farms a short distance from Greenville. He now rents these farms "on thirds," and the tenants supervise them. During the period June 28, 1963-March 31, 1964, plaintiff, in accordance with his doctor's orders, followed a strict routine of exercise, rest, and medications. He still follows this routine. In the mornings, he walks a mile at 70 steps a minute and then returns to his home for two hours of bed rest. He can take no exercise more strenuous than a leisurely walk. In the afternoons, he sometimes walks two blocks from his house to the doctor's office or takes a 30-minute stroll to relieve tension. Ordinarily, he spends 20-22 hours out of each 24 within his house. He never goes out in the evenings. Sometimes his wife takes him for a 30 to 40-minute drive, and on occasions they eat lunch at a restaurant. At least once every two weeks, they ride out to the farms just for the drive. Plaintiff goes to the barbershop and to the post office 2-3 times a week. On occasions, he drives himself to these places. Sometimes he goes to the drugstore for his medicine. The doctor permits him to drive his automobile for 30-40 minutes around town. Longer periods are likely to precipitate chest pains or angina pectoris. In September 1964, plaintiff took — and passed — the examination for his driver's license. He owns a cottage on Pamlico Beach, where, upon the advice of his doctor, he spends some time during the summer. At the beach, he follows the same routine as at home. His physician testified that he could go to a movie "if it were the right kind," *i. e.*, one free from excitement.

At the close of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed, and plaintiff appealed.

M. E. Cavendish for plaintiff.
Rodman & Rodman for defendant.

SHARP, J. Defendant concedes that plaintiff was totally and continuously disabled during the period in question and that he was under the regular care of a duly qualified physician. This appeal presents only the question whether, within the meaning of the policy, plaintiff's disability necessarily and continuously confined him within the house.

Except where the contract of insurance specifically defines policy requirements of continuous confinement withindoors, as in *Walsh v. Insurance Co.*, 265 N.C. 634, 144 S.E. 2d 817, this Court has treated such provisions as descriptive of the extent of the illness or injury rather than as a limitation upon insured's conduct. *Glenn v. Insurance Co.*, 220 N.C. 672, 18 S.E. 2d 113; *Duke v. Assurance Corp.*, 212 N.C. 682, 194 S.E. 91; *Thompson v. Accident Association*, 209 N.C. 678, 184 S.E. 695; *Hines v. Casualty Co.*, 172 N.C. 225, 90 S.E. 131. So long as the insured left his home only to visit his physician, to take walks ordered by his doctor, or for some other purpose which does not negate the seriousness of his illness and the totality of his disability, this Court has interpreted continuous confinement clauses liberally in favor of the insured and has allowed "reasonable deviation from the indoors requirement." *Suits v. Insurance Co.*, 249 N.C. 383, 106 S.E. 2d 579.

In *Suits*, the plaintiff, a paraplegic as a result of an automobile accident, was totally disabled and deprived of his earning capacity. He lived at home and was entirely dependant upon his father and mother, not only for his livelihood but also for his bodily needs. Notwithstanding, after attending a rehabilitation center, he was able to operate a specially equipped automobile and, with the use of crutches, braces, and specially fitted shoes, to walk short distances. During 1955-1957, he was enrolled at the University of North Carolina, and, three days a week, he drove to Chapel Hill, a distance of 35 miles from his home. In 1957, he received his M.A. degree in English. He also drove himself to church (where he taught a Sunday-school class), to the barbershop, to the doctor's office, and to nearby towns. Prior to the time that the plaintiff enrolled at the University of North Carolina, the defendant insurance company had paid him monthly benefits under a policy providing for such payments so long as injury or sickness confined him continuously withindoors. Thereafter, the defendant declined to make further payments, and the plaintiff brought suit. In holding that the plaintiff's activities away from home had been "too extensive and too regularly carried on for too long a time" to permit him to qualify

under the continuous confinement clause, Higgins, J., speaking for the Court, said:

> "It (the confinement clause) is an integral part of the contract which the parties made. We cannot revise it. When competent parties contract at arms length upon a lawful subject, as to them the contract is the law of their case.
>
> ". . . The outside activities of the insured in the *Glenn*, the *Duke*, and the *Thompson* cases above referred to were restricted in time, scope, and field, too much so to bear any true resemblance to those carried on by the plaintiff or to constitute a precedent in his favor." *Id.* at 386.

In *Suits*, the insurance policy made no attempt to define continuous confinement withindoors. The policy in the instant case likewise attempts no definition other than to provide that "confinement shall not be terminated by reason of the transportation of the insured, at the direction of his doctor, to or from a hospital or a doctor's office for necessary treatment." This provision merely implanted previous rulings of this Court into the policy. *Duke v. Assurance Corp., supra; Thompson v. Accident Association, supra.* Plaintiff's activities, however, have been so extensive and so prolonged that his case is governed by *Suits v. Insurance Co., supra.*

Defendant's contract with plaintiff does not obligate it to pay him $300.00 unless he is totally disabled *and* continuously confined to the house. For total disability and *non*confinement, defendant agreed to pay only $150.00 a month for a maximum of three months. Defendant is, therefore, obligated to pay plaintiff only under policy provision IV-B. "A bona fide, legally sufficient tender by a debtor, even though refused by the creditor, does not operate to discharge or extinguish the principal debt or obligation. . . ." 52 Am. Jur., Tender § 35 (1944). *Accord, Parker v. Beasley,* 116 N.C. 1, 21 S.E. 955.

Plaintiff's claim for a refund of premiums paid in 1962 and 1963 is governed by the following provision of the policy:

> "WAIVER OF PREMIUM — Upon due proof that total disability for which indemnity is payable under this policy has continued for six months while this policy is in force, the Company will waive the payment of any premium becoming due during any further continuous period of disability for which indemnity is payable and the policy will remain in force during such further period, subject to all its conditions except as to the payment of premium."

Plaintiff's heart attack occurred on May 4, 1962. The next premium became due November 1, 1962 — three days before the expiration of the six months' waiting period. His continuous confinement had been terminated when the next premium became due on November 1, 1963. Plaintiff, therefore, is not entitled to a refund of premiums paid.

The judgment of nonsuit must be

Affirmed.

STATE OF NORTH CAROLINA v. JAMES HIRAM TILLMAN.

(Filed 20 January, 1967.)

1. Criminal Law § 101—

The test of the sufficiency of circumstantial evidence to be submitted to the jury is the same as the test for direct evidence: there must be 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 of guilt.

2. Larceny § 7—

Evidence tending to show that defendant was loitering around a store in a shopping center for the better part of a week, that on the day of the larceny defendant was present, alone, in that part of the store which was behind locked doors and clearly marked for employees only, and that the door had been jimmied open and money and valuables taken from the safe therein, *held* sufficient to be submitted to the jury in a prosecution for larceny.

APPEAL by defendant from *Bickett, J.*, February 1966 Criminal Session of ALAMANCE.

Defendant was tried upon a bill of indictment charging that on September 3, 1965 (1) he broke into and entered the storehouse of Byrd Grocery Company, Inc., with the intent to steal chattels and money kept therein, and (2) he did feloniously steal $3,194.00, the property of Byrd Food Company, a corporation. Defendant offered no evidence.

The evidence for the State tends to show: Byrd's Food Store (Byrd's) occupies premises owned by Byrd's Grocery Company, Inc., in the eastern end of the Cum-Park Plaza, a shopping center in the city of Burlington. Practically every morning and afternoon during the week preceding Friday, September 3, 1965, Carl Parks, one of the owners of the shopping center, had observed defendant and one Howard Overman loitering about the shopping center. One

day he observed them seated in an automobile parked in a space which "wasn't used much in the daytime." One afternoon about 5:30, he saw them go around to the back of the Remnant Shop, which is next to Byrd's. From time to time during that week, he had observed Overman walking up and down the mall, spitting on the sidewalk — deportment that "got on his nerves."

Joe Cole, a former sheriff of Alamance County and an employee of the Remnant Shop, observed Overman and defendant for three or four hours on Thursday afternoon, September 2. Defendant was in an automobile parked near a lamppost across from Byrd's. Overman was not with defendant all the time, but Cole observed conversations between the two men. Cole mentioned the presence of Overman and defendant Tillman to James Young, another employee of the Remnant Shop. On Thursday, Young observed defendant from noon until about 4:00 walking up and down the walkway looking into the store. He also saw defendant on Friday, September 3. On both Thursday and Friday, he observed two cars drive up to the vehicle in which defendant was sitting. On Thursday morning and about lunchtime on Friday, the checker at Byrd's saw Overman in the store.

On Friday morning, September 3, at about 8:30, Nellie Wilson, a clerk from the main office of the Byrd corporations, went to the Cum-Park Plaza store. She handled the money for that particular store, which opened at 9:30. The store's office, stockroom, motor room, and two restrooms were located on the second floor, which was reached by stairs located behind double doors at the back of the store proper. These double doors bore the notice, "Employees Only." Miss Wilson got the key to the office from the manager, James Ford, went upstairs and unlocked the door to the office, which contained the 3 x 2-foot safe ("really just a firebox") in which money was kept. She knew the combination to the safe. She opened it and then counted the money it contained — $2,173.89. Thereafter, she went to the bank and secured $3,000.00 in cash. She returned to the store, put $1,584.00 in the cash register, left cash and checks in the amount of $414.89 in the till, and also $3,175.00 in the safe. She then put the combination of the safe on "day lock." When the combination was thus set, the safe could be opened by simply turning the combination to a certain number. At 10:00, she locked the door and left. The door to the office was opened by inserting and turning a key in the knob. When the door was closed, it locked automatically.

About 12:02, Sergeant Webster of the Burlington Police and Mr. Wayne Taylor, administrative assistant to Mr. Hugh Cummings, one of the owners of the shopping center, went into Byrd's. After in-

quiring for the manager, they went through the double doors into the back area of the store. They observed Howard Overman about 2-3 feet from the stairs coming toward them, walking toward the double doors. Webster followed Taylor up the stairs, "stepping distance behind" him. Part of the way up, he turned to be sure that Overman had left the area and was not following them. When Taylor got to the landing in front of the office door, he knocked. The door was opened 6-8 inches from the inside by a man whom Taylor knew was not employed by Byrd's. Taylor later identified the man from photographs in the files of the Burlington Police Department as defendant Tillman. Taylor asked the man if Mr. Ford was there. He said that Ford was downstairs and closed the door. Webster (who knew Tillman) heard the conversation but did not see the man because Taylor blocked his view. At the time, Taylor remarked to Webster that the man who opened the door must be somebody from the central office. At that time, the two men noted no signs of any forcible entry into the office.

During the forenoon of September 3, 1965, the store manager, Ford, did not go into the office although he had several times gone upstairs to the stockroom for merchandise. When he returned from lunch at 1:00, one of the checkers needed change, and he went into the office to get it. He found the door closed and locked, and the safe on day lock. Ford did not, at that time, notice any injury to the office door. When he opened the safe, he discovered that the money was gone. He immediately called Mr. Byrd, who arrived at 2:00. The police came sometime thereafter. This time Sergeant Webster observed that the paint had been broken from the door strip, which was pulled from the wall about 1/32 of an inch, just enough to be noticeable. On that part of the latch which comes in the doorjamb were two scratch marks. The safe itself was not damaged. The door easily could have been opened by the insertion of a knife blade behind the door strip. That door, according to Mr. Byrd, was "something to keep honest folks out."

In addition to Ford, the assistant manager — a Mr. Smith —, and a Miss Cook of the main office had keys to the Cum-Park store. When managers were changed, the lock on the outside door was always changed, but the lock on the office door and the safe combination had never been changed. Five former store managers knew the combination to the safe.

Defendant's motions for nonsuit were overruled. The jury's verdict was "guilty as charged in the bill of indictment." From the judgment that he be imprisoned for not less than six nor more than eight years on each count, the sentences to run concurrently, defendant appeals.

T. W. Bruton, Attorney General; Harrison Lewis, Deputy Attorney General; Charles M. Hensey, Trial Attorney, for the State.

Fred Darlington, III, for defendant.

SHARP, J. This appeal presents only the question whether the State's evidence is sufficient to withstand the motions for nonsuit. The State's evidence is circumstantial, but the test of its sufficiency is the same whether the evidence be circumstantial, direct, or both. *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374. "If there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." *State v. Johnson,* 199 N.C. 429, 431, 154 S.E. 730, 731. *Accord, State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

Defendant contends that the State's evidence discloses no more than an opportunity for the defendant to have taken the money and that it further reveals that others had an equal opportunity to have taken it. With this contention we cannot agree. Viewing the evidence in the light most favorable to the State — as we are required to do in evaluating a motion for nonsuit, 1 Strong, N. C. Index, Criminal Law § 99 — it is clear that defendant and Overman spent a large part of the week before Friday, September 3, in apparent idleness at the Cum-Park Plaza Shopping Center. They did no work there, but sat in an automobile or loitered in the vicinity of Byrd's and the Remnant Shop. The reasonable inference is that they were reconnoitering one or both of those places of business, probably, Byrd's since Overman was seen at least twice inside that store. Their actions aroused the suspicions of Joe Cole, a former sheriff of the county, who knew them both, and he mentioned their activities to Young, the administrative assistant to one of the owners of the shopping center. Undoubtedly, Cole thought that the two men were "casing the joint." On Friday at noon, Young went with a policeman into Byrd's — for what purpose the record does not specifically state — but their presence coincided with Overman's and defendant Tillman's, whom they encountered in that part of the store which was clearly posted for "Employees Only." At a time when the manager was out to lunch, defendant Tillman was inside the office from which the money was taken. At the same time, Overman was seen 2-3 feet from the stairs going toward the double doors.

Defendant had no legitimate business in the office. Those who did, had access to a key. Someone who had no key had evidently used a knife to jimmy the lock to obtain entrance. If that person were one other than defendant, the record does not suggest it. When

defendant opened the door at Taylor's knock, he opened it only 6-8 inches wide and closed it as soon as he had answered Taylor's question.

After a week of loitering in the shopping center, defendant's unauthorized presence in the office where the money was on the day it disappeared permits the logical inference that he is the thief who broke into and entered the office. To quote Lord Byron: "A 'strange coincidence,' to use a phrase. . . ."

No error.

STATE v. CLARENCE McKEE, JR.

(Filed 20 January, 1967.)

1. Bastards § 8—

In prosecutions under G.S. 49-2 it is the accepted practice to submit issues to the jury, treated as a special verdict, but the issues submitted must necessarily present to the jury inquiries as to all the facts necessary to determine defendant's guilt, and also, if challenged by defendant, the fact that the prosecution was commenced within the time limited.

2. Bastards § 8—

Where the paternity of the child is not adjudicated within three years of its birth the State must show, in a prosecution begun after the three year period, that defendant made payments for the child's support within three years after its birth, and that warrant was issued within three years of the date of the last payment.

3. Bastards § 8—

In a prosecution under G.S. 49-2 begun more than three years after the child's birth, without any judicial determination of paternity, the issues submitted to the jury must include predicate for a finding that defendant made payments for support of the child within three years of its birth, as well as a finding that defendant made such payments within three years prior to the issuance of the warrant, and when the issues fail to present one of these essentials they are insufficient to support conviction.

APPEAL by defendant from *McLaughlin, J.*, May 1966 Criminal Session of ROWAN.

Prosecution under G.S. 49-2 *et seq.*

Defendant was tried and convicted in the Rowan County Court on February 22, 1966, upon a warrant issued on December 31, 1965, which charged that, on or about December 1, 1965, and prior thereto, defendant did wilfully and unlawfully refuse to support his illegitimate child, Alicia Louise Hunter, born on February 23, 1960, to

Dorothy Louise Hunter. From the judgment imposed, defendant appealed to the Superior Court, where he was tried *de novo*. Prosecutrix and defendant were the only witnesses.

The evidence for the State tended to show: As a result of sexual relations with defendant in June 1959, Dorothy Louise Hunter became pregnant and gave birth to the child, Alicia, on February 23, 1960. Dorothy informed defendant immediately of her pregnancy. He told her that he wanted to go to college and could not get married until he graduated. He agreed, however, that he would support the child, giving her what he could until he got out of school. Defendant and his family paid the hospital bill incident to the birth of the child. During the first year of her life, defendant sent Alicia clothing costing between $10.00 and $15.00. Until June 1963, she still considered him her boyfriend. She went out with him and, during that time, he gave her things for the support of Alicia. In August 1963, he sent her a box of clothing. Once, prior to August 1963, he gave Dorothy money "from hand to hand." He sometimes took the baby out on his own and got her things. At intervals, Dorothy demanded of defendant more support for the child. Once she threatened to take out a warrant for him but desisted, upon his promise to do more for Alicia. He said "that he expected to do the right thing . . . that he was going to do more." At Thanksgiving 1964, defendant and prosecutrix spent the night together at the Holiday Inn in Greensboro. At that time, he gave her $10.00 for Alicia. Thereafter, he furnished no support whatever. In October 1964, Dorothy wrote defendant a letter demanding support. The last time she asked him for money was just before she took out the warrant.

The testimony of defendant, a schoolteacher, tended to show: He has never "owned up" to being the father of Alicia, but he has never denied it. He said:

> "I have not at any time since the birth of the child given her (Dorothy) anything for the support of the child. . . . I told her I would do the best I could and if I had anything I would give it to her. . . . I told her (whenever she would ask for money) that I didn't have anything to give her. . . . I assume that I am Alicia's father."

Defendant admitted that on Labor Day 1964 he spent the night with prosecutrix at the Holiday Inn in Greensboro, but he denied that he gave her money at that time or at any other time.

The court submitted issues to the jury which were answered as follows:

"1. Is the defendant, Clarence McKee, Jr., the father of the child, Alicia Louise Hunter, born February 23, 1960, begotten upon the body of Dorothy Louise Hunter, as alleged in the warrant?
ANSWER: Yes.

"2. Did the defendant, Clarence McKee, Jr., make any payments for the support of Alicia Louise Hunter within three years prior to December 31, 1965?
ANSWER: Yes.

"3. If so, is the defendant, Clarence McKee, Jr., guilty of wilfully neglecting, failing and refusing to support and maintain the said child, Alicia Louise Hunter, after due and lawful demand was made upon him, prior to the warrant being sworn and served, as alleged in the warrant?
ANSWER: Yes."

Defendant tendered the following interrogatory, which the court declined to submit:

"Did the defendant make any payments for the support of Alicia Hunter within 3 years after the birth of said child?
ANSWER: ....."

Upon the foregoing verdict, the court entered judgment that defendant be imprisoned for 6 months, and he appealed.

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

Graham M. Carlton for defendant.

SHARP, J. The submission of interrogatories, or issues, in criminal prosecutions under G.S. 49-2 *et seq.* is now the approved practice with us, the questions and answers being treated as a special verdict. *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840. The issues submitted, however, must necessarily present to the jury inquiries not only as to all the facts necessary to determine defendant's guilt but also to establish the right of the State to prosecute him if defendant's evidence challenges this right.

The wilful failure to support an illegitimate child less than 18 years of age is, by G.S. 49-2, made a misdemeanor. G.S. 49-4, however, permits the State to prosecute the putative father within the following periods *"and not thereafter":*

"1. Three years next after the birth of the child; or

"2. Where the paternity of the child has been judicially determined within three years next after its birth, at any time before the child attains the age of eighteen years; or

"3. Where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment whether such last payment was made within three years of the birth of such child or thereafter: Provided, the action is instituted before the child attains the age of eighteen years."

The illegitimate child, Alicia, was born February 23, 1960. This prosecution was instituted December 31, 1965. Thus, it was not begun within three years next after her birth. Neither was her paternity judicially determined within that time. In order to maintain this prosecution, therefore, the State must meet the requirements of G.S. 49-4(3), *supra,* and prove not only that defendant made payments for the child's support within the three years next after her birth but also that the warrant was issued within three years from the date of the last payment.

Defendant, although he "assumes" that he is the father of Alicia, categorically denies that he has ever, at any time, contributed anything whatever to her support — neither money, clothes, food, nor anything else. In other words, he relies upon the State's failure to prosecute him earlier to relieve him of his obligation to support Alicia. If the jury should find the facts in accordance with defendant's testimony, his contention is correct and the action cannot be maintained. On the other hand, if the jury finds the facts in accordance with the prosecutrix's testimony, defendant made payments for the child's support during the first three years of her life and the warrant was issued within three years from the date of his last payment, $10.00 at Thanksgiving of 1964. The verdict, however, leaves unanswered the question whether defendant made any support payments for the child during the first three years of its life. The issue tendered by defendant would have established this material fact. A special verdict is defective if a material finding is omitted. "Such verdict must find sufficient facts to permit of the conclusion of law upon which the judgment rests." *State v. Ellis, supra* at 451, 137 S.E. 2d at 845.

Defendant's assignment of error based on his exception to the failure of the court to submit the tendered issue is sustained. There must be a

New trial.

U-HAUL COMPANY OF NORTH CAROLINA, INC., v. IVEY G. JONES, D/B/A JONES ESSO SERVICE STATION.

(Filed 20 January, 1967.)

1. Injunctions § 13—

Ordinarily, a temporary restraining order will be continued to the hearing if plaintiff shows probable cause for supposing he will be able to sustain his primary equity and that injunction is reasonably necessary to protect plaintiff's rights until the controversy can be determined.

2. Contracts § 7—

Provision in a written contract for agency for the rental of "U-Haul" trailers and trucks, that after termination of the agency, the agent would not, within the geographical limits of the county, represent or render any service for others engaged in the trailer rental service for a period of one year after the expiration of the then current telephone directory listing, *held* valid.

3. Same; Injunctions § 6—

Plaintiff's evidence that the dealer contract with defendant was terminated for cause and that defendant violated his valid covenant not to engage as agent for a competing business within the reasonable time and geographical limits set forth in the written contract of dealership signed by defendant, *held* ground for injunctive relief against continued violation during the term of the agreement, and this result is not affected by the fact that the covenant provided for the payment of a specified sum as liquidated damages for its breach.

4. Evidence § 3—

The courts will take judicial notice that it is the custom of telephone companies annually to issue revised directories of their subscribers, and that an uninformed person desiring a special service would probably turn to the yellow pages index of the telephone directory to ascertain where he could obtain such service.

5. Injunctions § 3—

The mere fact that the contract provides for the payment of a specified sum as liquidated damages for its breach does not in itself constitute an adequate remedy at law precluding injunctive relief against the continued breach of the agreement.

APPEAL by defendant from *Bundy, J.*, April 18, 1966 Schedule "D" Civil Session of MECKLENBURG.

Action, instituted March 14, 1966, to restrain defendant from breaching a covenant not to compete and to recover damages for breach of contract. At the hearing upon plaintiff's motion for a temporary restraining order, defendant offered no evidence. Plaintiff offered the complaint as an affidavit. It alleges:

Defendant is the owner and operator of Jones Esso Service Station in Charlotte, North Carolina. Plaintiff, a North Carolina corporation, is the successor in interest to U-Haul Company of Tennessee (Company) and the assignee of two contracts which that

Company entered into with defendant on March 7, 1959, and April 26, 1961. In these contracts Company appointed defendant its agent for the rental of U-Haul trailers and trucks. Company agreed to furnish defendant the trailers, trucks, accessory equipment, rental contract books, etc.; to hold defendant harmless for Company's negligence; and to assume responsibility for the theft of its equipment while in defendant's custody. Defendant, *inter alia*, agreed to remit to Company weekly the total of all rental receipts which he collected for Company. Company agreed to send defendant every four weeks the commission specified in the agreement. The contract provided for its termination as follows:

> "This Agreement may be terminated by either party on thirty (30) days' written notice, or without previous notice, upon violation by the opposite party of any of the promises or conditions heretofore mentioned, with the exception that the Dealer warrants, covenants and agrees that, within the geographical limits of the county of his place of business, he will not represent or render any service in any capacity for any other persons, firm or corporation engaged in the trailer rental business for the duration of the then existing telephone directory listing, plus a period of one year from the termination of such telephone directory listing. In addition, upon violation by Dealer of the covenants contained in this paragraph, Dealer promises and agrees to pay to U-Haul Co. the sum of Five Hundred ($500.00) Dollars as liquidated damages, and not as a penalty."

On June 2, 1962, Company assigned defendant's contracts (copies of which are attached to the complaint as exhibits) to plaintiff. In violation of his contractual obligation, defendant has failed to account to plaintiff for the sum of $3,000.00 in rentals collected. Checks forwarded to plaintiff's collecting agent for that amount were worthless. On or about January 18, 1966, after its demands for payments were not met, plaintiff gave defendant a "dealership close-out notice", which terminated his agency. Since that date, in violation of his contract, defendant has been engaged in representing other persons, firms, or corporations engaged in the trailer rental business within Mecklenburg County.

Defendant's listing in the telephone directory in use in Charlotte, Mecklenburg County, North Carolina, reads in part as follows:

"Jones Esso Service Center — U-HAUL TRAILERS AND TRUCKS." This telephone listing expires June 9, 1966. Therefore, under the terms of his contract with plaintiff and its predecessor, defendant is

not entitled to engage in the trailer rental business in competition with plaintiff until June 9, 1967. If defendant is allowed to continue to represent competing interests, plaintiff will lose those customers who, pursuant to the advertisement contained in the telephone directory, telephone and inquire about the rental of U-Haul trailers. Plaintiff will not only lose business it may never recover, but its prestige will be irreparably damaged. Plaintiff has no adequate remedy and is entitled to restrain defendant until June 9, 1967, from representing or rendering any service for other persons, firms, or corporations engaged in the trailer rental business.

In addition to injunctive relief, plaintiff seeks to recover $500.00 liquidated damages as provided in the contract and $3,000.00 in rentals for which it holds defendant's worthless checks.

Upon the hearing, Judge Bundy found facts substantially as alleged in the complaint and concluded that plaintiff had no adequate remedy at law. He enjoined defendant until further orders of the court from representing or rendering services in any capacity for other persons, firms, or corporations engaged in the trailer rental business. From this order defendant appeals.

Plumides & Plumides by Jerry W. Whitley for plaintiff.
Richard A. Cohan for defendant.

SHARP, J. Ordinarily, a temporary injunction will be granted pending trial on the merits (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's rights until the controversy between him and defendant can be determined. *Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619; 2 Strong, N. C. Index, Injunctions § 13 (Supp.).

Plaintiff's affidavit makes out a *prima facie* showing of its right to the final injunctive relief sought. According to the uncontradicted evidence, plaintiff terminated defendant's contract for cause. Defendant's covenant not to compete after such a termination was (1) in writing, (2) entered into at the time and as a part of the original contract of employment, (3) based on a valuable consideration, (4) reasonable both as to the time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy. It, therefore, meets all the requirements for a valid restrictive covenant. *Exterminating Co. v. Griffin* and *Exterminating Co. v. Jones,* 258 N.C. 179, 128 S.E. 2d 139; *Asheville Associates v. Miller* and *Asheville Associates v. Berman,* 255 N.C. 400, 121 S.E. 2d 593. See

Annot., Employee — Restrictive Covenant — Time, 41 A.L.R. 2d 15, 179 (1955). Considering the nature of plaintiff's business, defendant's agreement that, when his contract was terminated, he would not compete during the time the current telephone directory was in effect, plus a period of one year thereafter, is a reasonable time limitation. We may take judicial notice that (1) it is the custom of telephone companies annually to issue revised directories of their subscribers, and (2) an uninformed person desiring to rent a trailer would probably turn to the yellow pages index of the telephone directory to ascertain where one could be obtained. Stansbury, N. C. Evidence §§ 11, 14 (2d Ed. 1963).

Defendant's contention that plaintiff is not entitled to injunctive relief because the contract provision for liquidated damages provides an adequate remedy at law is untenable.

> " 'The mere insertion in the contract of a clause describing the sum to be recovered for a breach as liquidated damages, but which were not intended to be payable in return for the privilege of doing the acts forbidden by the contract, will not exclude the equitable remedy and is regarded as put there for the purpose of settling the damages if there should be a suit and recovery for a breach.' There may also be an action in the nature of a bill in equity, for what substantially would be a specific enforcement of the contract and restraining any further violation of it." *Cooperative Assn. v. Jones*, 185 N.C. 265, 284, 117 S.E. 174, 183. *Accord, Bradshaw v. Millikin*, 173 N.C. 432, 92 S.E. 161. See 43 C.J.S., Injunctions § 80(6) (1945); 28 Am. Jur., Injunctions § 93 (1959).

On this record, we think plaintiff was entitled to the temporary restraining order which Judge Bundy issued.

The judgment of the court below is

Affirmed.

STATE v. THOMAS INMAN.

(Filed 20 January, 1967.)

1. Criminal Law § 71—

A statement voluntarily made by defendant to an officer prior to any custodial or even interrogatory relationship between them is competent.

2. Same—

Evidence that prior to the making of a statement while in custody, defendant was advised of his right to remain silent, that any statement he made might be used as evidence against him, that he was entitled to have an attorney, and that if he could not employ an attorney an attorney would be appointed for him, and that no promises or threats were made to induce the making of the statement, *held* to support the court's finding that the statement was voluntarily and understandingly made.

APPEAL by defendant from *Farthing, J.*, July 1966 Regular Criminal Session of HAYWOOD.

Defendant was indicted on a charge of first degree murder. Upon the trial of the cause the Solicitor announced that the State would not seek a conviction for murder in the first degree, but for second degree murder or manslaughter, as the evidence under the law might warrant.

The State's evidence tends to show that the deceased, Cecil Pressley, together with Gayno Morgan, Bill Blankenship and Paul Blankenship, came to defendant's home on 24 February 1966. Gayno Morgan testified, in substance, that while he was in defendant's kitchen he heard a scuffle and a shot fired in the front room. He then went into the front room and found the deceased on his back on the floor and the defendant sitting on the couch pointing a rifle in the direction of deceased. Morgan slapped deceased on the face and said, "Get up, Curley, get up." There was no response. Defendant pointed the gun at Morgan, who fled. The witness Paul Blankenship testified to substantially the same facts.

On 28 February 1966 the defendant's house burned, and while an attempt was being made to put out the fire, the body of deceased was found. The State offered evidence showing that deceased died as a result of gunshot wounds and not as a result of the fire, and further, that in the opinion of the State's expert witness the deceased had been dead for more than twenty-four hours before the fire started.

Defendant was arrested around 4:00 P.M. on 1 March 1966, and brought to Haywood County jail. He was in an intoxicated condition at that time. Around 2:00 A.M. on 2 March 1966, defendant was brought into the kitchen of the jail, where he was questioned by four law enforcement officers, one of whom was Claude Davis, Special Agent with the State Bureau of Investigation. Davis was the first witness offered by the State who testified as to statements made by the defendant. Upon defendant's objection, the jury was excused from the courtroom, and in its absence the court heard evidence both from the State and from the defendant on the question of the voluntariness of the statements. In the absence of the jury, Davis testified that he informed the defendant at the time of the

interrogation that he did not have to make any statement whatsoever, and that any statement he did make could be used as evidence in court against him; that he could remain silent and refuse and decline to answer any questions or make any statement; that he was entitled to remain silent and refuse to answer any question or make any statements until he had an attorney represent him; that he did not have to answer any questions or make any statements in the absence of an attorney employed or appointed to represent him; that if he did not employ an attorney to represent him and if no one else employed an attorney to represent him, that an attorney would be appointed, and he could refuse to answer any question or make any statements until an attorney was present; that no promise would be made him whether he did or did not make a statement; that he would not be harmed or threatened or mistreated in any way. The defendant testified and contended that he thought the word "attorney" referred to Mr. Brown, who was the District Solicitor. It was shown by cross-examination that defendant had been in both State and Federal courts on several occasions since 1936, and had been represented by both privately retained and court-appointed attorneys.

At the conclusion of the *voir dire* examinations, the court found as follows: "Let the record show that the court finds as a fact that the statements made by the defendant were made freely, voluntarily and understandingly after he had been fully advised of his constitutional rights not to make any statements, and right to have an attorney present." The jury then returned to the courtroom and the witness Davis stated that the defendant told him that on the night of February 28, 1966 the deceased came to his home about 9:00 or 10:00 o'clock and that deceased had waded the creek and had wet feet and was drunk. He and Pressley ate some peaches and Pressley went into the back room of the house and defendant then went to bed in another room. About midnight he was awakened by fire and smoke and left the house on his hands and knees, and did not have time to call Pressley. He went to his sister's house and asked her to notify the fire department and sheriff.

Defendant also excepted to the admission of evidence of similar statements made by him to the sheriff of Haywood County at the scene of the fire. On *voir dire*, in the absence of the jury, the Sheriff testified that he had no idea at the time statements were made to him that deceased died of any cause other than the fire, and that he did not make any inquiry concerning the cause of deceased's death, but that the statements were voluntarily made, without any questions from him. The Sheriff told the defendant that he had better go up to his sister's where it was warm. At the close of the

voir dire, the judge found that these statements were voluntarily made, with full understanding of his constitutional rights, and the statements were admitted in evidence before the jury.

The State also offered the testimony of Charles Messer, who was a deputy sheriff of Haywood County on March 1, 1966. He testified that the defendant made a statement to him between 8:30 and 9:00 o'clock on the evening of March 1, 1966, and upon objection by the defendant, *voir dire* was again held in the absence of the jury and witness Messer testified that he brought the defendant from his cell and talked with him in the presence of Dr. Brown, and before any conversation he advised the defendant that he was entitled to a lawyer to be present when they were talking to him, that the defendant did not have to tell them anything, and that what he might tell them could be used against him in court or for him, and that he didn't have to make any statement at any time to them; that he made no threats or promises of reward, and that thereupon the defendant told him that he did not want a lawyer because he had not done anything. After cross-examination of this witness by the defendant's attorney, the court found that the statement made to witness Messer was made after defendant had been advised of his constitutional rights, and was made freely, voluntarily and understandingly. Thereupon, the witness Messer testified to statements substantially the same as were testified to by S.B.I. Agent Davis and the Sheriff of Haywood County.

At the close of all the evidence, the jury returned a verdict of guilty of manslaughter, judgment was entered thereon, from which the defendant appeals.

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

Ferguson & Haire for defendant.

PER CURIAM. The sole question presented for decision is: Did the trial court err in holding that defendant had been fully apprised of his constitutional rights and that his statements to officers were made voluntarily and with understanding?

The case of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, relates to cases tried after 13 June 1966. The trial of this case commenced at the July Session 1966 of Haywood Superior Court. The *Miranda* case spelled out certain "safeguards" to be used in the interrogatory process. "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.'" *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

The procedure to be followed by the trial judge in determining whether evidence of defendant's statements should be given in the presence of the jury is clearly set out in *State v. Gray, supra,* where Lake, J., speaking for the Court, said:

> "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* (264 N.C. 517, 142 S.E. 2d 344); *State v. Outing, supra* (255 N.C. 468, 121 S.E. 2d 847); *State v. Rogers, supra* (233 N.C. 390, 64 S.E. 2d 572). 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 conclusive 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."

The defendant first made the statements complained of to the Sheriff of Haywood County when no custodial or even interrogatory relationship existed. Other statements were made while in custody "after adequate protective devices were employed to dispel the compulsion inherent in custodial surroundings." *Miranda v. Arizona, supra.*

There is plenary competent evidence in this record to support the trial judge's findings of fact that defendant made the statements voluntarily and with understanding.

No error.

STATE v. ERNEST CHARLES BATTLE, JAMES BELL, JR., YOHANNES HAILE MARIAM, ALIAS HAROLD WESLEY JONES, ROOSEVELT WALLACE.

(Filed 20 January, 1967.)

1. Criminal Law §§ 34, 91—

Where the unresponsive answer of a witness on cross-examination refers to defendant's parole or probation officer, but the court immediately instructs the witness not to go into that matter, the court's direct and positive correction of the improper reference to the parole or probation officer cures the error.

2. Criminal Law § 83—

Where the place at which defendant was employed is relevant because at the time of his arrest he was wearing a uniform of his employer, it is competent for the State to show that defendant had made contradictory statements as to where he lived and where he worked.

APPEAL by defendant Wallace from *Johnson, J.*, March, 1966 Regular Session, ROBESON Superior Court.

All defendants named in the caption were indicted, tried, convicted, and sentenced to prison terms upon a bill of indictment charging (1) the felonious formation of a conspiracy to break and enter the storehouse of M. H. McLean, Jr., in Lumberton for the purpose of committing a felony, to-wit: larceny; (2) the felonious commission of the substantive offense of breaking and entering the McLean storehouse.

The defendants, Bell and Mariam (alias Jones) prosecuted their appeals before this Court at the Spring Term, 1966. Decision finding no error in the trial is reported in 267 N.C. 513. The Attorney General and counsel for Defendant Wallace stipulate the facts stated in the former opinion are correct. However, the present appellant presents two additional assignments of error (not raised on the former appeal) which he insists should warrant a new trial as to him.

T. W. Bruton, Attorney General, Wilson D. Partin, Jr., Staff Attorney for the State.

J. H. Barrington, Jr., for defendant Wallace, appellant.

PER CURIAM. During the cross-examination of Officer Lovette, appellant's counsel asked this question: "When did you talk to him (Wallace) the last time?" Answer: "It was in the presence of the Parole or Probation Officer, one or the other." Without waiting for objection or motion to strike, the court said: "Don't go into that Mr. Lovette." The record states this constitutes appellant's Exception No. 5. However, the court apparently beat the defense

counsel to the punch, instructing the officer not to go further afield. Conceding the reference to parole or probation officer was improper, nevertheless the court's direct and positive correction without waiting for objection or motion to strike could have been understood by the jury only as disapproval of the officer's gratuitous remark and that the officer was off limits in making it.

The defendant's other objection was to the court's permitting the State in rebuttal to show that the appellant made contradictory statements as to where he lived and where he worked. The evidence disclosed that one time he stated he lived in Lumberton and worked in Fayetteville. At another time he stated he lived in Raleigh and worked at an Esso station. The contradictory statements were clearly admissible. There was plenary evidence that Wallace was in Raleigh and rented the U-Haul there a few hours before the arrest in Lumberton. At the time of his arrest, he was wearing an Esso uniform. Another Esso uniform with similar laundry markings was found in the Buick near the McLean Storehouse in which Battle was arrested. Bell and Mariam were in the Buick pretending to be asleep.

All other questions arising on the appeal are discussed and disposed of in the former decision. In the trial and judgment, we find

No error.

STATE v. CALVIN MABRY.

(Filed 20 January, 1967.)

1. Criminal Law § 99—

Contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant nonsuit.

2. Criminal Law § 101—

If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical deduction and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to a jury.

3. Rape § 18—

Evidence tending to show that defendant, a grown man, assaulted an eleven year old female, struck her on the head with some object, and threatened her life, partially undressed her, and that after the assault her underclothing had blood on it, *held* sufficient to be submitted to the jury in a prosecution under G.S. 14-22.

4. Criminal Law § 154—

An assignment of error which does not disclose within itself the specific question sought to be presented, is ineffectual.

5. Criminal Law § 162—

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have answered had he been permitted to testify.

APPEAL by defendant from *Hobgood, J.*, August 1966 Criminal Session of ALAMANCE.

Criminal prosecution for assault with intent to commit rape. G.S. 14-22.

Plea: Not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

M. Glenn Pickard for defendant appellant.

PER CURIAM. Defendant assigns as error the denial by the court of his motion for judgment of compulsory nonsuit made at the close of the State's case, and the denial of a similar motion by him made at the close of all the evidence. Both the State and the defendant presented evidence.

The State's evidence, considered in the light most favorable to it, and giving it the benefit of every inference reasonably to be drawn from the evidence, and the defendant's evidence favorable to the State *(State v. Spears,* 268 N.C. 303, 150 S.E. 2d 499), would permit a jury to find the following facts: Defendant was married to Jo Ellen Mabry's mother, but the evidence does not show when the marriage took place. Jo Ellen Mabry's mother had three children: a girl 17 years of age, who is not defendant's daughter; a girl 12 years of age, who is defendant's daughter; and Jo Ellen Mabry, 11 years of age, who is not defendant's daughter. Since 29 February 1966 defendant and his wife were living separate and apart. Jo Ellen Mabry was living with her mother and two sisters. Prior to 18 June 1966 while he was living apart from his wife, defendant came to his wife's home when he was drinking, and said he was going to give the 12-year-old girl, who was his daughter, and Jo Ellen Mabry the sum of $10. On 18 June 1966 Jo Ellen Mabry saw defendant in the garden back of the Mabry home talking with "Foots" Barber. She went down to the garden where he was, and asked him if he was going to give them the money he had promised. He told her to come with him to the store, and get the change. The

store is on the other side of the street from the Mabry home. She went with him. When they came to the store, he told her to come and go to the mill with him, that he had to talk to his "bossman." They went down the road to a dirt road which turns off to the mill. When she was going to turn down the dirt road to the mill, he told her to come with him and look at Uncle Walt's pigs. Uncle Walt was an uncle of hers who had some pigs. The pigs were down on the left but not too far from the dirt road. When they came to the pigpen, he told her to come and go through the woods to the mill. There was no path between the pigpen and the mill. She was barefooted. She told him that she could not go, that she was afraid she would get bitten by a snake. He told her that nothing was going to hurt her. When she was going through the woods, he grabbed her, put his hand over her mouth, and told her if she hollered he would kill her. She was wearing cut-off overalls, panties, and a poor-boy shirt. A poor-boy shirt is a plain old knitted shirt. He pulled her down on the ground and was holding her on the ground. He was down on his knees, and he pulled her overalls and panties to the bottom of her feet. It is true that she testified on cross-examination in substance: He must have pulled her pants off. She could remember nothing until she got back to the cafe. She does not remember putting her pants back on. She testified: "I didn't holler; he said if I hollered he would kill me. I didn't scream. I couldn't do anything to resist him." He struck her head. She did not know what he struck her head with. The next thing she remembers was when they got back to the cafe. Defendant was with her. When she came to, her head felt like she was crazy, and her eyes felt like they were crossed. Defendant gave her a quarter. She started running, threw the quarter at him, and went home. She told her mother what had occurred, and they took her to the hospital. When she reached home, her nose was bleeding, her eyes had blood in them at each corner and were red. Her head was hurting. Defendant's fingerprints were on her left arm where he held her. Her underpants had blood on the top of them. She then went to the sheriff's office, and told them what had happened.

A witness for the State, Loraine McKenny, was at Jo Ellen Mabry's home on 18 June 1966 when Jo Ellen Mabry came in. When she came in, half way up her nose was swollen and blue, her forehead was blue, and her eyes were badly bloodshot. There were also bruises and fingerprints on her arm.

Defendant's evidence was to this effect: He was with Jo Ellen Mabry at the pigpen on 18 June 1966. While he was with her that day, he never put his hands on her, and never assaulted her. He has never had any trouble with Jo Ellen Mabry.

This Court said in *S. v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649:

> "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. *State v. Burnette,* 242 N.C. 164, 172, 87 S.E. 2d 191. 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. *State v. Petry,* 226 N.C. 78, 81, 36 S.E. 2d 653. 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. Petry, supra; State v. Adams,* 214 N.C. 501, 199 S.E. 716."

Any contradictions and discrepancies in the State's case are for the jury to resolve, and do not warrant the granting of a motion for compulsory judgment of nonsuit. *S. v. Carter,* 265 N.C. 626, 144 S.E. 2d 826; *S. v. Simpson,* 244 N.C. 325, 93 S.E. 2d 425.

It is a general rule in this jurisdiction that if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to a jury. *S. v. Tessnear,* 254 N.C. 211, 118 S.E. 2d 393; Supplement to 1 Strong's N. C. Index, Criminal Law, § 101. Following that general rule, the State's evidence and the defendant's evidence favorable to it was sufficient to permit a jury to find that the prosecutrix was 11 years old and was in the hands of a grown man, and that defendant intended at some time during the felonious assault to gratify his passion on the person of Jo Ellen Mabry, and that he intended to do so, at all events, notwithstanding any resistance on her part; and that she resisted all that she could under the circumstances, or that if she did not resist that she had been overcome by fear and submitted without consent, and such a consent from fear of personal violence is void and no consent at all. *S. v. Carter, supra; S. v. Miller,* 268 N.C. 532, 151 S.E. 2d 47. The State's evidence and defendant's evidence favorable to it was sufficient to carry the case to the jury on the charge in the indictment, and the court properly overruled defendant's motion for judgment of compulsory nonsuit.

Defendant assigns as error that the court deprived him of an opportunity to show that the prosecuting witness was testifying in furtherance of enmity of her mother against the defendant. The assignment of error does not show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. There is a reference in this assignment of error to the record page where the asserted error may be discovered. The assignment of error is ineffectual to bring up for review by this Court the trial judge's rulings sustaining the objections to the questions asked by defendant's counsel on cross-examination. *In the Matter of the Will of Adams*, 268 N.C. 565, 151 S.E. 2d 59; *S. v. Douglas*, 268 N.C. 267, 150 S.E. 2d 412. However, when we search the record, it shows this in respect to questions asked by defendant's counsel:

"Q. Did you hear her make a statement to him that she was going to get him one way or another?

"THE COURT: OBJECTION: SUSTAINED, that is not germane to the issue before this jury.

"DEFENDANT'S EXCEPTION No. 6

"Q. Did you discuss this evidence with your mother?

"MR. ENNIS: OBJECTION.

"Q. You talk with your mother?

"THE COURT: SUSTAINED.

"DEFENDANT'S EXCEPTION No. 7."

The record does not show what the answers of the witness would have been if she had been permitted to answer. Consequently, prejudicial error is not shown. *S. v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342.

The other assignments of error have been carefully considered by the Court, and prejudicial error is not shown that would warrant a new trial.

Defendant has had a fair trial, free from error.

No error.

STATE OF NORTH CAROLINA v. DEWEY CLIFTON WILSON.

(Filed 20 January, 1967.)

1. Criminal Law § 83—

A defendant is entitled to show that the prosecuting witness was biased or prejudiced against him for the purpose of challenging her credibility.

2. Constitutional Law § 31—

Where the court excludes the testimony of defendant's witness tending to show that the prosecuting witness was biased or prejudiced against him, the fact that the court thereafter has the court reporter read the testimony to the jury does not cure the error, since defendant is entitled to have the jury hear the testimony of his witness and observe her demeanor.

APPEAL by defendant from *Latham, S.J.,* November 1963 Criminal Session of GUILFORD. *Certiorari* allowed.

Defendant, represented by privately employed counsel, was tried and convicted upon a bill of indictment charging him with incestuous relations with his 14-year-old daughter, Darlene Wilson. From a sentence of not less than 10 nor more than 15 years in the State's prison, defendant gave notice of appeal. At that time, however, he was indigent and unable to perfect his appeal because of his inability to pay his counsel. While serving the sentence imposed, defendant filed a petition for a post-conviction hearing under G.S. 15-217, *et seq.* On April 22, 1966, Judge Eugene G. Shaw conducted the hearing and directed Robert A. Merritt, Esq., defendant's court-appointed counsel, to undertake to perfect defendant's appeal. On October 20, 1966, we allowed *certiorari* and the appeal was heard on December 13, 1966.

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

Robert A. Merritt for defendant.

PER CURIAM. The evidence of the prosecuting witness, if true, justified the conviction and sentence imposed upon defendant. He, however, denied his guilt of the crime charged and testified that his daughter had threatened to get rid of him because of his attempts to control her conduct. She had told him at least three times, he said, that she could "make up something" which would "put him away." Defendant offered as a witness his next door neighbor, Mrs. Mary Cook, who, *inter alia,* testified in the absence of the jury as follows:

1. "Q. Did Darlene at any time tell you anything about her father and mother making her do things or not?
"A. No, I don't believe. I can't remember any. I know several times she would say that she'd have a lot more fun if her daddy wasn't at home; he was too tight on her.
* * *

2. "Q. At any time did you hear Darlene say anything concerning getting rid of her daddy?

"A. That's about all, I think. She said she could have more fun if he was away, that she wished he would get time.

3. "Q. What's that?
"A. That she wished he would get time so she could be, she could be, she could go places and do more than she could with him at home. That's about all.

4. "Q. Was she up at your house frequently?
"A. Yes sir, she was up there right frequently."

The solicitor's objection to each of the above questions and answers was sustained. Defendant excepted to the refusal of the court to permit the jury to consider each question and answer. Whereupon, the court instructed the court reporter to "read back to the jury" questions numbered 2, 3, and 4. She did so, and defendant excepted to the refusal of the court to permit Mrs. Cook to answer these questions in person in the presence of the jury.

The Attorney General concedes that, if the above evidence of Mrs. Cook was properly admissible and material to the defense, defendant is entitled to a new trial under the ruling in *State v. Payton,* 255 N.C. 420, 121 S.E. 2d 608. In *Payton,* "evidence vital to the State's case against the defendant was elicited from the State's witness in the absence of the jury. The court reporter relayed this evidence to the jury by reading her notes." In awarding a new trial, this Court said: "Thus the story of the witness went to the jury as hearsay. The defendant was entitled to have the jury hear the story from the witness herself and to observe her demeanor at the time she told it. This was a fundamental right." *Id.* at 420-21.

This defendant is no less entitled to have the jury hear the testimony of his witnesses and observe their demeanor. Mrs. Cook's testimony tended to show that Darlene Wilson was biased against her father and had a motive to get rid of him. It bore upon the credibility of the prosecutrix's declarations. It was, therefore, competent and material to defendant's defense. "It is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution who testify against him." *State v. Armstrong,* 232 N.C. 727, 728, 62 S.E. 2d 50, 51.

The exclusion of the proffered testimony entitles defendant to a New trial.

STATE v. FLOYD MAY.

(Filed 20 January, 1967.)

Criminal Law § 71—

The admission of defendant's incriminating statement in evidence *held* error entitling defendant to a new trial upon authority of *State v. Fuqua*, ante 223.

APPEAL by defendant from *Bickett, J.*, June 1966 Criminal Session of ALAMANCE.

This is a companion case to *State v. Fuqua*, also decided this day.

Defendant Floyd May, Jerry Arnold Fuqua and Richard May were respectively charged with breaking, entering and larceny by bill of indictment returned by the Grand Jury of Alamance County at the June 1966 Criminal Session of Alamance. All three defendants entered pleas of not guilty.

The State introduced evidence tending to show that on the night of 26 January 1965 a building in Mebane housing the Carolina Cotton Shops, Inc., was broken into and a strongbox containing approximately $305.00 in checks and cash was removed therefrom.

W. J. Cook, a police officer employed by the Town of Mebane at the time, testified that he questioned defendant in his cell in the Orange County jail at about 1:00 a.m. on 15 March 1965, and that while there the defendant made certain statements to him. Upon objection by defendant's counsel, the trial judge conducted a *voir dire* hearing in the absence of the jury to determine if the statement made to officer Cook was voluntary and admissible. Cook testified that he talked with defendant and Richard May in the Orange County jail and told them "They had the right to remain silent or not say anything to me, and they had the right to legal counsel, and anything they did say could be used for or against them in the court." He further testified that he did not make any promises of leniency, but he did tell them that *if they wanted to talk to him then he would be able to testify in court that they were cooperative with "us" in the case*, "and that is what I can do because they did." Officer Cook further testified that defendant May told him how the defendant and the others on 26 January drew up plans to break and enter the Carolina Cotton Shops and that pursuant to these plans they went to the building and defendant stood watch outside while others opened and went in through a window and afterwards they all returned to Clyde Junior Allen's house, where they divided the money taken.

At the close of the *voir dire* the judge found as follows:

"The statements made to W. J. Cook by Mr. Floyd May in the Orange County Jail were made freely and voluntarily and without fear, or reward or hope of reward, and after having been fully advised by Mr. W. J. Cook of his rights to remain silent, of his right to counsel, and that anything he might say could be used for or against him in court, and that no inducement was made to Mr. May."

Officer Cook was allowed over objection to testify in the presence of the jury as to defendant's statements.

The jury returned a verdict of guilty, and from judgment entered thereon defendant appeals.

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

John D. Xanthos for defendant.

PER CURIAM. Defendant in this action was indicted and tried at the same time and upon the same bill of indictment as Jerry Arnold Fuqua *(State v. Fuqua)*. The decisive facts in the instant case and in *State v. Fuqua* are the same. Upon authority of *State v. Fuqua, ante* 223, and cases therein cited, we hold that the confession made by defendant to officer Cook was involuntary. Since it was error to admit the confession into evidence, there must be a

New trial.

SAM WILLIAMS v. STATE OF NORTH CAROLINA.

(Filed 20 January, 1967.)

1. Criminal Law § 131—

Where, upon the second trial, granted upon post-conviction hearing, defendant is sentenced to serve the maximum term, he must be allowed credit for the time actually served plus gained time, if any, under the first conviction.

2. Same—

Defendant is not entitled to credit for time spent while in custody in default of bond awaiting a second trial granted on a post-conviction hearing.

3. Criminal Law §§ 26, 173—

The record *held* not to support defendant's contention that a new trial was ordered over his objection upon his post-conviction hearing.

ON *Certiorari* to review the denial of a writ of *habeas corpus* by *Campbell, J.*, at the 7 November, 1966 Conflict "C" Criminal Session of MECKLENBURG Superior Court.

The defendant was convicted of larceny from the person of $200 at the February Term, 1963, and was sentenced to serve two years. He gave notice of appeal but did not perfect it, and entered upon the service of the prison sentence. He was later awarded a new trial because he had not been represented by counsel.

Upon the re-trial at the July 1963 Term he was again convicted and was then sentenced to serve a ten-year prison term. Upon appeal to this Court the latter trial was upheld. *(S. v. Williams,* 261 N.C. 172, 134 S.E. 2d 163.) He has since sought relief in various applications for post conviction hearings and *habeas corpus.* His last hearing was in *habeas corpus* proceedings in which he seeks credit for the time served on the first sentence and the time spent in jail awaiting his second trial. He further complains that his second sentence far exceeded that first imposed. Upon failure to obtain any relief in the Superior Court he sought *certiorari* to this Court and it was allowed.

George S. Daly, Jr., counsel for petitioner.

PER CURIAM. The defendant here seeks credit for the time served on the first judgment to apply on his present sentence. Since the maximum sentence permissible is ten years, he is entitled to this and the prison authorities are directed to allow him proper credit for time actually served plus gained time, if any, for good behavior. *S. v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633.

The Clerk of the Supreme Court shall forward a certified copy of this opinion to each of the following: (1) Clerk of Superior Court of Mecklenburg County (2) North Carolina Prison Department, and (3) Williams.

The petitioner further claims that he is entitled to credit for the time spent while in custody in default of bond awaiting his second trial. This claim is denied under the authority of *S. v. Weaver, supra.*

The defendant now claims that he did not seek a second trial, but the record does not support him. This claim was not urged in his previous case on appeal. Also, the order resulting in his second trial recited that "he sought a new trial" and orders that he "be granted a new trial". No objection was taken at the time and his present position appears to be an afterthought.

The previous appeal disposed of the other matters sought to be presented.

Modified and affirmed.

WENDELL E. PRESCOTT v. WRENN BROTHERS, INC., AND LAKE SHORE REALTY COMPANY, INC.

(Filed 20 January, 1967.)

APPEAL by defendant Lake Shore Realty Company, Inc., from *McKinnon, J.*, June, 1966 Session, COLUMBUS Superior Court.

The plaintiff instituted this civil action to recover five per cent commissions for developing and selling a described tract of land in Columbus County. According to the allegations of the complaint, in 1961 the plaintiff and Wrenn Brothers Realty Company negotiated for the purchase of a described tract of land to be developed and sold for residential and recreational purposes. The parties agreed that the plaintiff would handle the sales and receive five per cent commission. They organized Lake Shore Realty Company, Inc., and conveyed the lands to that corporation. Wrenn Brothers received 75 per cent and the plaintiff 25 per cent of the stock in the corporation. Plaintiff was made sales manager of the corporation without salary other than the agreement that he should receive five per cent commission on sales. He further alleged he negotiated, or was responsible for negotiating a sale to L. R. Bowers for a part of the company lands at a price of $150,000.00. The plaintiff alleged he had done development work on the property sold to Bowers; and that he had interested Elwood Martin, who in turn contacted Bowers, and that both together actually bought the land. But for plaintiff's efforts, the sale would not have been made. The plaintiff demanded $7,500.00 commission. The defendants refused to pay and plaintiff instituted this action.

The defendants, by answer, alleged that Wrenn Brothers took title to the land for the purpose of holding it until Lake Shore Realty Company, Inc., could be organized. Thereafter they conveyed to the corporation.

The other material allegations of the complaint were denied. especially that the plaintiff negotiated the sale to Bowers or was entitled to recover any commission on that sale.

Both parties offered evidence, at the close of which the court allowed the motion for nonsuit as to Wrenn Brothers Realty Company and denied the motion as to Lake Shore Realty Company, Inc. The court submitted issues which the jury answered as here indicated:

"(1) Was there a contract for commissions between plaintiff and the defendant Lake Shore Realty Company, Inc., as alleged in the complaint?

ANSWER: Yes.

"(2) If so, what amount, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $7,500.00."

From a judgment in accordance with the verdict, the Lake Shore Realty Company, Inc., appealed.

L. T. Dark, Jr., J. B. Eure, D. F. McGougan, Jr., by D. F. McGougan, Jr., and J. B. Eure for Lake Shore Realty Company, Inc., defendant appellant.

Williamson & Walton for plaintiff appellee.

PER CURIAM. According to the plaintiff's allegations and the evidence in its light most favorable to him, the plaintiff and the Wrenn Brothers Realty Company were the only stockholders in the Lake Shore Realty Company corporation, the owner of the tract of land involved. The plaintiff was sales manager. For his services as such in the development and in the sale he was to receive five per cent commission. This was his sole compensation. He did development work, including road construction, and contacted Elwood Martin as a prospective purchaser who, in turn, contacted Bowers who made the contract to purchase with one of the Wrenn Brothers.

Appellant denied that the plaintiff had any contract for commissions or that he was instrumental in promoting the sale to Bowers. The controversy, therefore, involves the questions of fact: (1) Was there a contract as alleged, and (2) if so, what amount, if any, is the plaintiff entitled to recover under it? The jury found both issues for the plaintiff. The court entered judgment for the amount the jury found to be due.

The controversy, stripped of its nonessentials, involved the contract and its breach. The sale to Bowers of company land for $150,000.00 was stipulated. The factual dispute was resolved by the jury. Objection to the charge and to the introduction of testimony do not present any question of law stated in a manner prejudicial to the appellant.

In the trial and judgment, we find

No error.

STATE v. BUCK JUNIOR GOODMAN.

(Filed 20 January, 1967.)

APPEAL by defendant from *May, Special Judge,* April 1966 Session of ROBESON.

Defendant was charged, in each of three bills of indictment, with the felony of armed robbery defined in G.S. 14-87. The three cases were consolidated for trial; and, in each case, the jury returned a verdict of guilty as charged. The three cases were consolidated for judgment; and one judgment, imposing a prison sentence of 15-20 years, was pronounced. Defendant excepted and appealed.

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

F. D. Hackett for defendant appellant.

PER CURIAM. There was plenary evidence to support the verdict.

The State's evidence tends to show: The robbery occurred at Usher's Service Station in St. Pauls, Robeson County, about 11:30 on the night of Tuesday, January 4, 1966. Defendant and a confederate, at pistol point, made the service station attendant and two bystanders line up against the wall and later lie down on the floor. The money in the cash register was taken and also the money and billfold of the attendant and of each bystander. In the course of the robbery, defendant said: "Let's kill them or take them with us." The other replied, "No, let's put them on the floor and go." A witness testified: "They then made us lie down and said not to get up for five minutes or they would kill us." Defendant was arrested on January 7, 1966.

Defendant did not testify. He offered evidence tending to show he went to his mother's home in Pembroke, N. C., about 6:30 p.m. on Tuesday, January 4, 1966, and did not leave that night.

Defendant's only assignment of error, based on his exception to the court's instruction relating to alibi, is without merit. The instruction given complies with all requirements set forth in *S. v. Spencer*, 256 N.C. 487, 124 S.E. 2d 175, the only case cited in defendant's brief. Decisions in which similar instructions have been approved are cited in *S. v. Allison*, 256 N.C. 240, 123 S.E. 2d 465. Indeed, the instruction appears to be in all respects quite favorable to defendant.

No error.

STATE v. JOE HUGHES.

(Filed 20 January, 1967.)

APPEAL by defendant from *Bickett, J.*, at February 1966 Criminal Session of ALAMANCE.

The defendant was convicted of assaults with a deadly weapon, a knife, on his son-in-law, Elwyn Lee King, and the latter's father, Walter L. King. Upon sentences of 18 months pronounced in both cases, to be served concurrently, he appealed.

The State's evidence tended to show that Elwyn Lee King had been separated from his wife Mary Jo, the daughter of the defendant, Joe Hughes, for some time. On 3 December, 1965, the Kings went from their home in Kure Beach to Burlington to pay Elwyn's wife for the support of their baby. At a parking lot where the wife worked they had trouble with her father. In the ensuing fight both the Kings were cut by Hughes, and these prosecutions resulted.

Thomas Wade Bruton, Attorney General, Harrison Lewis, Deputy Attorney General, Donald M. Jacobs, Staff Attorney for the State.

Ross, Wood & Dodge for defendant appellant.

PER CURIAM. The defendant asserts no error except that the Judge's charge is not sufficient with regard to defendant's right of self-defense, both real and apparent.

An examination of the charge shows that it is carefully and completely worded in excellent form and is in almost identical words with those approved in *S. v. Anderson,* 230 N.C. 54 (56), 51 S.E. 2d 895, and *S. v. Fletcher,* 268 N.C. 140, 150 S.E. 2d 54.

Whatever the shortcomings or derelictions of his son-in-law the defendant should let the courts adjudicate them. When he attempted to usurp their functions with his knife he was clearly in the wrong.

No error.

STATE v. ALBERT BOBBY CHILDS.

(Filed 3 February, 1967.)

1. Indictment and Warrant § 5—

Defendant is not entitled to be present in court, either in person or by his attorney, when the indictments are returned as true bills by the grand jury, and his motion to quash the indictments because neither he nor his attorney was present in court when the indictments were returned is properly overruled.

2. Same—

If defendant contends that the indictment should be quashed because not returned in open court by the grand jury, it is incumbent upon defendant, in making up the record, to have the record clearly show this defect, but in this case, the record failing to disclose in clear terms that the indictments were returned in open court and defendant having been convicted of capital offenses, motion for diminution of the record was allowed, and the certified copies of the criminal minute docket of the Superior Court conclusively show that the indictments were properly returned in open court by the foreman of the grand jury, fifteen members of the grand jury being present, and that the requirements of G.S. 15-141 were strictly complied with.

3. Indictment and Warrant § 8—

Separate counts charging burglary in the first degree and larceny of money from the building allegedly broken into and entered, may be joined in one indictment. G.S. 15-152.

4. Criminal Law §§ 15, 167—

Where, on the hearing of defendant's motion for change of venue on the ground that defendant could not obtain a fair trial by a jury drawn from the counties within the district because of unfavorable publicity, the court enters an order that a venire be drawn from a county in an adjoining district, the order for a special venire is tantamount to a denial of the motion to remove, and the court's order for the special venire is entered by virtue of the discretionary authority vested in the court by G.S. 1-86, and is not reviewable in the absence of manifest abuse of discretion.

5. Jury § 4—

In a prosecution for a capital felony the State is entitled to challenge for cause any prospective juror who has conscientious scruples against the infliction of the death penalty, and defendant's contention that the exclusion of jurors having such conscientious scruples would result in an imbalanced jury is untenable, since to exclude such jurors on the panel would result in jurors biased in favor of defendant, and the State, as well as the defendant, is entitled to trial by an impartial jury.

6. Criminal Law § 91—

Where hearsay evidence, which is of minor import and relates to a matter amply established by other competent evidence, is immediately withdrawn by the court upon defendant's objection and the jury instructed to disregard it, any prejudice in the admission of such evidence is cured.

7. Criminal Law § 71— Evidence held to support conclusion that confession was voluntarily and knowingly made by defendant.

Evidence upon the *voir dire* tending to show that an attorney employed by defendant's wife was present with defendant upon interrogation by officers, that the attorney advised defendant that he was charged with serious offenses and that he should not make any statement at all to the officers, and that, after the attorney left, defendant made the incriminating statement offered in evidence without any threat or promise on the part of the officers, that defendant was not under the influence of any intoxicating beverages, and that the entire period of interrogation lasted only some hour and a half, *held* to support the court's conclusion that defendant's confession was freely, voluntarily, and knowingly made. The decision in *Miranda v. Arizona*, 384 U.S. 436, having been rendered subsequent to trial of this action, is not applicable.

8. Same—

Findings of fact by the trial court upon the *voir dire* as to the voluntariness of defendant's confession are conclusive on appeal when supported by competent evidence.

9. Criminal Law § 147—

It is the duty of defendant to see that the record is properly made up and transmitted. G.S. 15-180.

10. Criminal Law § 160—

Where the record does not support defendant's contention that the court allowed counsel to argue in the presence of the jury the court's ruling that defendant's confession was freely and voluntarily made, defendant has failed to carry the burden of showing error, but in this case, defendant having been convicted of capital offenses, motion for diminution of the record was allowed, and the copy of the original transcript certified by the clerk of the Superior Court discloses that the jury was absent from the courtroom during the time the judge made findings of fact and conclusions of law and found that the confession was voluntary.

11. Criminal Law § 118—

The verdict of the jury may be interpreted and given significance by reference to the indictment, evidence and the charge of the court.

12. Same; Burglary and Unlawful Breakings § 6—

Where the indictment and the evidence relate to burglary in the first degree and the court instructs the jury that defendant is on trial for the capital crime of first degree burglary, clearly defines burglary in the first degree, and correctly charges the jury as to the permissible verdicts upon the evidence, *held* the verdict of guilty returned by the jury, with no recommendation of mercy, necessarily imports a finding of guilty of burglary in the first degree, and supports judgment of death. G.S. 14-52. In this case, defendant was prosecuted for rape and burglary in the first degree, and the jury returned a verdict of guilty as to both counts, without recommendation that the sentence be life imprisonment.

APPEAL by defendant from *Martin, S.J.*, November 1965 Session of BUNCOMBE.

Criminal prosecution on two indictments. The first indictment

charged defendant on 27 May 1965 with the felony and capital offense of rape on Mrs. Carrie Waller, a female, a violation of G.S. 14-21. The second indictment charged defendant in one count about twelve on the night of 27 May 1965 with burglary in the first degree in breaking into and entering the dwelling house of Mrs. Carrie Waller, actually occupied by Mrs. Waller at the time, with the intent to commit larceny, a violation of G.S. 14-51, and in the second count with the larceny on the same date from said dwelling house of $100 in money, the property of Mrs. Carrie Waller. Each of these two indictments was found a true bill by the grand jury of Buncombe County at the June 1965 Session of Buncombe, and returned by them as such in open court. At the same June 1965 Criminal Session the grand jury also found and returned in open court as a true bill a third indictment charging defendant in one count on 27 May 1965 with attempt to commit armed robbery of Mrs. Carrie Waller of money and other personal property, a violation of G.S. 14-87, and in a second count on the same date with a felonious assault on Mrs. Carrie Waller and inflicting upon her serious injuries not resulting in death, a violation of G.S. 14-32.

At the June 1965 Session defendant moved to quash the three indictments against him. The court denied the motion, and defendant excepted. Immediately thereafter at the June 1965 Session, defendant was arraigned and, through his court-appointed counsel, informed the court that he would stand mute. Whereupon, the court, pursuant to the provisions of G.S. 15-162, ordered a plea of not guilty to be entered on behalf of defendant in all three cases. Then the cases were continued until a later session for trial.

At the November 1965 Session of Buncombe, the indictment charging defendant with rape and the indictment charging defendant with burglary in the first degree in one count and larceny in another count came on for trial, and, on motion of the solicitor, the two indictments were consolidated by the court for trial. The third indictment charging defendant in the first count with attempt to commit armed robbery, and charging defendant in the second count with a felonious assault, was not tried at the November 1965 Session.

This is a summary of the State's evidence: On 27 May 1965 Carrie Davis Waller, a widow 70 years of age, lived in her home at 77 Woodward Avenue in a residential section of the city of Asheville. She was preparing to go to Arizona to visit her son. The gutters on her house were filled, and she wanted them unstopped before she left. On the afternoon of that day, she went to the home of Mrs. Robert D. Barbour, which was two doors below her house, to see if she could employ defendant, who was working for Mrs. Barbour at

the time, to clean out her gutters. She asked Mrs. Barbour if he would have time to come to her house and clean out her gutters, and Mrs. Barbour replied that he would. She went home, and soon thereafter the defendant came over and cleaned out her gutters. He was there about thirty minutes. She told him she was deaf and she would have to stay in the yard until he finished so that she could pay him, because she could not hear a knock if he came around to the back door. When he had finished the work, she gave him $1.50.

She lived in a very small house with two bedrooms, a living room, and a kitchen. On the night of 27 May 1965 she was not feeling well and retired in her bedroom about 7:30 p.m. She never wore her hearing aid at night, and she did not have it on when she went to sleep that night. She was dressed in a nightgown. When she retired that night, the front and back doors had double locks and were locked, the screen door was locked, and her windows were closed and locked. She was awakened by a man's arm across her throat. She immediately tried to get off on the other side of the bed, and began to scream. She had the sheet pulled up around her, and this man got on the bed with her and pinned her down. She was screaming, and he put his hand down her throat to shut off her screams. She fought with all the strength she had. She turned her head and saw him distinctly and recognized him. The man was the defendant. In spite of her fighting him with all the strength she had, he had sexual intercourse with her. He also put his private organ in her mouth and in her rectum. In the struggle in her bedroom, the bed fell down. He then started dragging her across the floor, and when he saw she could not walk, he picked her up and carried her to her deceased husband's bed in the next room, and had sexual intercourse with her a second time. Her strength "had gone," and she ceased to struggle. He carried her back to her bedroom, and had sexual intercourse with her the third time. The next thing she remembers she was standing before a chest of drawers in the living room, and defendant was standing there beside her. She said to defendant, "I don't know what you want. Is it money?" He replied, "Yes." She told him her keys to her chest were in the bedroom, and she went and got her bag. She got the keys out, and she was trembling so she could not open the chest. He struck her and she finally got it open and handed him what she thought was $150. Then he left. In leaving she saw him distinctly. He put on his hat that she had seen him wear so much coming up the street to Mrs. Barbour's to work. When he left, she was nude. Trembling all over, she went to the front door, unlocked it, got out on her steps and began to scream, and help came immediately. She described the man who had criminally assaulted her as the man who cleaned out her gutters.

She is deaf, but her sense of smell is very keen. She did not smell any odor of whisky on defendant's breath. She found her false teeth that had been knocked out and were on the bed on the floor.

Mrs. Ruth Luca lives across the street from Mrs. Barbour. On 26 May 1965 she went to bed at midnight, and was later awakened by cries for help. She looked out and saw Mrs. Waller standing in front of her home naked. Mrs. Waller said to her, "Oh, Ruth, it was horrible, it was horrible." She took Mrs. Waller into her bedroom. The bed was broken down and in shambles. She helped Mrs. Waller into a nightgown. The bed linen was on the floor, and it was all bloody, and in the corner of the living room there was a pile of clothing and it was all blood-stained.

Mrs. Charles A. Ricker resided near Mrs. Waller. In the early morning of 27 May 1965 she was awakened by horrible cries for help. She recognized Mrs. Waller's voice saying, "Mary Frances, for God's sake help me." She arrived there just after Mrs. Luca. Mrs. Waller was naked and was pleading for a doctor.

Police officers arrived around 2:30 a.m. Lt. J. G. Morris since 1 January 1958 has been a policeman in the city of Asheville assigned to the Fingerprinting-Identification Section. Since being assigned to do this work, he has taken several thousand fingerprints. In the Waller home he found and developed several latent fingerprint impressions — one beside the window which had been broken open in the back of the home. He lifted, developed, and photographed those latent fingerprints. He compared the photograph of the latent fingerprint which he found at the open window at the Waller house with the right index fingerprint of defendant, and, in his opinion, the fingerprint impression which he found on the rear window of the Waller home was the same as the print of the right index fingerprint of defendant. Lt. Morris found dog manure beneath the open rear window, and it had a footprint in it. He examined the linen on Mrs. Waller's bed and a stain thereon had the odor and color of dog manure.

About 2:30 a.m. she was carried to the hospital, where she was examined around 3:30 a.m. by Dr. Robert S. McDuffie in the emergency room of St. Joseph's Hospital. Dr. McDuffie saw a number of reddish mottled areas about her face and neck, a number of scrape marks about her face and neck, bruises on her back and low back, blood on her fingernails and fingers and around her mouth, and some blood around her ankles. He found the presence of male sperm outside as well as inside the vagina. He saw bruises and blood around her private organs. In his opinion, a man had recently had sexual intercourse with her.

Entrance into the Waller home had been by breaking open a

window in the rear of the house. A pair of hedge clippers were beneath this window. Mrs. Barbour identified this pair of hedge clippers as belonging to her.

The State offered in evidence a confession of the defendant in substance as follows: He had been out on the night of May 27 drinking with some friends at the bus station. He left the bus station and went to the A & W Drive-In at Woolsey Dip, hoping to see a man there about some employment. The place was closed, and he walked up the hill to the home of Mrs. Waller, where he had cleaned some gutters a day or two before. He knew she was hard of hearing, and he had heard her talk about plans for leaving town. He went there with the idea of breaking into her house and stealing something that he could turn into money, or some money. He broke out a glass in a window on the back side of the house with his hand and crawled in the window. After he got inside he did not turn the light on. He went through into the living room and into a front bedroom, where he noticed Mrs. Waller was in bed. She raised up and started to scream, and he grabbed her and muffled her scream with his hand. While scuffling on the bed with her, the bed fell and he just lost all control of himself and had sexual intercourse with her. After this, she offered to give him money and unlocked a drawer and got some money out. Her pocketbook was sitting on a table. He reached in the pocketbook and took a red billfold out, and realizing what he had done, he left through the window he came in.

Defendant offered no evidence.

Verdict as set forth in the case on appeal: "(T)he said Albert Bobby Childs is guilty of rape and burglary." The verdict on the burglary case, as set forth in the case on appeal, will be discussed in the opinion.

From a judgment of death by asphyxiation on the verdict of guilty of rape, and from a judgment of death by asphyxiation on the verdict of guilty of burglary in the first degree as charged in the indictment, the defendant appeals to the Supreme Court.

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

Thomas White, Ruben Dailey, and Robert Riddle for defendant appellant.

PARKER, C.J. The record contains 360 exceptions and 42 assignments of error. Many of the exceptions and assignments of error present the same question for decision, *e. g.*, many rulings of the judge granting the State's peremptory challenge for cause of a pros-

pective juror on the *voir dire* because the prospective juror stated in reply to questions by the State that he had conscientious scruples against the infliction of the death penalty by the State, or that by reason of such conscientious scruples and beliefs he could not render a verdict of guilty where a death sentence is mandatory. Many of the exceptions and assignments of error do not merit any discussion. To discuss all of them *seriatim* would cause us to write a long book, and would serve no useful purpose. We shall discuss only those assignments of error set forth in defendant's brief for which there is citation of authority, and those assignments of error which we deem merit discussion.

Before defendant's arraignment, defendant, through his counsel, moved to quash the three indictments against him. According to the record before us, defendant assigned no reason to support his motion to quash. The record shows simply, "MOTION DENIED - EXCEPTION No. 1." Defendant assigns as error the denial of his motion to quash the three indictments against him. We shall discuss only the two indictments for which he was placed on trial, to wit, the rape indictment and the burglary indictment.

In his brief he contends that the court erred in denying his motion to quash the three indictments for the following reasons: (1) "The Bills of Indictment were returned by the foreman of the Grand Jury to the court at a time when the defendant was not in court nor were his attorneys present in court." (2) "The record fails to disclose that the defendant was brought into open court and there present with his counsel upon the return of the Bills of Indictment or that Bills were even returned in open court." (3) "It is the returning of the Bill publicly, in open court and its being there recorded that makes it effectual. *State v. Cox*, 28 N.C. 440." (4) "It is submitted that the burglary bill of indictment attempts to charge several offenses and is defective."

In *S. v. Stanley*, 227 N.C. 650, 44 S.E. 2d 196, the defendant was tried upon an indictment charging him with the murder of his wife; he was convicted of murder in the first degree, sentenced to death, and appealed. At the opening of the trial, the defendant moved to quash the bill of indictment, because he was not present in court when it was returned and read. The motion was overruled, and defendant excepted. In its opinion the Court said:

> "Relative to indictment and trial there are two things guaranteed by the Constitution to one accused of crime; information as to the nature of the crime of which he is accused, and confrontation of his accusers. One of these requirements is satisfied by his arraignment, and if by plea of not guilty he puts himself upon his country the ensuing trial by jury in which he

may confront and examine the witnesses, satisfies the other. The exception seems to point to one or the other of these rights, neither of which was denied him. In a capital case the indictment is still required to be returned into open court by the grand jury in a body, or a majority of them. G.S. 15-141. In other cases it may be returned by the foreman. It may be assumed that the practice has been preserved in the case of capital felonies as an additional guaranty that the requisites to its validity have been duly observed.

"The indictment and its return are no part of the trial. The fallacy of the argument that it was in any way necessary that the defendant be present at once appears when we understand that the indictment is often found before the accused is even apprehended. It is not the practice to have defendant present although he may be in custody."

In the instant case, defendant contends that neither he nor his lawyers were in court when the indictments were returned in open court true bills. In the *Stanley* case, the defendant contended that the indictment should be quashed because he was not in court when the indictment was returned in open court as a true bill. This factual distinction in our opinion, and we so hold, in no way impairs the authority of the *Stanley* case on the point for which it is cited here, and it is controlling in the instant case.

In 42 C.J.S., Indictments and Informations, p. 856, it is said:

"An indictment is not void because accused was not present in the county when he was indicted. In the absence of a statutory provision to the contrary, a grand jury has the power to indict or present for a crime whether accused has been arrested and is in custody or not, jurisdiction not being in any way dependent on his arrest or custody."

Defendant further contends, "The record fails to disclose . . . that bills were even returned into open court." He cites in support of this contention *S. v. Cox*, 28 N.C. 440, which holds, *inter alia*, that it is the returning of the indictment publicly in open court, and its being there recorded, that makes it effectual.

On 30 August 1966 the Attorney General of North Carolina filed a motion in the Supreme Court suggesting a diminution of the record in the instant case on two grounds: First, that the transcript of the case on appeal originally certified to the Supreme Court by the Clerk of the Superior Court of Buncombe County does not disclose in clear terms that true bills of indictment were returned in open court against the defendant. Attached to his motion were certified copies of:

"1. Page 27, Criminal Minute Docket 33, Buncombe County Superior Court, January 4, 1965; pages 203 and 208, Criminal Minute Docket 33, Buncombe County Superior Court, June 7, 1965, showing the actual transactions in court with respect to the return of the bills of indictment against the defendant.

"2. [The second ground will be discussed later on in this opinion.]"

The Court in conference allowed this motion on 30 August 1966. Copies of the criminal minute docket of Buncombe County Superior Court on 7 June 1965, certified under the signature and seal of Zebulon Weaver, Jr., clerk of the Superior Court of Buncombe County, by deputy clerk Evelyn C. Boone, as set forth above in the Attorney General's motion and attached thereto, show that the indictment against defendant in the rape case here and the indictment against defendant in the burglary case here were returned in open court by J. G. Stikeleather, Jr., foreman of the grand jury, and 15 members of the grand jury; and that the two indictments were read in open court to the foreman and members of the grand jury, and that each indictment was reported a true bill and signed by the foreman of the grand jury, and so recorded in the clerk's minutes. The Clerk of the Supreme Court, by order of this Court, mimeographed the Attorney General's motion with the attached minutes of the Buncombe County Superior Court and filed it as an addendum to the record. The minutes of the court show that the requirements in *S. v. Cox, supra,* and G.S. 15-141 were strictly complied with.

There is no merit to defendant's contention that the burglary indictment charges several offenses, and is defective. In support of this contention, he cites no authority and simply makes the bald statement of what his contention is without analysis or discussion. It is true that this indictment charges two offenses, (1) burglary in the first degree, and (2) larceny of money from the building allegedly feloniously broken into and entered, as alleged in the first count, but the bill is not defective. These two counts, by virtue of G.S. 15-152, may be joined in one indictment in separate counts. See also *S. v. Knight*, 261 N.C. 17, 134 S.E. 2d 101.

Defendant's assignment of error that the court erred in denying the motion to quash the indictments for rape and burglary is overruled.

At the 23 August 1965 Criminal Session of Buncombe, Judge Raymond B. Mallard presiding, the three indictments here against defendant, as set forth above, were called for trial. Before proceeding with the trial defendant's court-appointed lawyers, members of the Buncombe County Bar, filed with the court a written motion alleging that due to the wide publicity given by the daily papers in

Asheville and by the radio in Asheville to the alleged offenses for which defendant was under indictment, and to the contents of a psychiatric examination and evaluation concerning defendant's sanity, and due to the very extensive discussion of defendant's cases by residents of Buncombe County and of the western area of the State, it is impossible for defendant to obtain a fair and impartial trial by jurors from Buncombe, Madison, Haywood, Henderson, Transylvania, Swain, Cherokee, Jackson, Polk, McDowell, Burke, Yancey, Avery, Mitchell, Rutherford, Clay, Graham, Macon, or Watauga Counties. Wherefore, defendant prays that the court in its discretion enter an order removing the cases for trial "to some other county outside the area served by the Buncombe County news media and one other than the counties mentioned in this motion." Defendant offered evidence in support of his motion, and the State offered evidence against it. Judge Mallard entered an order finding as a fact that there is no evidence of any prejudice created against defendant by any news media, or otherwise, that would prevent defendant from obtaining a fair and impartial trial in Buncombe County by a jury drawn as provided by law from McDowell County. Wherefore, Judge Mallard acting pursuant to G.S. 1-86, and upon his own motion, instead of making an order of removal from Buncombe County, recited in his order, "this court will by proper order cause as many jurors as may be necessary to select a fair and impartial jury to try the defendant to be summoned, as provided by law, from McDowell County." From this order, defendant appealed to the Supreme Court.

Defendant on 21 October 1965 filed in the office of the Clerk of this Court a statement of case on appeal to be heard at the Spring Term 1966 of the Supreme Court. Appeals from the Superior Court of Buncombe County for the Spring Term 1966 were scheduled to be heard by this Court during the week of 15 February 1966. On 22 October 1965 the Attorney General filed a verified written motion with this Court that the cases of defendant be advanced on the docket for hearing, pursuant to Rule 13, Rules of Practice in the Supreme Court, 254 N.C. 783, 792, for the reason set forth in his motion. On 28 October 1965 the Attorney General notified attorneys for defendant that upon the call of appeals from the Tenth and Twentieth Districts on Tuesday, 2 November 1965, at 10 a.m., in the Justice Building, Raleigh, North Carolina, the State of North Carolina will move before the Supreme Court that the case of *State of North Carolina v. Albert Bobby Childs* be advanced on the docket for the reason set forth in his written motion heretofore forwarded to him. Attorneys for defendant filed no answer to the Attorney General's motion, so far as the records of this Court disclose.

This Court, in a per curiam opinion filed 10 November 1965 and reported in 265 N.C. 575, 144 S.E. 2d 653, allowed the Attorney General's motion, held that the appeal was fragmentary and premature, and consequently falls under the ban of the general rule forbidding fragmentary and premature appeals from interlocutory orders, and dismissed the appeal. The Court in its opinion stated: "Judge Mallard's interlocutory order does not put an end to these cases, and it does not destroy or impair or seriously imperil any substantial right of this defendant, for the reason that defendant's remedy is to note an exception at the time of the entry of Judge Mallard's order, as he did, to be considered on appeal from a final judgment adverse to defendant, if there is one." The Attorney General's verified written motion is set forth in the per curiam opinion.

Defendant assigns as error the denial by Judge Mallard of his motion for change of venue.

Defendant's motion for a change of venue was addressed to the sound legal discretion of Judge Mallard. *S. v. Scales,* 242 N.C. 400, 87 S.E. 2d 916. When Judge Mallard on his own motion, instead of making an order of removal, entered an order that a venire of jurors be drawn, according to law, from the jury box of McDowell County, a county in an adjoining district to Buncombe, to obtain a fair and impartial trial of defendant in Buncombe County, he was acting pursuant to authority vested in him by G.S. 1-86, to exercise his sound legal discretion as to whether the case should be removed from Buncombe County for trial or tried in that county with a jury drawn from another county. This was tantamount to a denial of a motion to remove the cases to another county for trial. *S. v. Moore,* 258 N.C. 300, 128 S.E. 2d 563. Judge Mallard's order, entered by virtue of authority vested in him by the General Assembly in G.S. 1-86, is not reviewable, unless there has been a manifest abuse of his discretion, and no such abuse of discretion appears in this case. *S. v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341; *S. v. Scales, supra; S. v. Culberson,* 228 N.C. 615, 46 S.E. 2d 647; *S. v. Allen,* 222 N.C. 145, 22 S.E. 2d 233; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737; *S. v. Kincaid,* 183 N.C. 709, 110 S.E. 612. This assignment of error is overruled.

Defendant assigns as errors many rulings of the trial judge granting the State's peremptory challenge for cause of a prospective juror on the *voir dire* because the prospective juror had conscientious scruples against the infliction of the death penalty by the State. These assignments of error are overruled.

It is a general rule that the State in the trial of crimes punishable by death has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror

who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty. *S. v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229; *S. v. Vann,* 162 N.C. 534, 77 S.E. 295; *S. v. Vick,* 132 N.C. 995, 43 S.E. 626; *S. v. Bowman,* 80 N.C. 432; Annot., 48 A.L.R. 2d 563. The annotation in A.L.R. 2d cites in support of this general rule cases from 35 states (including North Carolina) and from the United States courts. In accord, 4 A.L.R. 2d, Later Case Service, p. 1273, and supplement.

In *Turberville v. United States,* 303 F. 2d 411, cert. den. 307 U. S. 946, 8 L. Ed. 2d 813, the Court held that the trial court's action in excusing for cause on *voir dire* veniremen who answered affirmatively questions as to whether they were opposed to capital punishment was not error. The Court, in a scholarly discussion of the question, said in part:

> "Opposition to capital punishment may be for any one of a variety of reasons. They range from an unshakable religious conviction as stark as the Old Testament Commandment to a mere intellectual or philosophical distaste. Not all 'opposition' to this penalty creates incompetence for jury service. So not all who are 'opposed' to capital punishment are necessarily unqualified for service in a capital case. The nub of disqualification on this ground is whether the opposition is of such nature as to preclude an impartial judgment on the facts and the law of the case to be tried.
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> ". . . What Simpson is really asserting is the right to have on the jury some who may be prejudiced in his favor — *i. e.,* some who are opposed to one possible penalty with which he is faced. We think he has no such constitutional right. His right is to absolute impartiality."

The whole subject here under consideration was thoroughly explored in an exhaustive, scholarly opinion by Circuit Judge Hincks writing for a unanimous Second Circuit in *United States v. Puff,* 211 F. 2d 171, cert. den. 347 U.S. 963, 98 L. Ed. 1106. We refer to the *Puff* case and rely upon it.

Defendant contends that we should reconsider our decisions that in a prosecution for a capital felony the State is entitled to challenge for cause any prospective juror who has conscientious scruples or beliefs against the infliction of the death penalty by the State, for the following reasons: That he is entitled to a "balanced" jury, composed of jurors who believe in capital punishment and those who do not; that jurors who believe in capital punishment are more prone to convict than those who do not so believe; and that to ex-

clude jurors who do not believe in capital punishment denied him a fair and impartial jury from a cross-section of the community. These contentions have been refuted in *United States v. Puff, supra,* which case holds, *inter alia,* as stated in the eleventh and twelfth headnotes to this case:

"11. Under statute providing for prosecution of murder in first degree and making death penalty mandatory, upon conviction, unless jury recommends life imprisonment, a verdict must be unanimous both as to guilt and as to punishment. 18 U.S.C.A. § 1111.

"12. In prosecution for murder under statute making death penalty mandatory unless jury should recommend life imprisonment, defendant was not entitled to a balanced jury in the sense of including jurors who held scruples against imposition of death penalty. 18 U.S.C.A. § 1111."

In its opinion the Court said:

"It will readily be seen that this 'balanced' jury, which the defendant envisages, is in reality a 'partisan jury'; if, as he urges, it may include jurors with bias or scruples against capital punishment it must — if it is to have 'balance' — include also those with bias in favor of the death penalty as the punishment for murder. It is settled by *Andres v. United States,* 333 U.S. 740, 68 S. Ct. 880, 92 L. Ed. 1055, that under the Statute the verdict must be unanimous both as to guilt and as to punishment. As a result, as Mr. Justice Frankfurter noted in his concurring opinion, 333 U.S. at page 766, 68 S. Ct. at page 892, any juror 'can hang the jury if he cannot have his way' as to the sentence which *he* deems appropriate. These considerations lead to the conclusion that trials before 'balanced juries,' even on unanimous findings of guilt, would frequently result in disagreements. And disagreements on successive trials would result in practical immunity from murder. We cannot believe that the Statute was intended to have such a tendency."

This is said in Annot., 48 A.L.R. 2d, p. 563:

"Upon the theory that conscientious scruples against infliction of the death penalty under any circumstances, or equivalent beliefs, equally disqualify a juror for cause in a prosecution for a capital crime, whether the law prescribes the single punishment of death upon conviction, or invests the jury, upon conviction, with a discretionary power to assess death or life imprisonment according to the evidence and circumstances, the rule has become generally accepted that where the jury is vested

with such discretion the state may challenge for such cause because it is entitled to the maximum penalty if the proof shall justify it, and to contend throughout the trial and finally to the jury that the character of the crime justifies it."

It seems, according to the record before us, that defendant did not exhaust his peremptory challenges to the jury.

In *United States v. Puff, supra,* it is said:

"And often the failure of a party to exhaust his peremptory challenges is taken as convincing indication that, even if a talesman without sufficient justification had been excused for cause, at least those who were impanelled were indeed impartial. [To support that statement, voluminous authorities are cited.]"

Defendant has assigned as error the court's refusal to withdraw a juror and order a mistrial because during the presentation of the State's evidence James Sloop, a member of the Asheville fire department, testified as follows: "I went to Police Headquarters and obtained a picture of Albert Childs. I then went to the hospital and had Mrs. Carrie Waller identify the picture." The defendant objected and made a motion to strike. The court sustained the objection and allowed the motion to strike. Defendant then moved the court to instruct the jury to disregard it. The court instructed the jury, "Members of the Jury, you won't consider the statement of this witness as to what the prosecuting witness did in the hospital with him." For this reason, defendant moved for a mistrial, which the court denied, and he excepted. The court's prompt action in sustaining the defendant's objection and allowing his motion to strike and in instructing the jury at defendant's request not to consider the statement of the witness Sloop as to what the prosecuting witness did in the hospital with him would seem to render this occurrence not prejudicial, particularly as defendant's counsel did not request any more specific instruction to the jury by the judge. *S. v. McKethan, supra.* This assignment of error is overruled.

Defendant's assignment of error No. 41, based upon his exception No. 359, is: "Did the court err in allowing counsel to argue in the jury's presence concerning the court's ruling in the absence of the jury on a confession?" When we search through the record to find defendant's exception No. 359, and carefully read the statement of counsel referred to in defendant's exception No. 359, we find that counsel did not argue in the jury's presence concerning the court's ruling in the absence of the jury on a confession. This assignment of error is overruled.

Defendant assigns as error the ruling of the trial judge that the alleged confession by defendant on 27 May 1965 was voluntary and was admissible as evidence in the case. In his brief, "The defendant earnestly contends that the alleged confession made by him on the 27th day of May, 1965, was incompetent and should not have been admitted into evidence in this case in view of the fact that he had not been properly advised of his rights to counsel, that he was not represented by counsel at the time of his interrogation by the officers, that no counsel had been appointed for him and that he was not represented at the time of his preliminary hearing." This assignment of error is overruled.

The court conducted a preliminary examination in respect to the admissibility of the alleged confession. The State offered evidence in respect thereto. The defendant offered no evidence. After listening to the evidence the court made the following findings of fact:

"1) That on May 27, 1965, the defendant Albert Bobby Childs was arrested and taken into custody of the Asheville Police Department.

"2) That about 9:30 a.m., on said day, that the defendant was visited in the Asheville Jail Building by the witnesses Poore, Holland and Reynolds, and that all the aforesaid persons were together within the sight and hearing of each other.

"3) That at said time the witness Holland served a warrant upon the defendant charging him with first degree burglary, by reading this warrant to the defendant.

"4) That the witness Reynolds was introduced to the defendant as an attorney, as having been sent, to the defendant by the defendant's wife.

"5) That the witness Reynolds is an able and experienced lawyer, competent and efficient in the trial of criminal cases in the Buncombe County Superior Court; and that he became a member of the bar in 1955, and has maintained his office for the practice of law in the City of Asheville of Buncombe County, since 1961, engaging in a general practice of law, handling civil and criminal matters.

"6) That Attorney Reynolds advised the defendant that he did not have to make any statement; that any statement that he made might be used against him; that he should keep his mouth shut; that he was charged with first degree burglary, and that he would be charged with rape, and that either of these charges were serious charges, and that the defendant's life was in danger; that he told the defendant that he should not make any statement at all to the officers; that the officers

might not have sufficient evidence to convict him; and that he should not make any statement at all to the officers; that the officers had a right to question him, and that they would question him, and that he, Reynolds, could not remain with the defendant during the entire day;

"7) That officer Holland is a Police Officer with some 19 years of experience in the Asheville Police Department; that he advised the defendant that he had a right to counsel; that he did not have to make any statement at all; that if he made a statement that it would be used against him in a court of law; that he could call his family or other persons —

"MR. DAILEY: If your Honor please: Is that in the record? I don't recall that.

"COURT: You may make such exceptions to the Findings of Fact as you care to do.

"MR. DAILEY: Exception to that.

"COURT: You will have an opportunity to make them all at the conclusion. I do not think it is proper to put them in piecemeal.

"8) The defendant was not under the influence of any intoxicating beverages on the morning of May 27th, 1965, and about 9:30 a.m.

"9) That the defendant was not promised anything to induce him to make any statement to the officers; that he was not threatened in any way to induce him to make any statement to the officers; that he was not interrogated in relays or for an extended period of time; that the entire period of the interrogation, including the time when Attorney Reynolds was present, was some one hour and a half.

"10) That after about 15 or 20 minutes, that Attorney Reynolds left the room, and that he heard the defendant answer, or begin to answer, some questions asked by the officers concerning an automobile; that the witness Reynolds returned to the room and again told the defendant that his life was in danger and that he should keep his mouth shut and not tell the officers anything.

"11) That thereafter Attorney Reynolds left the Asheville Police Department Building and returned to his office.

"12) That thereafter the defendant made a statement to the officers concerning the alleged offenses."

A reading of officer Holland's testimony shows that the judge's finding of fact No. 7 is supported by his testimony.

Based upon the facts found by him, the judge made the following conclusions of law:

"1) That the defendant was effectively advised as to his legal and constitutional rights as a person charged with a capital offense; that he was so advised by Officer Holland and by Attorney Joseph C. Reynolds.

"2) That the defendant knew and understood the advice so given him.

"3) That the statement made by the defendant to the witnesses Holland and Poore on the morning of May 27, 1965, about 9:30 a.m. and thereafter, was a voluntary statement by the defendant, made by him after knowledge of his Constitutional and legal rights; that it was not coerced or in any way made under duress or upon promise of leniency or hope of reward; and by making said statement, none of the Constitutional or legal rights of the defendant were impaired or infringed upon."

Based upon his findings of fact and conclusions of law, the judge held that defendant's confession was admissible in evidence, and defendant excepted.

The evidence is ample to support the findings of fact by the trial judge, which findings of fact are unchallenged by defendant except in the one particular stated above. These findings of fact are, therefore, conclusive on appeal and support his conclusions of law, and his findings of fact and his conclusions of law support his ruling that the confession was admissible in evidence. *S. v. Temple,* 269 N.C. 57, 152 S.E. 2d 206; *S. v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *S. v. Roberts,* 12 N.C. 259.

The trial of the instant case having occurred prior to the announcement of the decision by the Supreme Court of the *United States in Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, that decision has no application to this appeal. *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882.

So far as the record before us discloses, there is no evidence as to whether or not defendant had a preliminary hearing before his trial in the Superior Court or whether he was bound over to the Superior Court or waived a preliminary hearing on these charges. The record is bare of information. If he did have a preliminary hearing, he made no statement in the preliminary hearing at all, so far as the record before us discloses.

Defendant in his brief makes no contention that Judge Martin made his findings of fact and conclusions of law and held that the confession of defendant was voluntary and admissible in evidence

in the presence of the jury; he does not in his brief mention this question at all. Certainly, it is not clear and manifest from the record before us that Judge Martin made his findings of fact, conclusions of law, and held that the confession of defendant was voluntary and admissible in evidence in the presence of the jury.

It is the duty of defendant to see that the record is properly made up and transmitted. G.S. 15-180; *S. v. Roux,* 263 N.C. 149, 139 S.E. 2d 189; *S. v. Jenkins,* 234 N.C. 112, 66 S.E. 2d 819; *S. v. Daniels,* 231 N.C. 17, 56 S.E. 2d 2, cert. den. 339 U.S. 954, 94 L. Ed. 1366; *S. v. Wray,* 230 N.C. 271, 52 S.E. 2d 878; *S. v. Frizell,* 111 N.C. 722, 16 S.E. 409.

This is said in 1 Strong's N. C. Index, Criminal Law, § 160: "The burden is on defendant not only to show error but also that the error complained of affected the result adversely to him. . . . Thus, where the matter complained of does not appear of record, defendant has failed to make irregularity manifest." The text is supported by citation of numerous of our cases.

(On 30 August 1966 the Attorney General of North Carolina filed a motion in the Supreme Court suggesting a diminution of the record in the instant case on two grounds: The first ground has been discussed before in this opinion. Second, the transcript on appeal originally certified to the Supreme Court by the clerk of the Superior Court of Buncombe County leaves doubt as to whether or not the trial judge made findings of fact in the presence of or out of the presence of the jury impanelled to try the case relating to the admissibility of statements made by defendant to police officers on 27 May 1965. Attached to his motion was a "certified copy of the original transcript of testimony in the Superior Court of Buncombe County, pp. 273 through 292, showing that the trial jury was absent during the findings of fact by the trial judge as to the admissibility of defendant's confession." The court in conference allowed this motion on 30 August 1966. The clerk of the Supreme Court, by order of this Court, mimeographed the Attorney General's aforesaid motion with attachments thereto, and filed it as an addendum to the record. A copy of the original transcript of testimony in the Superior Court of Buncombe County, certified under the signature and seal of the clerk of the Superior Court of Buncombe County by deputy clerk Evelyn C. Boone, shows on pp. 273 through 292 that the jury was absent from the courtroom during the time the judge made findings of fact, conclusions of law, and held the confession to be voluntary and admissible in evidence. We are advertent to our rule that the record imports verity and the Supreme Court is bound thereby, and the Supreme Court can judicially know only what appears of record. 1 Strong's N. C. Index, Criminal Law, § 151. De-

fendant is under two sentences of death. Despite the fact that defendant in his brief makes no contention that the jury was in the courtroom when the judge made findings of fact, conclusions of law, and held that the confession was admissible in evidence, we, realizing the responsibility that is ours in passing upon an issue of defendant's life or death, and in such a case unwilling to rely entirely upon the presumption of regularity, decided *ex mero motu,* in spite of our rule, to examine the original transcript to see if the jury was absent from the courtroom when the judge made his findings of fact, conclusions of law, and held the confession admissible in evidence, because if the jury was in the courtroom, it was manifest error. *S. v. Walker,* 266 N.C. 269, 145 S.E. 2d 833.)

As stated above, the verdict, as set forth in the case on appeal, reads: "The said Albert Bobby Childs is guilty of rape and burglary." On 5 September 1966, the Attorney General of North Carolina filed a second motion in the Supreme Court suggesting a diminution of the case on appeal for the following reason: That the case on appeal does not disclose in clear terms that the jury returned a verdict in case No. 65-425 charging defendant with first degree burglary, or burglary in the first degree without recommendation of mercy, and he attached to his motion a certified copy of page 507, Criminal Minute Docket 33, Buncombe County Superior Court, 2 December 1965, showing the true verdict returned by the jury against the defendant in case No. 65-425 wherein the defendant was charged with first degree burglary. We allowed this motion on 7 September 1966. The minutes of the court as certified to us under the signature and seal of the clerk of the Superior Court of Buncombe County by deputy clerk Evelyn C. Boone show the following:

"65-424, 65-425	)	CHARGE: RAPE, BURGLARY
STATE	)	PLEA: NOT GUILTY
VS.	)	ATTORNEYS: RUBEN DAILEY, ROBERT
ALBERT BOBBY CHILDS	)	RIDDLE, THOMAS WHITE

"In the cases of the *State of North Carolina v. Albert Bobby Childs,* cases Nos. 65-424 and 65-425, the jury retired and returned into open court with unanimous verdicts of GUILTY AS TO BOTH COUNTS OF THE INDICTMENT, with no recommendation of mercy. At request of Defense Counsel Dailey, the jury was individually polled as to their verdict as to each count of the indictment."

The written judgment of death in indictment No. 65-424, which is the rape case, signed by the presiding judge, as it appears in the record agreed upon by counsel for defendant and Robert S. Swain,

solicitor of the Nineteenth District, does not show what the defendant was convicted of. Minute Docket No. 33, page 507, of the Superior Court of Buncombe County, certified under the signature and seal of the clerk of the Superior Court of Buncombe County by deputy clerk Evelyn C. Boone, which appears in the second addendum to the record by the Attorney General, which we allowed, sets forth as its first paragraph the following: "The defendant Albert Bobby Childs, having been convicted of rape by verdict of the jury, duly returned at this session of the Superior Court of Buncombe County, North Carolina." The second paragraph of this judgment of death is identical with the judgment of death for rape set forth in the record.

The written judgment of death in indictment No. 65-425, which is the burglary case, signed by the presiding judge, as it appears in the record agreed upon by counsel for defendant and Robert S. Swain, solicitor of the Nineteenth District, does not show what the defendant was convicted of. Minute Docket No. 33, page 507, of the Superior Court of Buncombe County, certified under the signature and seal of the clerk of the Superior Court of Buncombe County by deputy clerk Evelyn C. Boone, which appears in the second addendum to the record by the Attorney General, which we allowed, sets forth as its first paragraph the following: "The defendant Albert Bobby Childs, having been convicted of burglary in the first degree by verdict of the jury, duly returned at this session of the Superior Court of Buncombe County, North Carolina." The second paragraph of this judgment of death is identical with the judgment of death for burglary set forth in the record.

First degree burglary is punishable with death, provided the jury when rendering its verdict in open court shall not recommend imprisonment for life in the State's prison; second degree burglary is punishable with imprisonment in the State's prison for life, or for a term of years, in the discretion of the court. G.S. 14-52.

Defendant has no exception to any part of the judge's charge. In the beginning of his charge, the judge stated this to the jury:

> "In this case, Members of the Jury, the defendant Albert Bobby Childs is being tried upon two Bills of Indictment. In the first Bill of Indictment, Case Number 65-424, the defendant is charged with the capital crime of rape, alleging that this occurred on May 27, 1965; the second Bill, Case Number 65-425, charges the capital crime of first degree burglary, charging that this occurred on the same day, May 27, 1965."

The court in its charge clearly defined burglary in the first degree. As to that he charged the jury that they could find one of the fol-

lowing verdicts as they found the facts to be under the instructions of law given to them by the court: Guilty of first degree burglary, and if they returned that verdict and nothing more, the punishment would be death, but they had the absolute right in their discretion if they returned a verdict of guilty of first degree burglary to recommend that the punishment shall be imprisonment for life in the State's prison, and if they so recommended the punishment would be life imprisonment, or guilty of a non-burglarious breaking and entry, or a verdict of not guilty. He did not charge on second degree burglary, for the reason there is no evidence in the record to show second degree burglary. Coming then to the record before us, and the verdict of the jury on the burglary indictment set forth in the minutes of the court and the judgment of death in the burglary case set forth in the minutes of the court, and interpreting the verdict with reference to the burglary indictment, the facts and evidence, and the charge of the court — a permissible method of interpretation — we think it is manifest that the verdict as set forth in the minutes of the court in respect to the burglary indictment, "Guilty as to both counts of the indictment, with no recommendation of mercy," means guilty of burglary in the first degree as charged in the burglary indictment, and this supports the judgment of death for burglary in the first degree. So clear is this that no challenge has been made to the sufficiency of the verdict in the burglary case to support the sentence of death upon his conviction of burglary in the first degree. The record as a whole reveals the clear intent of the jury. *S. v. Morris,* 215 N.C. 552, 2 S.E. 2d 554.

Stacy, C.J., said for the Court in *S. v. Morris, supra:*

> "Coming then to the record before us and interpreting it with reference to the indictment, the facts in evidence, and the charge of the court — a permissible method of interpretation — we think it is manifest that the verdict, 'guilty as charged,' means 'guilty of burglary in the first degree' as charged in the bill of indictment. *S. v. Whitley,* 208 N.C. 661, 182 S.E. 338; *S. v. Bryant,* 180 N.C. 690, 104 S.E. 369; *S. v. Wiggins,* 171 N.C. 813, 89 S.E. 58; *S. v. Millican,* 158 N.C. 617, 74 S.E. 107. So clearly is this so that no challenge has been made to the sufficiency of the verdict. The record as a whole reveals the clear intent of the jury. *S. v. Kinsauls,* 126 N.C. 1095, 36 S.E. 31. Indeed, the facts essential to the establishment of the capital offense are not in dispute. *S. v. Foster, supra; S. v. Whit, supra.* They appear in part from the defendant's own evidence.
>
> "Under the principle stated, and owing to the clearness of the evidence and the very definite and precise instruction of

the court as to the terms of the verdict, we find no difficulty in giving the instant verdict significance and upholding it as sufficiently determinative by reference to the indictment, the facts in evidence, and the charge of the court. *S. v. Wiggins, supra.*

"We deem it proper to say, however, that this method of interpreting a record is not a desirable one in a capital case where the pitfalls attendant upon such procedure are wholly disproportionate to the ease with which they may be avoided. *S. v. Murphy,* 157 N.C. 614, 72 S.E. 1075. In a matter of supreme importance, the jury should definitely and expressly say of what degree of crime they convict the prisoner, and the verdict should be recorded as rendered. There should be no room for doubt or mistake. *S. v. Matthews,* 191 N.C. 378, 131 S.E. 743."

In thus interpreting the verdict in the burglary case, we are on firmer ground than the Court was in interpreting the verdict in the *Morris* case, for the simple reason that there is no uncertainty in the verdict of guilty of rape, and that verdict fully supports the judgment of death in the rape case. If defendant is put to death by the State under the judgment of death in the rape case, he cannot again be put to death by the State under the judgment in the first degree burglary case, for the simple reason that no man can be put to death twice. Defendant does not challenge the sufficiency of the verdict in either the rape case or the burglary case to support the sentence of death in each case rendered separately.

We have carefully examined defendant's other numerous assignments of error. Such assignments of error merit no discussion. Many have no citation of authority to support the contention, and all are overruled. The charge of the court is full, accurate, and impartial. Nothing is shown in the record before us or in defendant's brief which would justify disturbing the verdicts and the judgments of death below.

No error.

STATE v. ROBERT E. PORTH.

(Filed 3 February, 1967.)

1. Criminal Law § 15—

A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that defendant could not obtain a fair trial because of widespread and unfavorable publicity, is addressed to the discretion of the trial court, and where the record discloses that the trial judge conducted a hearing, read all the affidavits, and examined the press releases, that each juror selected stated that he could render a verdict uninfluenced by the publicity, and that defendant did not exhaust his peremptory challenges, abuse of discretion in denying the motion is not disclosed.

2. Indictment and Warrant § 13—

The denial of a motion for a bill of particulars will not be held for error when the record discloses that defendant's counsel was given copies of documents disclosing the basis of the State's case, and the State introduces no evidence at the trial which could have taken defendant by surprise. G.S. 15-143.

3. Criminal Law § 43—

Photographs which are competent for the purpose of illustrating the testimony of the witnesses are not rendered inadmissible because they may be inflammatory or gruesome.

4. Criminal Law § 53—

A medical expert may testify from his autopsy, even though the autopsy is made five months after deceased's death, as to the cause of death, the expert having testified that the body was in an excellent state of preservation and quite satisfactory for examination. The delay in making the autopsy relates to the weight of the testimony rather than to its competency.

5. Homicide § 16—

The State contended that defendant murdered his wife because he was in love with another woman and his wife would not consent to a divorce. *Held:* Testimony of the woman as to conversations with defendant involving their relationship, defendant's promise of marriage, his report that his wife refused to consent to a divorce, and his remark to the woman, after the body of his wife had been found and before it was identified, that if the body turned out to be that of his wife, "all this is ours", are competent as tending to show motive.

6. Criminal Law § 76—

The State contended that defendant murdered his wife because he was in love with another woman and his wife would not consent to a divorce. *Held:* It is competent for the other woman to testify as to the contents of letters written to her by defendant which she had burned, the testimony being competent on the question of motive.

7. Criminal Law § 165.1— Defendant injecting collateral matter in evidence may not object thereto.

The body of defendant's wife was found on a mountain side. Medical expert testimony was to the effect that she died from internal and ex-

ternal injuries inflicted by a blunt instrument. Defendant contended that the wounds and abrasions were caused by the wife's fall down a flight of stairs in their home, and that he drove the body of his wife to the mountainside and threw the body out because he was afraid no one would believe his story of accidental death because "of the arsenic case". *Held:* Defendant having injected the question of arsenic poisoning in the case, may not complain that the solicitor pursued the matter in questioning another witness in regard thereto at a time when it appeared that the evidence would be competent on the question of premeditation in the development of the circumstantial case.

8. Criminal Law § 162— Exculpatory answer of witness held to render improper question harmless.

The State's evidence tended to show that the body of defendant's wife was found on a mountainside and that she died of internal and external injuries inflicted by a blunt instrument. Defendant contended that his wife died as a result of injuries received in a fall in their home and explained that he drove the body to the mountainside and left it there because of his fear that no one would believe his story of accidental death in view of his wife's prior illness from arsenic poisoning. The solicitor asked defendant's son on cross-examination whether the son did not know that the son's sister had died of arsenic poisoning. *Held:* Even if the question be held improper as injecting the question of defendant's guilt of a separate and independent crime, the witness' categorical denial, being exculpatory, rendered the inquiry harmless.

9. Criminal Law § 156—

Instructions which defendant contends the court should, but did not, give should be set forth only in the assignments of error and not incorporated in the record with the charge actually given by the court.

10. Criminal Law § 162—

The exclusion of evidence proffered by defendant is not prejudicial when the court later instructs the jury that the evidence was competent and the excluded evidence is admitted and fully considered by the jury.

11. Criminal Law § 50—

The State introduced expert testimony that defendant's wife died as a result of multiple external and internal injuries produced by some blunt instrument. *Held:* Testimony of an officer finding the body of the wife on a mountainside that there was definitely no sign to indicate a violent death, is properly excluded as the conclusion of an unqualified witness.

12. Homicide § 20— Evidence held sufficient to be submitted to jury on issue of defendant's guilt of murder in the first degree.

The State's evidence tended to show that defendant was in love with another woman, that his wife would not consent to a divorce, that the body of the wife was found on a mountainside, with medical expert testimony that she died as a result of multiple external and internal injuries produced by some blunt instrument. Defendant contended that his wife fell down a four-step stair in the home, resulting in fatal injuries, and that defendant then drove his wife to the mountainside and threw her body out because he was afraid no one would believe that her death

was the result of an accidental fall. *Held:* The circumstantial evidence was sufficient to be submitted to the jury and sustain a conviction of murder in the first degree.

APPEAL by defendant from *Fountain, J.*, February 14, 1966 Criminal Session, FORSYTH Superior Court.

At the September 13, 1965 Session, Forsyth Superior Court, the Grand Jury returned a bill of indictment charging the defendant, Robert E. Porth, with the murder of his wife, Hilda Borchardt Porth. Upon arraignment, the defendant, in person and through counsel of his own selection, entered a plea of not guilty.

On September 23, 1965, the defendant filed a motion that the cause be removed to, or that a jury be drawn from, another county as provided in G.S. 1-84 and G.S. 1-86 on the ground the charge had been given such widespread and such unfavorable publicity that it would be impossible for the defendant to obtain a fair trial in Winston-Salem or before a Forsyth County jury. In support of the motion, the defendant offered 25 affidavits of citizens of the county, among them some members of the Bar, each of whom stated that in his opinion the defendant could not get a fair trial in Forsyth County because of the unfavorable newspaper, television, and radio publicity.

On the other hand, the State filed the affidavits of 25 local citizens, lawyers among them, and called and examined four witnesses in opposition to the motion to remove. Each affiant and each witness expressed the opinion that the defendant could obtain a fair and impartial trial before a local jury.

At the conclusion of the hearing, Judge Shaw made the finding that the defendant could obtain a fair and impartial trial in Forsyth County and denied the motion. After the court's ruling, the defendant filed application for a bill of particulars. The Solicitor filed an answer. The answer alleged that the defendant voluntarily waived a preliminary hearing. The Sheriff's office had furnished defense counsel copies of the investigators' reports and had permitted defense counsel to interview the principal State's witnesses. At the Solicitor's invitation, defense counsel had been present when Dr. Mann, the Medical Examiner of Virginia, discussed the results of his autopsy disclosing his opinion of the cause of Mrs. Porth's death. Dr. Asteinza's report and findings after his autopsy were made available to defense counsel. Judge Shaw denied the petition for the bill of particulars. The defendant excepted.

At the trial beginning on February 14, 1966, the regular jurors summoned for the term and the venire men were examined. Twelve regular and two alternate jurors were accepted as satisfactory both to the State and to the defendant. During the selection the State

exhausted its six peremptory challenges. The defendant exhausted only 12 of his 14 challenges. All other prospective jurors were excused by the court for reasons of age, health, or upon challenges for cause which the court found to be proper.

The State offered evidence tending to show the following: The defendant, 58 years of age, on and prior to August 13, 1965, was employed by Western Electric Company as a missile engineer in its Winston-Salem plant. He and his wife, Hilda Borchardt Porth, were constructing a new home in Winston-Salem. Neighbors saw both at their house on August 13, 1965. At about 5:00 p.m. on that day Mrs. Porth was seen driving her automobile at the Reynolda Manor Shopping Center in Winston-Salem.

On August 14, 1965, at about 7:20 p.m., William Peyton Delp discovered a woman's body a short distance below the road on Draper Mountain, near Pulaski, Virginia. Delp flagged down a passerby who remained at the scene while Delp notified the Police Department of the City of Pulaski. The rescue squad of the police department, the Pulaski County Sheriff's Office, and the Virginia State Police were notified. Dr. Fox, the medical examiner, had the body taken to Radford Hospital for autopsy and pathological examination. The "gross autopsy" by Dr. Fox (apparently superficial) disclosed numerous bruises, contusions and abrasions over the body.

Dr. Asteinza, pathologist at Radford Hospital, performed an autopsy. He described the various evidences of injuries, including fractured ribs, numerous bruises on the body, including a very large and deep bruise at the base of the skull on the left side of the neck. He gave as his opinion that death resulted from brain concussion and shock.

Other evidence at the trial disclosed that the body of Mrs. Porth was prepared for burial and shipped to and interred in Milwaukee, Wisconsin.

About five months after interment, the body was exhumed under court order. Dr. Geoffrey Thomas Mann, Chief Medical Examiner of Virginia, performed an autopsy. Dr. Mann described in detail the extent of the injuries he found. He said the body was in suitable condition for a revealing autopsy. Based on his examination, he gave as his opinion, "She died as a result of multiple external and internal injuries produced by some blunt instrument." Dr. Mann testified the injuries his autopsy disclosed, in his opinion could not have been caused by a fall down a stairway consisting of four steps, 39 inches from top to bottom.

On Monday, August 16, 1965, the defendant called the Virginia Police Headquarters in Richmond and reported his wife missing.

He reported she left Winston-Salem on Friday night, about 9:30, and that she should have arrived in O'Fallon, Illinois, on Sunday but that he had heard nothing from her. The Fourth District Police Headquarters at Wytheville, Virginia, received a call at 1:00 a.m. on August 16, 1965, from one who identified himself as Robert Porth. He said his wife, who was en route to Wisconsin, was missing. He said she left Winston-Salem about 9:30 at night, driving a Chrysler Imperial, North Carolina license No. A R 3509; that she was a good driver, preferred to drive at night during hot weather, but she "had a habit of picking up college students and servicemen who *(sic)* she would see hitch-hiking."

The Virginia State Police contacted Sheriff Shore of Forsyth County. Captain Burton of the Winston-Salem Police Department, and F. B. I. Agent Chandler participated in the investigation. On August 26, Sheriff Shore, Deputy Sheriffs Baker and Speas, and F. B. I. Agent Chandler conferred with Mr. Porth at his office. He stated that he and his wife went to the new house just after 5:00 o'clock on August 13 where he did some wiring and she did some painting. They returned home and at about 9:30 at night she left, in the Chrysler, to drive to Milwaukee, Wisconsin.

On September 6, 1965, Sheriff Shore, Police Captain W. C. Burton, Deputies Speas and Baker, and James Booker, defendant's attorney, pursuant to defendant's request, went to the Porth home where he made a voluntary statement. The more material parts are here quoted:

> " 'Something is tearing me up inside,' he said, 'I've got to get it off my chest. I need help.' . . . And at that time Mr. Booker warned him that he didn't have to tell us anything. And he reiterated that two or three times, and Mr. Porth said, 'I know that.' And Mr. Booker asked him if this is what you want to do, and Mr. Porth said, 'It is.' He [defendant] said, 'My friends have turned against me. Those that I thought I could depend on. I have been receiving phone calls calling me a murderer and I can take it no longer.' Said, 'I want to talk about Friday, the 13th of August.' He said, 'You have done a thorough job in your investigation. You have uncovered a lot of skeletons in my closet. I have not been able to sleep. I cannot live with myself. I have made a mess of my life, and I want to straighten things out. I deserve to be punished and you can do whatever you want to with me. You can hang me if you want to.' He said, 'My wife was a fine woman. I have become a professional bum.' He said, 'The arsenic deal is a separate deal and I'll straighten that out later. I want to tell you what happened to my wife.' " * * *

"He said he went down into the Tiki room to get up the paint brushes and tools and clean them up and put them away. The Tiki room is the room on the lower, ground floor.

"And he said that while he was in there he heard a thud out in the hall . . . rushed out . . . found Mrs. Porth lying on the floor with her feet on the steps. . . . she only breathed a couple of times. . . .

" 'I realized there wouldn't be anybody believe me. I knew I was in a hot spot on account of the arsenic case.' " * * *

" 'I got in the Chrysler automobile and backed it into the garage. . . . I put her in the trunk and I drove to the filling station . . . had the car filled up with gas . . .' drove to his house and went in and changed clothes and he called Nancy Johnson in Florida." * * *

"He said he drove up Interstate 52 . . . that he wanted to make it appear that a hitch-hiker had done it. . . . He pulled off the road . . . took the body out, sat it down on the edge of the road and then she rolled down the ravine. 'I drove to Charleston, West Virginia, parked the automobile, caught the plane to Greensboro.' "

The State called and examined Nancy Cockerman Johnson. She stated she had been meeting the defendant secretly for some years. Mrs. Porth found out about the affair. "At some time in February, 1964, the defendant and Mrs. Porth came to my apartment on Polo Road. Mrs. Porth knew that Mr. Porth and I had been seeing each other and she was, of course, mad, and she had learned that I had a ring or something he was supposed to have sent me for my birthday . . . She wanted me to write a note saying that I would not see him anymore." On two occasions when Mrs. Porth was in the hospital the witness admitted she had stayed in the home with the defendant. Defendant told her Mrs. Porth was in the hospital "suffering from arsenic poisoning."

In February, 1965, Mrs. Johnson moved to Florida, "to get a divorce." During her stay in Florida she received many letters from the defendant and talked to him often over the telephone; that on account of the contents of the letters she burned them. He proposed marriage, later said his wife refused to consent to a divorce. In one of his letters, "discussing his wife's illness . . . he said that when dogs . . . are not useful any more they do away with them. In one of our telephone conversations from Fort Lauderdale he stated to me that he was about ready to dig that hole. He said, 'I think you should come up and drive her car up north for me.' "

The witness stated she received a telephone call from Winston-

Salem the night of August 13, around 9:00 o'clock, asking her to come to Winston-Salem. In consequence she met him in Greensboro at the airport on August 14. She remained with him until the investigation of Mrs. Porth's death was transferred from Virginia to Winston-Salem, then she returned to Florida. The testimony both as to the contents of the letters and telephone conversations were admitted over defendant's objections. Exceptions were duly taken.

On cross-examination, Mrs. Johnson admitted she had been treated in hospitals for a nervous breakdown and that she had attempted suicide. The hospital records were offered by the defendant and excluded. They showed a diagnosis "probable schizophrenic reaction." Near the close of the case, however, the Solicitor withdrew his objection and all hospital records were admitted in evidence. During the testimony of Dr. Asteinza defense counsel asked this question:

> "In the event and if the jury should find, Doctor, that Mrs. Porth did in fact fall from a height of approximately three to four feet down a flight of stairs beside which there was a brick planter in the immediate vicinity of these steps, would you state whether or not in your opinion the bruises, abrasions and excoriations that you observed on the body of Mrs. Porth could have been produced by a fall down this flight of stairs?"

If permitted, Dr. Asteinza would have answered: "It would have been compatible." Later Judge Fountain concluded the question and answer should have been admitted. Accordingly he addressed an instruction to the jury, repeated the question to them at the time, and stating that he had concluded the evidence was admissible he then permitted the reporter to read what would have been Dr. Asteinza's answer.

At the close of the State's evidence the defendant's motion for a directed verdict was overruled. The defendant called many witnesses who testified he was kind and courteous to Mrs. Porth.

His son, William Porth, testified that in their family discussions his mother would sometimes display temper — his father never. Many witnesses gave the defendant an excellent character. Members of the family and others testified that Mrs. Porth had trouble with her feet and ankles. This was offered to explain the probability of a fall down the steps. The defendant did not testify. His motion to dismiss was renewed at the close of all the evidence and again overruled. The jury returned this verdict: "Guilty of murder in the first degree with recommendation for life imprisonment." From the court's judgment that the defendant be committed to the State's Prison for the term of his natural life, he appealed.

T. W. Bruton, Attorney General, Andrew A. Vanore, Jr., and Wilson B. Partin, Jr., for the State.

White, Crumpler, Powell and Pfefferkorn by Harrell Powell, Jr., William Pfefferkorn and Fred G. Crumpler, Jr., for defendant appellant.

HIGGINS, J. Before pleading to the indictment the defendant filed a written, duly verified motion requesting, in the alternative, that the cause be removed to, or that a jury be drawn from, another county as contemplated by G.S. 1-84 and G.S. 1-86. In support of the motion the defendant offered 25 affidavits, in each of which a citizen of the county stated that in his opinion, because of the widespread discussion and unfavorable publicity, the defendant could not obtain a fair trial in Forsyth County. The State filed approximately an equal number of affidavits and called four witnesses, each expressing the opinion a fair and impartial jury could be obtained in the county. Judge Shaw conducted a hearing on the motion, read all the affidavits, examined the press releases, and heard the witnesses. At the conclusion of the hearing he found that a fair and impartial jury could be obtained from Forsyth County and denied the motion. The evidence was sufficient to support the finding and called for the exercise of the court's discretion. Failure to exercise the discretion properly is not disclosed. *State v. Childs, ante* 307; *Irvin v. Dowd,* 366 U.S. 717; *Reynolds v. U. S.,* 98 U.S. 145; *State v. McKethan, ante* 81; *State v. Scales.* 242 N.C. 400. 87 S.E. 2d 916; *State v. Culberson,* 228 N.C. 615, 46 S.E. 2d 647; *State v. Lea,* 203 N.C. 13, 164 S.E. 737.

In the actual selection of the jury, the record discloses that 109 veniremen were called and examined under oath, touching their qualifications to serve as jurors. During the examination the State exhausted its six peremptory challenges. The defendant exhausted only 12 of his allotted 14 peremptories. A jury, including two alternates (later excused) was selected. Most of those approved by both parties had read some of the news articles and had heard the case discussed. Each juror selected testified he could hear the evidence, the argument of counsel, and the court's charge and render a verdict thereon uninfluenced by anything he had read or had heard. *State v. Moore,* 258 N.C. 300, 128 S.E. 2d 563.

The defendant assigns as error the court's refusal to require the State to file a bill of particulars. Defense counsel had been furnished copies of the officers' reports, the reports of the autopsies, and had been permitted to interrogate the State's key witness, Nancy Johnson. Defense counsel was present when the defendant made the admissions to Sheriff Shore, his deputies, and Captain Burton. The

State introduced nothing which should have been of surprise to the defendant. The court's refusal to order any additional bill of particulars was not error. G.S. 15-143; *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318; *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901; *State v. Hinton,* 158 N.C. 625, 74 S.E. 104.

During the course of the long trial the defendant entered numerous exceptions to the admission and the exclusion of evidence, both testimony of witnesses and documents. All told, the defendant's brief of 126 pages discusses 57 assignments of error based on 116 exceptions. Obviously, a seriatim discussion would prolong this opinion beyond reasonable bounds. *State v. Lea,* 203 N.C. 13, 164 S.E. 737. The assignments not herein discussed have been examined and have been found to be without merit.

Defendant insists the court should not have admitted for illustrative purposes photographs of the dead body. Two objections were interposed: (1) certain photographs were repetitious; (2) others were inflammatory. Notably, inaccuracy in any particular, is not claimed. Photographs were used to illustrate the testimony of the witnesses with respect to the position and extent of the blood, bruises, and contusions on the body. "If a photograph is relevant and material, the fact that it is gory or gruesome . . . will not alone render it inadmissible." Stansbury on Evidence, § 34, pp. 66-67; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; *State v. Utley,* 223 N.C. 39, 25 S.E. 2d 195.

Six of defendant's assignments of error involve the evidence of the medical experts as to the cause of death. In particular, the defendant challenges the testimony of Dr. Mann who performed an autopsy in Milwaukee five months after Mrs. Porth's death. Dr. Mann's qualifications were most impressive, fully justified the court's finding of expertness in his field. He testified: "Well, the body was in an excellent state of preservation and quite satisfactory for examination." He found that death resulted from concussion and shock. This evidence was admissible. 3 Underhill, Criminal Evidence, § 632; *State v. Daly,* 210 Mo. 664, 109 S.W. 53; *Kemp v. State,* 179 So. 2d 762, 278 Ala. 637; *Tarkaney v. Commonwealth,* 240 Ky. 790, 43 S.W. 2d 34; *Williams v. State,* 64 Md. 384, 1 A. 887. The delay in making the autopsy related to the weight rather than to the competency of Dr. Mann's evidence.

Two assignments of error challenge the testimony of Nancy Johnson, "the other woman" in the case. Mrs. Johnson testified to an association with the defendant for a number of years. She detailed many conversations, some by telephone. These involved their relationships, the defendant's promise of marriage, and his report later that his wife refused to consent to a divorce. The defendant

admitted to Sheriff Shore that he called Nancy Johnson in Florida just before he started on the trip north to dispose of his wife's body which was then concealed in the trunk of his automobile.

While the defendant and the witness were in the new home after the body was found in Virginia and before it was identified, the defendant remarked to Nancy Johnson that if the body turned out to be his wife, "(A)ll this is ours." This evidence was competent on the question of motive. *State v. Smoak,* 213 N.C. 79, 195 S.E. 72. The testimony as to the contents of the burned letters was competent. *State v. Neville,* 157 N.C. 591, 72 S.E. 798; *State v. Ferguson,* 107 N.C. 841, 12 S.E. 574. Mrs. Johnson properly identified the author of the letters and testified she burned them. *State v. Wilkerson,* 98 N.C. 696, 3 S.E. 683; *State v. Credle,* 91 N.C. 640.

". . . (T)he declarations, statements, and admissions of a defendant of facts pertinent to the issue, and tending, in connection with other facts, to prove his guilt of the offense charged, are competent against him in a criminal action." *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364; *State v. Ragland,* 227 N.C. 162, 41 S.E. 2d 285; *State v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25; Wharton's Criminal Law, 12th Ed., Vol. 2, § 400.

Assignments of Errors Nos. 17, 30, 39, 43, and 64 relate to the evidence of "another crime" — arsenic poisoning. The first time this subject came into the evidence was by the testimony of Sheriff Shore quoted in the statement of facts. The defendant called the officers and told them Mrs. Porth fell down the steps and sustained fatal injuries; that he became panicky, realizing no one would believe the story because of the skeletons in his closet. In his panic he disposed of the body in such manner as to indicate a hitch-hiker had murdered her. In this conversation he said, "The arsenic deal is a separate deal and I will straighten it out later."

Nancy Johnson testified Mrs. Porth found out that her husband and the witness had been seeing each other while she was in the hospital. Mrs. Porth accused both of being responsible for her illness. The Solicitor asked Mrs. Johnson whether the defendant had ever told her "what she (Mrs. Porth) was suffering from." Her answer was, "Yes — arsenic poisoning."

One of the assignments of error involved a question addressed to William Porth, son of, and witness for, the defendant. He had testified that he came home from Alaska for his sister's funeral in 1962. The solicitor's question: "Don't you know for a fact that your sister died from arsenic poisoning?" Answer: "No, sir, I don't." He was asked whether the family did not discuss arsenic poisoning. He said arsenic was never mentioned. The question and the answer were admitted over the defendant's objection. As bearing on the

objection, it should be remembered that the defendant first brought up the "arsenic deal" as one of the skeletons in his closet. This was one of the reasons he assigned for his panic and his realization no one would believe that his wife had been killed by the fall down the steps. Nancy Johnson had quoted the defendant as saying Mrs. Porth was in the hospital because of arsenic poisoning. These clues alone were sufficient to justify the solicitor's efforts to find out if an attempt had been made to take Mrs. Porth's life by poisoning. Such efforts, if attributable to the defendant, would have obvious bearing on the question of premeditation. *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; *certiorari* denied, 368 U.S. 851. However, the solicitor's effort to show by cross-examination of William Porth that his sister died as a result of arsenic poisoning was not warranted. The court should have sustained the objection. There was nothing to show the daughter, at the time of her death, was a member of the defendant's household, or that by mistake she took arsenic poisoning which the defendant had intended for Mrs. Porth.

Absent a showing that the death of witness Porth's sister was caused by arsenic poisoning which was intended, not for her, but for her mother, the inquiry into the cause of the sister's death would appear to be improper as introducing evidence of a separate and independent crime. The rule, and the exceptions with respect to such evidence are fully discussed in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. The question may be debatable whether the evidence of the sister's death by poisoning is governed by the general rule and should be excluded, or by the exceptions, and should be admitted. But assuming the question was improper, nevertheless, the answer was exculpatory and rendered the inquiry harmless.

The full context of the court's charge as disclosed by the record contains not only what the court actually charged but the defendant has embodied therein the contention as to what the court should have charged. The contention should be set forth only in the assignment of error.

The alleged error based on the court's refusal to permit Dr. Asteinza to testify that in his opinion the injuries he found on the body of Mrs. Porth could have been caused by a fall was cured by the court's instruction that the evidence in his opinion was competent, and was then admitted and fully considered by the jury. Likewise, the solicitor withdrew his objection to the admissibility of the hospital records showing that Nancy Johnson had been in the hospital on several occasions and her condition diagnosed as schizophrenic. These records were before the jury as Exhibits Nos. 46 and 47.

State Trooper Dowdy, the first officer to view the body on the

mountain, on cross-examination was asked if he did not make a report of the case. He testified he made a report to the Judge and the Commonwealth Attorney. This report was not required. He was then asked what was included in the report as the cause of death. The court sustained the State's objection. If permitted the officer would have testified: "There definitely were no signs to indicate a violent death." He had testified to bruises apparent on the body but only an autopsy by a medical expert could determine the cause of death. Mr. Dowdy testified as to bruises and contusions he observed. This did not qualify him to testify as an expert witness and tell the jury, "There definitely were no signs to indicate a violent death." The court properly sustained the objection as the conclusion of an unqualified witness. *State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229; *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494.

We have given careful consideration to the defendant's assignments of error based on the court's refusal to dismiss at the close of all the evidence. Without reciting the details of the evidence, it discloses that Mrs. Porth died in the new home when no one but the defendant was with her. He claimed her injuries resulted from the fall. The medical testimony discloses that she died of concussion and shock. He told Sheriff Shore that he became panicky because of the other woman and the arsenic poisoning, concluded that no one would believe his story. For this reason, he stuffed the body in the trunk of his automobile and drove that night to Pulaski County, Virginia, where he placed the body by the side of the road and permitted it to roll down the side of Draper Mountain. Before he left, however, he called the "other woman" in Florida and invited her to come at once. She met him at the airport in Greensboro the following night. Apparently they lived together in and around Winston-Salem until the investigation began there. She then went back to Florida.

The evidence before the court and jury was sufficient to furnish ample support for a conviction of murder in the first degree. Present was one of the strongest motives inducing a man to do away with his wife — the other woman. The manner by which that objective was accomplished in this case shows premeditation, deliberation, the formation of a fixed purpose and design to kill, and a felonious execution of the design. The facts and circumstances in evidence clearly and from every angle point an accusing finger at the defendant. *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599; *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555; *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Moore,* 262 N.C. 431, 137 S.E. 2d 812; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

Painstaking examination of the court's charge fails to disclose any error. When considered in its entirety, the instructions given the

jury cover clearly, accurately and impartially all essential features of the case. In the verdict and judgment, we find

No error.

ALLSTATE INSURANCE COMPANY v. SHELBY MUTUAL INSURANCE COMPANY, CONCORD MOTORS, INC., RUBY CLEO WIDENHOUSE, RAY W. WIDENHOUSE AND DAVID ELROY CLONTZ AND R. B. CLONTZ.

(Filed 3 February, 1967.)

1. **Insurance § 3—**

An insurance policy is a contract between insured and insurer and must be construed to carry out the intent of the parties except insofar as a statute or authorized administrative order requires a different construction.

2. **Same—**

An ambiguous provision of an insurance contract will be given that meaning most favorable to insured, and exception to coverage is not favored; nevertheless the policy must be construed as written, and the courts may not rewrite it and thus make a new contract for the parties.

3. **Insurance § 59—**

Whether a claim comes under the exclusion from liability under a clause relating to other insurance is to be determined by construction of the policy to determine what event will activate the exclusion, without regard to the terms of the other contract of insurance, and the construction of the other policy is required only to determine whether it constitutes an event excluding coverage under the terms of the first policy.

4. **Same—**

A clause excluding liability under a policy of automobile insurance if the accident occurs while insured is using the vehicle in the automobile business does not apply when insured is driving a car as a prospective purchaser from an automobile dealer, since such use by insured is not a use in insured's automobile business.

5. **Same— Exclusion clause of garage liability policy held effective when prospective purchaser is covered by other collectible insurance.**

The accident in question occurred while the insured under an owner's liability policy was using, as a prospective purchaser, an automobile owned by an automobile dealer, the policy providing that the insurance with respect to use of a non-owned automobile should be excess insurance over any other valid and collectible insurance. The automobile dealer's garage liability policy provided that the policy should not apply to any loss covered by other valid and collectible insurance, either primary or excess, with further provision under the limits of liability that unless the total amount of such loss exceeded the limits of liability of all other policies

affording coverage, the insurer should then be liable only for the excess. *Held:* The existence of other insurance was an event activating the exclusion clause of the garage liability policy, and the event that would set in operation the limitation or deferment clause of the owner's liability policy thus did not occur, and only the owner's liability policy covered the liability in question.

6. Same—

The N. C. Financial Responsibility Law will be construed to protect victims of automobile accidents, and provision in a policy of liability insurance which contravenes that statute is void.

7. Same—

A provision in a liability policy excluding coverage if the accident in question is covered by other insurance does not contravene the N. C. Financial Responsibility Law, since the provision excluding liability is not operative unless there be in effect other insurance protecting a person injured by the use of a vehicle up to the amount required by the Law, the Law not being concerned with which company provides the coverage. G.S. 20-279.21(j).

APPEALS by plaintiff, Allstate Insurance Company, and by defendants, Shelby Mutual Insurance Company and Concord Motors, Inc., from *Bone, E.J.*, at the 12 September 1966 Civil Session of GUILFORD.

This is a suit for a declaratory judgment brought by Allstate Insurance Company for an adjudication of the nature, extent and priority of automobile liability insurance coverage provided by Allstate under its policy issued to Ray W. Widenhouse, and by Shelby Mutual Insurance Company under its policy issued to Concord Motors, Inc., with reference to claims and damages arising out of an accident in which an automobile owned by Concord Motors, Inc., and driven by Mrs. Widenhouse, struck and injured David Elroy Clontz, a minor child.

By consent, a jury trial was waived and the matter was submitted to the superior court upon the pleadings, stipulated facts and exhibits attached thereto. The superior court found the facts to be as set forth in these documents and drew therefrom conclusions of law referred to below. Upon these findings and conclusions the court adjudged that both the Allstate policy and the Shelby Mutual policy afford primary coverage to the driver, Mrs. Widenhouse, that the limit of Allstate's liability was $10,000, the limit of Shelby Mutual's liability was $5,000, that within such limits, the total loss sustained should be borne two-thirds by Allstate and one-third by Shelby Mutual, and that both companies were under a duty to defend the driver, Mrs. Widenhouse, in any suit brought by the injured boy.

From this judgment Allstate appeals, contending that the Shelby

Mutual policy provided primary insurance coverage to Mrs. Widenhouse, that Allstate is not liable at all under its policy for the reason that the automobile was being used at the time of the accident "in the automobile business," and thus was excluded from the coverage of the Allstate policy, and, if Allstate be liable at all, its liability would be limited to that portion of the loss which is in excess of the total coverage afforded by the Shelby Mutual policy.

Shelby Mutual and its policyholder, Concord Motors, also appeal from this judgment, contending that no insurance coverage is afforded by the Shelby Mutual policy to Mrs. Widenhouse on account of the claims arising out of this accident.

Stipulated facts, insofar as material, and summarized for the sake of brevity, are:

On 27 February 1965 an automobile owned, and held for sale, by Concord Motors, Inc., struck and injured David Elroy Clontz. It was driven by Mrs. Widenhouse, wife of Allstate's named insured, with the permission of Concord Motors for the purpose of determining whether she and her husband would purchase the car. The Clontz child, through his next friend, filed suit against Concord Motors and Mrs. Widenhouse. His father filed suit against them for damages by reason of such injuries and resulting medical expenses incurred by him. Both suits are now awaiting trial.

At the time of the accident the Shelby Mutual policy, issued to Concord Motors, designated a "Garage Liability Policy," was in effect. There was also then in effect the Allstate policy, under which Mrs. Widenhouse is an insured.

Allstate demanded that Shelby Mutual furnish a defense for Mrs. Widenhouse in the suits brought by the boy and his father, notifying Shelby Mutual that the Allstate policy is "excess insurance" only. Shelby Mutual has declined to provide defense or coverage to Mrs. Widenhouse, contending that the coverage of its policy does not extend to her with reference to the claims arising out of this accident. Shelby Mutual does not deny its duty, under its policy, to defend and to provide coverage for Concord Motors.

Both the Allstate policy and the Shelby Mutual policy were certified to the North Carolina Department of Motor Vehicles by the respective policyholders as their compliance with the provisions of the Financial Responsibility Law. Shelby Mutual knew, at the time it issued its policy, that it would be so certified in connection with the application of Concord Motors for the issuance to it of license plates for its vehicles, which plates were issued. A regulation of the Department of Motor Vehicles provided that such plates would not be issued to an automobile dealer unless there was in effect a liability insurance policy in the form known as "Garage Lia-

bility, Division I," or an alternative not applicable to the present case.

Part I of the Shelby Mutual policy is a "Garage Liability Policy, Division I," and is in a form approved by the North Carolina Commissioner of Insurance.

In consideration of a reduction in the premium charged for the Shelby Mutual policy, there was attached thereto an endorsement, designated "Endorsement AL 8522," the form of which was approved by the North Carolina Commissioner of Insurance, its use being optional. Both this policy form and this endorsement form are in general and approved use by many insurance companies writing liability insurance policies for garages and dealers.

The definition of "Persons Insured," in the Shelby Mutual policy as amended by endorsement AL 8522, reads:

> "Each of the following is an insured under Part 1, except as provided below:
>
> "(3) * * * any of the following persons while using such automobile with the permission of the named insured, provided such person's actual operation * * * is within the scope of such permission:
>
> "(a) * * *
>
> "(b) any other person, but only if no other valid and collectible automobile liability insurance, *either primary or excess,* with limits of liability at least equal to the minimum limits specified by the Financial Responsibility Law of the state in which the automobile is principally garaged, is available to such person * * *" (Emphasis added.)

It further provided in the foregoing endorsement, so included in and made part of the Shelby Mutual policy, with reference to the "Limits of Liability" under such policy:

> "Provided that with respect to a person described as insured under paragraph (3) (b) of Persons Insured * * *
>
> "(i) the applicable limit of the company's liability shall be the amount by which (1) the applicable minimum limit of liability for bodily injury or property damage specified in the Financial Responsibility Law of the state in which the automobile is principally garaged exceeds (2) the sum of the applicable limits of liability under all other valid and collectible insurance available to the insured, and
>
> "(ii) the insurance under this policy shall not apply to any loss to which the insured has other valid and collectible insurance unless the total amount of the loss exceeds the sum of the

limits of liability of all other policies affording such other insurance and the company shall then be liable, subject to clause (i) foregoing, only for the excess."

The following are significant provisions of the Allstate policy:

"The following are insureds * * * (b) With respect to a non-owned automobile, (1) the named insured * * * provided the actual use thereof is with the permission of the owner * * *

"'[N]amed insured' * * * includes his spouse, if a resident of the same household * * *

"This policy does not apply * * * (h) to a non-owned automobile while used (1) in the automobile business by the insured or (2) in any other business or occupation of the insured * * *

"'[A]utomobile business' means the business or occupation of selling, repairing, servicing, storing or parking automobiles. * * *

"If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.*" (Emphasis added.)

Smith, Moore, Smith, Schell & Hunter for plaintiff Allstate Insurance Company.

Jordan, Wright, Henson & Nichols by Charles E. Nichols and Edward Murrelle for defendants Shelby Mutual Insurance Company and Concord Motors, Inc.

LAKE, J. The nature and extent of the liability of an automobile liability insurance company depends upon the proper construction of the terms of its policy. The policy is a contract between the parties thereto and must be construed so as to carry out their intent, except insofar as a statute or an authorized administrative regulation or order requires a different construction. Rodman, J., speaking for the Court in *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474, said:

"Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our

> constitutional guarantees. * * * Since the contractual provision is, as related to the facts of this case, a valid one, the parties are entitled to have it enforced as written. We cannot ignore any part of the contract."

It is well settled that, in the construction of a policy of insurance, ambiguous provisions will be given the meaning most favorable to the insured. Exclusions from and exceptions to undertakings by the company are not favored. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410; *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845. Nevertheless, it is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties. *Hardin v. Insurance Co.*, 261 N.C. 67, 134 S.E. 2d 142; *Richardson v. Insurance Co.*, 254 N.C. 711, 119 S.E. 2d 871; *Pruitt v. Insurance Co.*, 241 N.C. 725, 86 S.E. 2d 401.

The terms of another contract between different parties cannot affect the proper construction of the provisions of an insurance policy. The existence of the second contract, whether an insurance policy or otherwise, may or may not be an event which sets in operation or shuts off the liability of the insurance company under its own policy. Whether it does or does not have such effect, first requires the construction of the policy to determine what event will set in operation or shut off the company's liability and, second, requires a construction of the other contract, or policy, to determine whether it constitutes such an event. A provision in a policy of insurance is not rendered invalid by the presence of a "repugnant" provision in another policy of insurance issued by a different company to a different policyholder, but the other policy, by reason of its own terms, properly construed, may fall outside the class of events which the first policy declares to be exclusions from or limitations upon the liability of the company issuing the first policy.

In *Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161, Moore, J., speaking for the Court, said:

> "An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. It is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decision."

In the present case we have two policies of liability insurance issued by different companies to different policyholders. The liability of each company must be determined by the terms of its own policy, subject to such modification as may be imposed by statute or by authorized administrative regulation or order. It is clear that

each policy would provide coverage to Mrs. Widenhouse against liability upon the claim of David Elroy Clontz had the other policy not been in existence.

The principal questions to be determined on this appeal are: (1) Is the existence of the Allstate policy an event which brings into operation the exclusionary clause of the Shelby Mutual policy? (2) Is the existence of the Shelby Mutual policy an event which brings into operation the provision of the Allstate policy deferring liability of Allstate? (3) Does the fact that Mrs. Widenhouse was driving an automobile, owned by a dealer, for the purpose of deciding whether to buy it, constitute an event which brings into operation the exclusionary provision of the Allstate policy relating to a non-owned automobile used by the insured "in the automobile business"?

We turn to the last question first since, if it be answered as Allstate contends it should be, that will determine the answer to question No. 1, and make it unnecessary to answer question No. 2.

There is no liability upon Allstate, under the terms of its policy, if, at the time of the injury to the Clontz boy, Mrs. Widenhouse was driving this automobile "in the automobile business"; that is, in "the business or occupation of selling * * * automobiles." Under the rule above stated, this exclusionary clause in the Allstate policy must be construed in favor of the insured; that is, in favor of the existence of coverage for Mrs. Widenhouse, if this is a reasonable interpretation of the language used in the policy.

It will be observed that the operation of this exclusionary clause in the Allstate policy is not contingent upon the existence of any other insurance covering Mrs. Widenhouse while so driving this automobile. Thus, if it be construed as Allstate contends, the holder of such an Allstate policy test drives the vehicle of a dealer at his peril. Unless the dealer has a policy of insurance in effect and covering the prospective customer so driving the automobile to the full extent of the coverage specified in the driver's own policy, the driver is wholly or partially uninsured while so driving.

We dealt with this problem in *Jamestown Mutual Insurance Co. v. Nationwide Mutual Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410. There we said: "It would be a strained construction of the phrase, 'used in the automobile business,' to apply it to a prospective purchaser of a vehicle who is 'trying it out' to see if he likes it." Accordingly, we there held that this exclusionary clause is not brought into operation by the fact that a prospective purchaser of an automobile, owned by a dealer, is driving it with the dealer's permission, to see if he wishes to purchase it, neither the dealer nor any of his representatives being present. We reaffirm that decision.

Consequently, the Allstate policy does afford some coverage to

Mrs. Widenhouse against the claim of the Clontz boy for his injuries. We come, therefore, to the question of whether its liability is affected by the existence of the Shelby Mutual policy, which, in turn, depends upon whether the existence of the Allstate policy is an event bringing into play the exclusionary clause of the Shelby Mutual policy. We first turn to the construction of the Shelby Mutual policy, irrespective of the provisions of the North Carolina Financial Responsibility Law, G.S. 20-279.1, *et seq.*, and without regard to regulations of the North Carolina Department of Motor Vehicles.

There is no uniformity among the decisions of other courts upon this and closely related questions, but much of the apparent lack of harmony in these decisions disappears upon a careful analysis of the factual situations presented to those courts. Few of the decisions from other jurisdictions involved policies containing the exact language in the two policies now before us. The answers to the questions now before us depend upon the constructions to be placed upon the language in these policies. Decisions from other jurisdictions as to the meaning and effect to be given to policies containing different language are helpful only insofar as they outline or point to broad, general principles to be applied in the construction of exclusionary or limiting provisions of policies of automobile liability insurance.

In the frequently cited case of *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F. 2d 958, the court had before it two policies not precisely like those now before us. There, the policy issued to the driver provided that, as to a claim arising out of his use of an automobile other than the one specified, it would be "excess" insurance over and above "other valid and collectible insurance." The policy issued to the car owner provided that it did not insure one other than the named insured if he had "other valid and collectible insurance." The court said, "It is plain that if the provisions of both policies were given full effect, neither insurer would be liable." This result, the court rejected.

We, likewise, reject such a result in the present case. To do so, it is not necessary to hold that the law requires one or both companies to be liable, and forbids the use of language in the respective policies which would relieve both from liability. In the present case, it is sufficient to state that it was clearly not the intent of the parties to the Shelby Mutual policy, or of the parties to the Allstate policy, that Mrs. Widenhouse would be an uninsured motorist while driving the automobile in question. The language used is not fairly susceptible to that interpretation. The Shelby Mutual policy was intended by its parties to provide coverage to Mrs. Widenhouse while driv-

ing the automobile, unless the event named therein occurred; that is, unless there was in effect a policy of another insurer of a type described in the Shelby Mutual policy. Similarly, the Allstate policy was intended by the parties thereto to provide primary coverage to Mrs. Widenhouse while driving this automobile, unless there was in effect the policy of another insurer of the type referred to in the limitation clause.

In the *Oregon Auto Insurance Company* case, *supra,* the court held that both policies covered the claim in question and the loss should be prorated between the two companies, saying:

> "In our opinion the 'other insurance' provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them. We understand the parties to concede that where neither policy has an 'other insurance' provision, the rule is to hold the two insurers liable to prorate in proportion to the amount of insurance provided by their respective policies. Here, where both policies carry like 'other insurance' provisions, we think [they] must be held mutually repugnant and hence be disregarded."

Thus, the court in that case construed each policy as not being the event specified in the limitation or the exclusionary provision of the other policy. Consequently, as to each policy, it held that the event, upon which the limitation or exclusion of liability depended, had not occurred and, as a result, each company remained liable without limitation or deferment. Without either approving or disapproving the correctness of the principle of construction there applied, or the court's conclusion that the two policies there involved contained "like" provisions, we note that the "other insurance" provisions of the two policies before us are not "like" provisions.

In the leading case of *Zurich General Accident Liability Ins. Co. v. Clamor,* 124 F. 2d 717, the Zurich policy, issued to the owner of the car, provided that its coverage did not extend to "any person * * * with respect to any loss against which he has other valid and collectible insurance," whereas the other company's policy issued to the driver, provided that, as to his use of a non-owned car, the coverage of the policy would be "excess" over other valid and collectible insurance available to him. The court said:

> "A decision must rest upon a construction of the language employed by the respective insurers. * * * It will be noted that the language employed by Zurich in this respect is general in nature, while that employed by Car & General is specific, or, at any rate, more specific than Zurich. * * * The 'excess

insurance' provided by the latter is not 'other insurance' required by Zurich."

For this reason, the court there held that the event specified in *Zurich's* exclusionary clause had not happened and, therefore, the *Zurich* policy was in full force. This, in turn, was the precise event which set in operation the limitation or deferment clause of the other company's policy. Consequently, *Zurich* was held to be primarily liable for the loss in that case.

It is apparent that the *Zurich* case did not hold that there is an inherent quality in an "excess" clause which makes it impossible for a company to provide in its own policy that its liability shall be excluded by the existence of another policy containing an "excess" clause.

Subsequent cases, citing the *Zurich* case as authority, have not always noted this reason for the decision there rendered. However, it is observed in 8 Appleman, Insurance Law and Practice, § 4914, where it is said:

> "It has been held that where the owner of an automobile or truck has a policy with an omnibus clause, and the additional insured also has a non-ownership policy which provides that it shall only constitute excess coverage over and above any other valid and collectible insurance, the owner's insurance has the primary liability. In such case, the liability of the excess insurer does not arise until the limits of the collectible insurance under the primary policy have been exceeded. It should be noted that under this rule, the courts give no application to the other insurance clause in the primary policy, which provides that if additional insured has other valid and collectible insurance, he shall not be covered by the primary policy. *That is because the insurance under the excess coverage policy is not regarded as other collectible insurance, as it is not available to the insured until the primary policy has been exhausted. Or, to put it another way, a non-ownership clause, with an excess coverage provision, does not constitute other valid and collectible insurance within the meaning of a primary policy with an omnibus clause.*" (Emphasis added.)

In the recent case of *New Amsterdam Cas. Co. v. Certain Underwriters (Lloyds)*, 34 Ill. 2d 424, 216 N.E. 2d 665, the Lloyds' policy provided that an insured, other than the named insured, if "also covered by other valid and collectible insurance, * * * shall not be indemnified under this policy." The Illinois Court, citing the above statement in Appleman, held that such exclusionary

clause was not set in operation by the existence of another policy containing an "excess" clause. The reason given by the court was "because plaintiff's policy was not 'other' insurance but rather 'excess' coverage." That is, the Illinois Court held an "excess" policy was not the kind of policy specified in the Lloyds' policy as the event which would set Lloyds' exclusionary clause in operation.

The present case presents a different situation. Here, the Shelby Mutual policy is not ambiguous with reference to the intent of the parties to exclude coverage under it where the other policy contains an "excess" clause. The Shelby Mutual policy expressly makes the existence of such "excess" policy an event which sets the Shelby Mutual's exclusionary clause into operation. It states that a person in the category of Mrs. Widenhouse is an insured thereunder, "but only if no other valid and collectible automobile liability insurance, *either primary or excess,* * * * is available to such person." (Emphasis added.)

The clear meaning of this provision is that the existence of an "excess" policy (the Allstate policy) is an event which prevents the Shelby Mutual policy from operating at all with reference to Mrs. Widenhouse. Consequently, the event which would set in operation the limitation or deferment clause of the Allstate policy has not occurred, unless there is some statutory provision, or some authorized administrative regulation or order, which requires that the Shelby Mutual policy be given a different construction.

The construction and effect which we give to the exclusionary clause in the Shelby Mutual policy finds support in the decision of the Supreme Court of Florida in *Continental Cas. Co. v. Weekes,* 74 So. 2d 367, 46 A.L.R. 2d 1159. The Louisiana courts have taken a different view of the matter. *State Farm Mutual Auto. Ins. Co. v. Travelers Ins. Co.,* 184 So. 2d 750, cert. den., 249 La. 454, 187 So. 2d 439; *Lincombe v. Ins. Co.,* 166 So. 2d 920. The Louisiana cases start with the premise that the exclusionary clause in the one policy and the excess clause in the other policy are "like" provisions. From this premise, just as was done in *Oregon Auto Insurance Co. v. United States Fidelity & Guar. Co., supra,* they proceed to the conclusion that neither the exclusionary clause in the one policy (Shelby Mutual) nor the limitation or deferring clause in the second (Allstate) is set in operation by the existence of the other policy. We consider that premise to be unsound.

It remains to be considered whether the exclusionary clause in the Shelby Mutual policy is invalid on the ground that it violates the requirements of the Motor Vehicle Financial Responsibility Law, G.S. 20-279.1, *et seq.,* or is in conflict with authorized administrative regulations issued by the Department of Motor Vehicles.

The purpose of the Financial Responsibility Law is to protect victims of automobile accidents. Ambiguous provisions of the law must be construed so as to accomplish that purpose, and a provision in a policy of liability insurance which contravenes that Act is void. *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654.

To give effect to the Shelby Mutual exclusionary clause does not leave either the injured boy or Mrs. Widenhouse, the driver, without the benefit of liability insurance to the full extent contemplated by the statute. The provision is that the Shelby Mutual policy does not apply if there is available to Mrs. Widenhouse "other valid and collectible automobile liability insurance * * * with limits of liability at least equal to the minimum limits specified by the Financial Responsibility Law." The Allstate policy provides her with insurance up to those limits if the Shelby Mutual's exclusionary clause is given full effect.

The purpose of the Financial Responsibility Law, and the policy of the State expressed therein, are not violated by the Shelby Mutual policy. On the contrary, that policy assures that there will be "valid and collectible" insurance in effect up to the amount required by the law. If it is not provided by another policy (Allstate's), the Shelby Mutual policy will provide such insurance. Neither the language of the statute nor the policy which caused its adoption is concerned with which company provides the coverage. The Act expressly provides, G.S. 20-279.21(j), "The requirements for a motor vehicle liability policy may be fulfilled by the policies by one or more insurance carriers which policies together meet such requirements."

Concord Motors, the owner of the automobile driven by Mrs. Widenhouse and the named insured in the Shelby Mutual policy, was required by G.S. 20-279.21(a) to have an "owner's policy" applicable to this automobile. G.S. 20-279.21(b)(2) provides that an owner's policy "shall insure the person named therein and any other person, as insured, using any such motor vehicle * * * with the express or implied permission of such named insured" up to the limits specified in the Act. We hold that this statute is satisfied by a policy which provides such insurance to such person subject to the provision that it will not apply if other valid and collectible insurance, in the amount required by the Act, is provided to such person by a different policy. In either event, the injured person has available the full amount of insurance required by the statute and the full purpose of the statute has been accomplished.

The same question was before the Supreme Court of Florida in *Continental Cas. Co. v. Weekes, supra.* That Court said:

> "There is no basis in the record before us for the conclusion that public policy will be violated by the enforcement of clause 3(b)(4) [identical with the clause in the Shelby Mutual policy here involved], although we cannot and do not hold that this will be true in every case. For aught that appears here, sufficient financial responsibility is provided for the protection of the public, and this is nothing more than a contest between insurance companies."

The regulations promulgated by the Department of Motor Vehicles with reference to the filing by automobile dealers of proof of financial responsibility, which are set forth in the record, do not, in our opinion, purport to require proof in addition to that required by the statute. It is, therefore, unnecessary to determine in this case what would be the effect of a regulation which did purport to impose requirements exceeding those of the statute. Since the Shelby Mutual policy is in compliance with the statutory requirement, it follows that it does not violate the regulation of the Department of Motor Vehicles. The certification by Concord Motors of such policy to the Department of Motor Vehicles as proof of its financial responsibility does not enlarge the liability of Shelby Mutual under the policy.

The court below erred in its conclusion that Mrs. Widenhouse is an insured under the Shelby Mutual policy. Consequently, it erred in adjudging that Shelby Mutual has any liability for the payment of any judgment recovered against Mrs. Widenhouse upon a claim arising out of the accident referred to in the pleadings. The court below was correct in adjudging that the Allstate policy affords protection, up to the maximum limits of liability set out therein, to Mrs. Widenhouse with respect to such accident and that, up to such limits, Allstate is under a duty to pay any judgment recovered against her by reason of such accident. The court was in error in holding that Shelby Mutual has a duty to defend Mrs. Widenhouse in any action brought against her by reason of such accident. The court was correct in holding that Allstate does have such duty to defend Mrs. Widenhouse in any such action. The judgment rendered below must, therefore, be reversed and the cause remanded for the entry of a judgment in accordance with this opinion.

Reversed and remanded.

GOVERNMENT EMPLOYEES INSURANCE COMPANY v. LUMBERMENS MUTUAL CASUALTY COMPANY, MAE BEAL WALLACE, EUGENE TATUM, ANNIE RUTH TATUM AND CARR MOTOR COMPANY.

(Filed 3 February, 1967.)

1. Insurance § 59—

A clause excluding liability under a policy of automobile insurance if the accident occurs while insured is using the vehicle in the automobile business does not apply when insured is driving a car as a prospective purchaser from an automobile dealer, since such use by insured is not a use in insured's automobile business.

2. Same—

An exclusion clause of a garage liability policy *is held* effective when a prospective purchaser is covered by other valid and collectible insurance.

3. Same—

A provision in a liability policy excluding coverage if the accident in question is covered by other valid and collectible insurance does not contravene the Financial Responsibility Law, and therefore in an action involving the validity of such exclusion clause, the conclusion of the trial court that the clause was rendered valid by reason of its approval by the Insurance Commissioner, is not germane and is deleted.

4. Same—

Whether a claim comes under the exclusion from liability under a clause relating to other insurance is to be determined by construction of the policy to determine what event will activate the exclusion, without regard to the terms of the other contract of insurance, and therefore there can be no conflict between the exclusion clauses in separate policies of liability insurance.

APPEAL by plaintiff from *Cowper, J.*, at the 29 August 1966 Civil Session of CUMBERLAND.

This is a suit for a declaratory judgment to determine to what extent, if any, automobile liability insurance coverage is afforded to Eugene R. Davis, with reference to claims arising out of an automobile collision on 11 October 1963, by a policy issued to Davis by the plaintiff, hereinafter referred to as GEICO, and by a policy issued by Lumbermens Mutual Casualty Company, hereinafter called Lumbermens, to Carr Motor Company.

The pertinent provisions of the GEICO policy are identical with those contained in the Allstate policy involved in the case of *Allstate Insurance Company v. Shelby Mutual Insurance Company*, ante 341 decided this day, and the pertinent provisions of the Lumbermens' policy are identical with those contained in the Shelby Mutual policy there involved. Reference is made to the statement of facts in that case for such policy provisions.

It is the contention of GEICO that no coverage is afforded by

its policy with reference to such claims, but if its policy is applicable thereto it provides only "excess coverage" over the coverage afforded by the Lumbermens' policy. It is contended by Lumbermens that its policy affords no coverage with reference to these claims.

The superior court adjudged that GEICO's policy affords primary coverage to Davis with respect to such claims, up to the limits of liability set forth therein, and that the Lumbermens' policy does not afford coverage to Davis, or to any other party to this action except Carr Motor Company, with respect to such claims.

The defendants Mae Beal Wallace, Eugene Tatum, Annie Ruth Tatum and Carr Motor Company were duly served with summons and copies of the complaint. None of them filed answer or other pleading, the time for filing such pleading having expired prior to the hearing of the matter in the superior court. Davis was not made a party.

The parties waived trial by jury and the matter was heard by the court on the pleadings and stipulated facts, the defendant Wallace, through her attorney, having agreed to such stipulations and having agreed to be bound by the judgment.

Upon the pleadings and such stipulations, the court made findings of fact, to which no exception is taken. The pertinent facts, other than the provisions of the respective policies, are:

At the time of the collision in question, there was in full force and effect a policy of automobile liability insurance issued by GEICO to Davis covering certain automobiles owned by Davis.

There was also in full force and effect at the time of the collision a policy issued by Lumbermens to Carr Motor Company, a dealer in automobiles, covering all automobiles owned by it.

On 11 October 1963, Davis was driving a car owned by Carr Motor Company, with its permission, his purpose being to determine whether he would buy it. The automobile so driven by Davis collided with an automobile owned by Eugene Tatum and driven by Annie Ruth Tatum, his wife, Mae Beal Wallace being a passenger in the Tatum car and sustaining injuries for which she has made a claim for damages against Davis and Carr Motor Company.

At the time of the collision in question, the automobile so driven by Davis bore a dealer's license plate issued to the Carr Motor Company by the Department of Motor Vehicles. The regulations of that Department, issued pursuant to G.S. 20-315, provide that dealer license plates shall not be issued unless the dealer, at the time of his application therefor, presents to the Department of Motor Vehicles proof of financial responsibility, which shall be evidenced by a "certificate of insurance or certificate of financial security bond or a financial security deposit or by qualification as a self-insurer,

as those terms are defined in Article 9A, Chapter 20, of the North Carolina General Statutes."

GEICO notified Lumbermens of its contention and demanded that Lumbermens provide a defense for Davis and pay any judgments which may be rendered against him as a result of the collision on 11 October 1963, which demand Lumbermens rejected, contending that its policy affords no coverage for Davis.

Davis, who is not a party to this action, has also made demand both upon GEICO and upon Lumbermens that he be furnished with a defense and that any judgment rendered against him by reason of the said collision be paid.

Upon these findings of fact the superior court reached the following conclusions of law:

"1. The court has jurisdiction of the parties and the subject matter; an actual controversy exists between the parties; and that the action is the proper subject of declaratory judgment.

"2. Except for the 'approval' of the Commissioner of Insurance of Endorsement No. 12 in Lumbermens' policy, paragraph 6 of Findings above, the same would be in conflict with the provisions of G.S. of N.C. 20-279.21. (Approval of this endorsement by the Commissioner of Insurance eliminated this conflict and made the Endorsement valid.)

"3. (The automobile being driven by Davis, but owned by Carr Motor Company was not being used in the automobile business 'by the insured' at the time of the accident herein involved so as to bring its use within the 'Exclusion' of GEICO's policy, Paragraph 9 of Findings.)

"4. While the 'escape' provisions of Endorsement 12 of Lumbermens' policy, Paragraph 6 of Findings, and the 'excess' provisions of GEICO's policy, Paragraph 9 of Findings, are in conflict, (GEICO's policy afforded coverage for Davis driving a 'non-owned' automobile under its insuring agreement which reads: * * *)

"5. (At the time of and with respect to said accident of October 11, 1963, GEICO's policy constituted 'other valid and collectible automobile liability insurance, either primary or excess, with limits of liability at least equal to the minimum limits specified by the financial responsibility law of the state in which the automobile is principally garaged' available to Davis, and therefore under the express language of Endorsement 12 of the policy issued by Lumbermens, Davis was not a person insured under Lumbermens' policy, and said policy is not applicable to and did not afford coverage to him either pri-

mary or excess with respect to said accident and any claims and lawsuits arising out of it.)"

Upon these conclusions the court entered its judgment as summarized above.

GEICO assigns as error those portions of the conclusions enclosed in parentheses, and each of the adjudications of the court.

Anderson, Nimocks & Broadfoot by Henry L. Anderson for plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis for defendant appellee.

LAKE, J. The questions presented by this appeal are identical with those decided this day in *Allstate Insurance Company v. Shelby Mutual Insurance Company, et al.,* 269 N.C. 341, 152 S.E. 2d 436. For the reasons there stated, the judgment rendered below in this case is affirmed. We do not, however, approve the superior court's conclusion of law No. 2 above quoted. As we held in the above mentioned case, the Lumbermens' policy, as modified by the endorsement, does not conflict with G.S. 20-279.21 and, therefore, it is not necessary to determine, in this action, the effect of an approval by the Commissioner of Insurance of a provision in an endorsement upon an insurance policy which conflicts with the requirements of the statute cited.

Neither do we approve the statement in the superior court's conclusion of law No. 4 to the effect that the "escape" clause of the Lumbermens' policy and the "excess" provision of GEICO's policy are in conflict. As pointed out in *Allstate Insurance Company v. Shelby Mutual Insurance Company, et al., supra,* these provisions are contained in separate and distinct contracts between different parties. The terms of each contract must be construed in accordance with the intent of the parties to that contract, subject to possible modification by statutory requirements. The provisions of one of these contracts cannot change the meaning of the other. The question is whether the existence of the GEICO policy, properly construed, is an event which brings into operation the exclusionary clause of the Lumbermens' policy, properly construed.

Notwithstanding these erroneous portions of its conclusions of law, the superior court's adjudications of the rights of the parties are in accord with our decision in the *Allstate* case, *supra.*

Affirmed.

FIREMAN'S FUND INSURANCE COMPANY AND THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY.

(Filed 3 February, 1967.)

1. Insurance § 66.1—

Insured assumes no liability to the attorneys employed and paid by insurer in defending claim against insured, and therefore the amount paid by insurer to its attorneys in defending the suit may not be recovered under the subrogation clause of its policy.

2. Insurance § 63—

The obligation of a liability insurer to defend an action brought by the injured third party against insured upon allegations bringing the claim within the coverage of the policy, is absolute and separate and apart from the policy provisions limiting liability under the policy to the amount recovered by such third party in excess of all other valid and collectible insurance.

3. Insurance § 3—

Ambiguous provisions of an insurance policy are to be construed in favor of the insured.

4. Same; Insurance § 59— Excess insurer may not recover fees paid to its attorneys against primary insurer settling claim.

The injured party brought suit against the named insured in an automobile liability policy and against the driver of the truck owned by the named insured. The insurer in the policy defended the action on behalf of the named insured while refusing to defend it on behalf of the driver, but nevertheless obtained a settlement by a consent judgment discharging the liability of the insured and the driver. Upon the refusal of the insurer to defend the action in regard to the driver, the driver called on his liability insurers, in policies covering only liability in excess of other insurance, to defend the action, but they withdrew upon discovering facts excluding coverage of their policies. The driver's insurers then brought this action against the insurer in the owner's liability policy to recover the amount expended by them for attorneys' fees prior to the withdrawal of their attorneys. *Held:* Judgment denying recovery was properly entered.

APPEAL by plaintiffs from *McKinnon, J.*, at the 22 August 1966 Mixed Session of WAKE.

This is an action to recover fees paid by the plaintiffs to attorneys employed by them to defend a suit against their insured, Jerry Denning. That suit was brought by Edith Denning against Jerry Denning and Charles Denning for damages on account of an injury alleged by her to have been caused by the negligent operation by Jerry Denning of a truck owned by Charles Denning.

The plaintiffs now sue on the theory that they are subrogated, by the terms of their policies and by operation of law, to a right of Jerry Denning against the defendant. They contend that a policy

of automobile liability insurance issued by the defendant to Charles Denning afforded, with reference to the accident in question, primary insurance coverage to Jerry Denning and obligated the defendant to defend on his behalf the action brought by Edith Denning. They contend that their own policies, issued to Jerry Denning, were, with reference to the accident in question, excess insurance only. They allege that after the defendant refused to defend on behalf of Jerry Denning the action brought by Edith Denning, he made demand upon the plaintiffs to defend the action, which they did under the erroneous belief that the claim of Edith Denning was covered by their respective policies. Upon discovering facts by which her claim was excluded from the coverage of their policies, they withdrew their defense of the action and paid the attorneys for the services rendered to that point. Subsequently, the defendant reached a settlement with Edith Denning and obtained from her a release both of Charles Denning and of Jerry Denning.

The matter was heard without a jury upon the pleadings and stipulated facts. The significant facts so stipulated, summarized in the interest of brevity, are:

The policy issued by the defendant to Charles Denning insured against liability any person using the truck with his permission. Jerry Denning was so using the truck at the time of the injury of Edith Denning. He was, therefore, an "insured" under the policy. The policy provided that the defendant would "defend any suit against the insured" seeking damages on account of an injury for which the policy afforded liability coverage and would pay the expenses of such defense in addition to the $5,000 limit of liability for injury to one person.

Each plaintiff issued to Jerry Denning, as owner of another automobile, its policy which provided liability coverage to him when using an automobile not owned by him, but provided that such insurance with respect to the use of a non-owned automobile would be "excess insurance over any other valid and collectible insurance." Each of these policies also provided that the company would defend, at its expense, any suit against Jerry Denning alleging an injury within its liability coverage. Each policy also provided that in event of any payment under the policy, the company would be subrogated to all the insured's rights of recovery therefor against any person or organization.

The action by Edith Denning was for recovery of an amount far in excess of the coverage under the defendant's policy. Her complaint alleged facts, which, if true, constituted a cause of action in her favor against both Jerry Denning and Charles Denning by reason of the negligence of Jerry in the operation of the truck.

Jerry Denning demanded of the defendant that it afford him a defense to the action brought by Edith Denning. The defendant denied any coverage to Jerry Denning under its policy, because of certain exclusory provisions, and refused to defend the suit on his behalf, but did defend it on behalf of Charles Denning.

Thereupon, Jerry Denning demanded of the plaintiffs that they defend on his behalf the action brought by Edith Denning. The plaintiffs, subject to a reservation of their rights to disclaim coverage, employed attorneys to represent him in that action.

As a result of an adverse examination of Edith Denning by these attorneys, the plaintiffs disclaimed coverage to Jerry Denning on account of her claim, and notified him that the attorneys so employed by the plaintiffs would seek permission of the court to withdraw as his counsel. This they did and the court permitted them to withdraw. The plaintiffs thereupon paid the attorneys for their services to that point, this being the amount they now seek to recover of the defendant.

Thereafter, the defendant settled the claim of Edith Denning and obtained from her a full release of "Charles E. Denning * * * and all other persons." Her action was dismissed by a consent judgment joined in by all parties thereto.

The trial court found the foregoing facts, and concluded thereon, as matters of law: The policy issued by the defendant afforded coverage to Jerry Denning with reference to the claim of Edith Denning; the defendant was obligated by its policy to provide him with a defense to her action; but the plaintiffs are not subrogated to his right to have such defense provided by the defendant and, therefore, are not entitled to recover from the defendant the attorneys' fees for which they sue. The plaintiffs assign as error the conclusions that they are not subrogated to the rights of Jerry Denning and are not entitled to recover the fees for which they sue.

Dupree, Weaver, Horton, Cockman & Alvis for plaintiff appellants.

Broughton & Broughton for defendant appellee.

LAKE, J. Each of the plaintiffs, by its policy, contracted with Jerry Denning to do two different things. First, it contracted to pay on his behalf all sums for the payment of which he became legally liable, because of bodily injury sustained by any person arising out of the use of an automobile not owned by him, to the extent that such liability exceeded other valid and collectible insurance and did not exceed the limit fixed by its policy. Second, it contracted to defend, at its expense, on his behalf, any suit, even though groundless,

brought against him, alleging such bodily injury and seeking damages payable under the terms of the policy.

It will be observed that the first of these undertakings requires the plaintiff company to step into the shoes of Jerry Denning and pay a sum for the payment of which he became liable. The second undertaking is not of that nature. In the performance of it the company does not step into the shoes of the policyholder. Its liability under that undertaking is not contingent upon the existence of a liability on his part, and its performance of that undertaking does not impose any liability upon him. That undertaking is absolute.

The attorneys employed to defend such suit were selected by the company and looked to it for their compensation. At no time did Jerry Denning have any liability to the attorneys. He made no payment to them. He, therefore, never had a right of recovery, against any person or organization, because of fees paid to these attorneys. Consequently, the subrogation provisions of the policies issued to him by the plaintiffs have no application, since they provide only that the issuing company will be subrogated "to all the insured's rights of recovery" for any payment made by the company.

The plaintiffs are, therefore, not entitled to recover of the defendant in this action unless, as a matter of law, apart from these subrogation clauses, there is a right in the plaintiffs to such recovery.

It is elementary that provisions of an insurance policy, if ambiguous, are to be construed in favor of the insured. *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845; *Walsh v. Insurance Co.*, 265 N.C. 634, 144 S.E. 2d 817; *Mills v. Insurance Co.*, 261 N.C. 546, 135 S.E. 2d 586.

The policy issued by the defendant provided, "with respect to such insurance as is afforded by this policy for bodily injury liability," the defendant would defend any suit against the insured (*i. e.*, Jerry Denning), alleging such injury and seeking damages on account thereof, the expenses of defending such suit to be "in addition to the applicable limit of liability of this policy." When this provision in the defendant's policy and the above mentioned "excess insurance" provisions of the plaintiffs' policies are construed in favor of Jerry Denning, it is apparent that the "excess" clauses of the plaintiffs' policies relate to the amount to be paid in discharging the liability, if any, of the insured to a third party claimant. Irrespective of the existence of other insurance available to Jerry Denning, each of the plaintiffs, by its own policy, came under a duty to him to defend on his behalf a suit against him by a third party claimant, even though groundless, if in such suit the third

party claimant alleged facts which, if true, imposed upon Jerry Denning a liability to such claimant within the coverage of such plaintiff's policy.

If the complaint of Edith Denning alleged a right to recover damages within the liability coverage afforded to Jerry Denning by the policy issued by either plaintiff, its duty to defend on his behalf, at its expense, such suit was absolute and was separate and apart from any right in him to call upon the defendant for such a defense. He was entitled under the several policies to demand of each, or all, or any two, of the companies a full and complete defense against the suit so brought against him. As to him, none of the three promises to defend was "excess" protection or secondary to the undertaking of either of the other two companies, assuming the claim of Edith Denning to be within the liability coverage of all of the policies.

These contractual obligations of the three insurance companies to defend a suit brought against Jerry Denning do not arise out of a single contract to which all three companies are parties either jointly or severally, or primarily or secondarily. The obligation of each company arises out of its own, separate contract and is an absolute, unqualified undertaking to defend on behalf of Jerry Denning a suit brought against him.

It was the defendant in this action, not the plaintiffs, who brought to a conclusion the suit of Edith Denning against Jerry Denning. It did so without any loss or liability to Jerry Denning. He has paid no attorneys' fees and never incurred an obligation to do so. Under these circumstances, the record shows no damage sustained by Jerry Denning as a result of the defendant's original refusal to defend on his behalf the suit brought by Edith Denning. Jerry Denning, therefore, did not have and does not have a right to recover damages from the defendant. Since the second theory of the plaintiffs' complaint is that they are, by operation of law, "subrogated to the right of Jerry W. Denning against the defendant," their right of recovery in this action can rise no higher than his.

The record in this action does not show anything concerning the nature and extent of the services rendered by the attorneys employed by the plaintiffs except: They "appeared" for Jerry Denning, from which it may be inferred that they filed answer on his behalf; they took an adverse examination of Edith Denning, by which they determined to their satisfaction that her claim was not within the liability coverage afforded to Jerry Denning by the policies of the plaintiffs; and they, thereupon, moved for and obtained leave of the court to withdraw as counsel for Jerry Denning. There is in this record nothing to indicate that the defendant received the

benefit of any legal research or of any investigation made by the attorneys, or that the defendant's settlement and disposition of the Edith Denning suit was facilitated in any way by the services of the attorneys so employed by the plaintiffs. Thus, the plaintiffs are not entitled to recover upon any theory of benefits derived by the defendant from such services.

It is to be noted that in her suit Edith Denning demanded damages far in excess of the maximum amount which the defendant would, by its policy, have been obligated to pay upon any judgment recovered by her against Jerry Denning. The plaintiffs, therefore, had an interest of their own to protect in her action and were entitled to employ attorneys to participate in its defense for that purpose. Fees paid to attorneys employed for such purpose could not have been recovered from the defendant if the defendant, itself, had also undertaken the defense of the action on behalf of Jerry Denning. See *McCabe v. Assurance Corp.*, 212 N.C. 18, 192 S.E. 687.

Upon this record, we do not reach and do not undertake to decide the interesting question of the right of an "excess" liability insurer to recover from a "primary" liability insurer its expenditures in defending to a conclusion an action against a person insured by both upon a claim within the coverage of the policies of both, the "primary" liability insurer having failed to settle or to defend the action. That question has not yet been determined by this Court. The authorities from other jurisdictions are in conflict. Holding that the "excess" insurer is not entitled to recovery from the "primary" insurer in absence of a specific contractual provision, see: *United States Fidelity & Guar. Co. v. Tri-State Ins. Co.*, 285 F. 2d 579; *Continental Casualty Co. v. Curtis Pub. Co.*, 94 F. 2d 710; *United States Fidelity & Guaranty Co. v. Church*, 107 F. Supp. 683. Allowing recovery by the "excess" insurer, see: *American Surety Company of N. Y. v. Canal Ins. Co.*, 258 F. 2d 934; *Employers' Liability Assur. Corp. v. Indemnity Ins. Co.*, 228 F. Supp. 896; *Continental Casualty Co. v. Zurich Insurance Co.*, 17 Cal. Rptr. 12, 366 P. 2d 455, reversing *Financial Indemnity Co. v. Colonial Insurance Co.*, 132 Cal. App. 2d 207, 281 P. 2d 883; *National Farmers U. Prop. & Cas. Co. v. Farmers Ins. Group*, 14 Utah 2d 89, 377 P. 2d 786. See also: 7A Appleman, Insurance Law and Practice, § 4691, and *American F. & C. Co. v. Pennsylvania T. & F. M. Cas. Ins. Co.*, 280 F. 2d 453, footnote 11, in which other authorities pro and con are collected.

Since, upon the facts in this record, the trial court properly held that the plaintiffs are not entitled to recover any amount from the defendant on account of attorneys' fees paid by them, it was not necessary for the trial court to determine the reasonableness of the

fees so paid, or to determine what portion thereof was paid for services rendered in establishing that the claim of Edith Denning was not covered by the policies issued by the plaintiffs. The assignment of error with reference to the court's failure to find that the amount so paid by the plaintiffs was the reasonable value for services rendered by the attorneys in defending the action is, therefore, not sustained. This is not to be deemed a suggestion that the fees exceeded the value of the services rendered by the attorneys to the plaintiffs.

Affirmed.

FRANK PENDERGRASS (WIDOWER) AND RUTH PENDERGRASS (SINGLE), v. E. S. MASSENGILL AND WIFE, MARGARET T. MASSENGILL, HOME SAVINGS & LOAN ASSOCIATION, SAMUEL F. GANTT, TRUSTEE, RALPH B. MASSENGILL, CONSERVATOR, AND RALPH B. MASSENGILL, GUARDIAN OF E. S. MASSENGILL.

(Filed 3 February, 1967.)

1. Appeal and Error § 38—

Exceptions not discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Appeal and Error § 49—

Where there is sufficient competent evidence to support a finding of fact by the court, it will be presumed that the court disregarded incompetent evidence tending to support the same finding.

3. Same—

Findings of fact supported by competent evidence are conclusive on appeal.

4. Cancellation and Rescission of Instruments § 4; Unjust Enrichment § 2—

The owner, due to mistake, conveyed lot 13 to a purchaser instead of conveying intended lot 15. The purchaser executed a deed of trust. In proceedings to rectify the error the deed of trust was foreclosed and the land bid in by the original owner and the deed of trust discharged out of the proceeds of sale. *Held:* The *cestui*, having been reimbursed only for monies advanced by it, may not be held liable to the original owner for any payment made by him in his endeavor to rectify the error. The same result follows as to the trustee in a second deed of trust, executed by the grantee to the original owner, which was wiped out by the foreclosure.

5. Same; Mortgages and Deeds of Trust § 1— Court decreeing cancellation of deed for mistake may decree equitable lien in favor of grantee for improvements and amount paid on purchase price.

The owner, due to mistake, conveyed lot 13 to a purchaser instead of conveying intended lot 15. The purchaser executed a deed of trust. Pursuant to an agreement to rectify the mistake, the purchaser allowed the deed of trust to become in default and to be foreclosed, but, contrary to the agreement, the original owner bid in the property. Upon discovering that the original owner had bid in the property, the attorney for the grantee registered the deed to lot 15 which had been executed by the original owner pursuant to the agreement to rectify the mistake. *Held:* Judgment in the owner's suit decreeing the cancellation of the deed to lot 15 correctly awarded the grantee an equitable lien in the amount of that part of the purchase price paid by the grantee, together with the amount which the improvements made on the land by the grantee had enhanced its value, and the original owner, having brought about the collapse of the plan to rectify the error, is not entitled to credit on the equitable lien for the rental value during the occupancy of the grantee.

APPEAL by plaintiffs from *Hobgood, J.*, at the 6 June 1966 Civil Session of DURHAM.

In their complaint the plaintiffs allege that a deed executed by them, which purports to convey to E. S. Massengill and wife, Margaret T. Massengill, a fee simple estate in a certain lot, hereinafter referred to as Lot 15, is a cloud upon the title of the plaintiffs to such lot. The prayer for judgment is that the alleged cloud be removed from the plaintiff's title, that the plaintiffs be declared the owners of the property free and clear from any claim of the defendants, and that a writ of possession be issued in favor of the plaintiffs.

A jury trial was waived. The court, after hearing the evidence, made detailed findings of fact, drew certain conclusions of law and entered judgment thereon. It adjudged: That the deed for Lot 15 from the plaintiffs to the Massengills is void; that it be removed from the record; that the Massengills have no right, title or interest in Lot 15 except that there be imposed thereon an equitable lien in their favor for $4,431.01 with interest; that the action be dismissed as to the Home Savings & Loan Association and Samuel F. Gantt, Trustee; and that the costs of the action be taxed one-half against Frank Pendergrass and the remainder against the Massengills.

The following is the substance of the material facts found by the trial judge, the numbering being ours:

1. Frank Pendergrass is a widower. Ruth Pendergrass is his unmarried daughter. Mr. Pendergrass originally owned a tract of land which he caused to be subdivided into lots, a plat of which was recorded. He caused a house to be built upon what is now known as Lot 15. He contracted with E. S. Massengill and wife to sell and

convey to them this house and the lot on which it was situated. The purchase price was $16,000. The plan was that the Massengills would pay $2,000 in cash, borrow $8,500 from Home Savings & Loan Association upon their note secured by a first deed of trust upon such house and lot, and give Mr. Pendergrass their note, secured by a second deed of trust for the balance of $5,500.

2. By mistake of all parties concerned, Mr. Pendergrass executed and delivered to E. S. Massengill and wife a deed conveying to them Lot 13, and the two deeds of trust were drawn, executed and delivered so as to convey Lot 13 as security for the said notes. Lot 13 was then a vacant lot. This deed and the two deeds of trust were placed upon record. Mr. Pendergrass received from the Massengills the $2,000 plus the $8,500 borrowed from the Home Savings & Loan Association, together with the $5,500 note secured by the second deed of trust to Samuel F. Gantt, Trustee. The Massengills moved into the house and made the prescribed monthly payments on the notes secured by the deeds of trust.

3. Some two years later Frank Pendergrass discovered the error and consulted his attorney, Mr. Marshall T. Spears, Jr., in an effort to correct the confusion. It was agreed by all concerned that an exchange of conveyances should be made so as to place all parties in the positions they would have occupied had the original error not occurred. In order to give to the Massengills a lot of the size originally contemplated, it was agreed that a strip would be taken from Lot 14, owned by Miss Ruth Pendergrass, and added to the area upon which the house occupied by the Massengills was located, this combined area being now known as Lot 15. It was further agreed by all concerned: Mr. and Miss Pendergrass would give a deed to the Massengills for Lot 15; the Massengills would give a deed to Mr. Pendergrass for Lot 13, previously conveyed by him to them; the Massengills would execute a new note to the Home Savings & Loan Association and a new deed of trust conveying Lot 15 as security therefor; the Massengills would execute a new note to Frank Pendergrass and secure it by a second deed of trust to Samuel F. Gantt, Trustee; and thereupon the original first and second deeds of trust upon Lot 13 would be cancelled. [*Note:* Had all of these steps been taken, E. S. Massengill and wife would have owned the house and lot they intended to acquire, subject to the intended encumbrances, Frank Pendergrass would have owned, free of encumbrances, Lot 13 which he had intended to retain, the Home Savings & Loan Association and Frank Pendergrass would have held notes secured by deeds of trust upon the property they had contemplated as security for their notes, and Ruth Pendergrass would have given up a strip from the lot owned by her.]

4. A new plat, showing Lots 13, 14 and 15, was prepared and placed on record. Mr. Spears, attorney for Mr. Pendergrass, prepared the contemplated documents. Mr. and Miss Pendergrass executed the deed conveying Lot 15 to E. S. Massengill and wife, leaving it with Mr. Spears upon the understanding that it was not to be delivered until the other papers had been executed, it being the intention of all the parties that the entire exchange of papers be consummated at the same time.

5. Instead of executing the deed, notes and deeds of trust which he and his wife were to execute, E. S. Massengill disappeared. None of the parties knows what has become of him. This made it impossible to carry out the plan agreed upon for the correction of the original mistake.

6. Thereupon Mr. Spears, attorney for Mr. Pendergrass, suggested an alternative plan for correcting the original mistake, which alternative was assented to by all interested parties other than the absent Mr. Massengill. This plan was: Mrs. Massengill, who remained in occupancy of the house, would cease to make payments on the note to Home Savings & Loan Association; thereupon, the Association would request the trustee in the first deed of trust to foreclose it under his power of sale, this being the first deed of trust on Lot 13; at such foreclosure sale the Association would place a bid equal to the balance due it upon the note, plus the expenses of the sale; assuming that it would be the only bidder, the Association would assign its bid to the widowed mother of Mrs. Massengill and the trustee would convey to her Lot 13; she, in turn, would convey Lot 13 to Mr. Pendergrass; Mr. and Miss Pendergrass would then convey Lot 15 to her; she (the mother of Mrs. Massengill) would execute a new note to Home Savings & Loan Association and a deed of trust on Lot 15 to secure such note, and would also execute a new note to Frank Pendergrass for the amount due him and secure it by a second deed of trust on Lot 15; thereupon she (the mother of Mrs. Massengill) would convey Lot 15, so encumbered, to Mrs. Massengill. [*Note:* Had this arrangement been carried out the result would have been that Mr. Pendergrass would have become the owner of Lot 13, free of encumbrances; Mrs. Massengill would have become the owner of the house and lot she and her husband originally contemplated buying, subject to the encumbrances they originally contemplated placing thereon; Home Savings & Loan Association and Mr. Pendergrass would have had notes secured by the same property they originally intended to take deeds of trust upon; and Miss Ruth Pendergrass would have contributed to the settlement the strip of her lot which she had previously agreed to contribute.]

7. Pursuant to this agreement, Mrs. Massengill defaulted in a

payment due upon the note she and her husband had given to Home Savings & Loan Association. Thereupon, the Association instructed the trustee to foreclose the deed of trust upon Lot 13 and such foreclosure sale was duly advertised and held. At that sale the Association placed upon the property its agreed bid. To the surprise of all the parties, except Mr. Pendergrass, a slightly higher bid was placed by one S. Y. Hargrove, who became the highest bidder and whose bid was not raised within the time allowed by law for an upset bid. Hargrove was the agent of Mr. Pendergrass and placed this bid for his benefit. At the instruction of Mr. Pendergrass, Hargrove assigned his bid to Mrs. Kathleen P. Elliott, another daughter. Up to that time Mr. Spears, the attorney for Mr. Pendergrass, who had not been informed of his client's plan to have Hargrove bid on the property, was under the impression that Mr. Pendergrass would have the Hargrove bid assigned to the mother of Mrs. Massengill so that the alternative plan for correcting the original mistake could be carried through to its conclusion. Instead of doing so, Mr. Pendergrass paid the amount of the bid ($8,122.92) to the trustee, who thereupon advised Mr. Spears that he would be obliged to convey Lot 13 to Mrs. Elliott. [*Note:* Miss Ruth Pendergrass testified that she, herself, raised the money for the payment of this bid by mortgaging some other properties owned by her.]

8. Realizing that upon such conveyance by the trustee, nothing else being done, the title to Lot 13 would be in Mrs. Elliott, the daughter of Mr. Pendergrass, and Mr. Pendergrass and Miss Ruth Pendergrass would still own the component parts of Lot 15, Mr. Spears, for the purpose of protecting the Massengills, placed on record the deed from Mr. Pendergrass and Miss Ruth Pendergrass conveying Lot 15 to E. S. Massengill and wife.

9. Thereupon the trustee under the deed of trust conveyed Lot 13 to Mrs. Elliott. On the same day she conveyed it to Mr. Pendergrass and he and Miss Ruth Pendergrass instituted this action to remove as a cloud upon their title to Lot 15 the deed so placed on record by Mr. Spears.

10. The trustee in the deed of trust paid over to Home Savings & Loan Association, from the proceeds of the foreclosure sale, the balance due upon the Massengill note which was secured by such deed of trust on Lot 13. Thus, that note was paid in full.

11. After his discovery of the original mistake in his deed to the Massengills, and apparently after the original plan for correcting that mistake had been evolved by Mr. Spears and approved by all parties concerned, but before the disappearance of E. S. Massengill, Mr. Pendergrass, without waiting for the execution of the plan for the correction of the mistake, began to construct upon Lot 13

another house. This he did in reliance upon the assurance by Mr. Spears that the matter would be worked out by the proposed exchange of conveyances and cancellations of deeds of trust. He completed this house on Lot 13 prior to the trial of this action.

12. Mrs. Massengill remained in the house on Lot 15 until a few days after the conveyance of Lot 13 to Mrs. Elliott and the institution of this lawsuit. Thereupon she left the property and has received no benefit from it. [*Note:* Thus, she occupied the house without paying rent or making payments upon the note from October to early February, which was in accordance with the plan agreed upon by all the parties for clearing up the confusion.]

13. Had Mr. Spears known, at any time prior to the completion of the foreclosure sale, that Mr. Pendergrass did not intend to have the Hargrove bid assigned to the mother of Mrs. Massengill so as to carry out the agreement he planned, Mr. Spears would have advised Mrs. Massengill to pay the installments in default upon her note so as to bring about the discontinuance of the foreclosure sale.

[*Note:* At the time this suit was instituted, the result of all these transactions was that the record title to Lot 15, including the strip formerly owned by Miss Ruth Pendergrass, was in E. S. Massengill (assuming E. S. Massengill to be alive) and Margaret T. Massengill, his wife, free of encumbrances, and the record title to Lot 13 was in Frank Pendergrass, free of encumbrances. For Lot 13 Mr. Pendergrass (or Mrs. Elliott, acting for him) had paid out the $8,122.92, which was paid to the trustee as a result of the foreclosure sale, plus the cost of the house he had erected thereon. Mr. Pendergrass had received the following in money; $2,000 from the Massengills at the time of the original transaction; $8,500, the proceeds of the loan from Home Savings & Loan Association to the Massengills; $1,750 (including $500 interest) paid to him by the Massengills on their note secured by the second deed of trust; and, presumably, $100 from the proceeds of the foreclosure sale, this being the amount by which the Hargrove bid exceeded the expenses of the sale plus the balance due on the note secured by the first deed of trust. The Massengills had paid out the following, in addition to the proceeds of their note to Home Savings & Loan Association: $2,000 to Mr. Pendergrass at the time of the original conveyance; $1,750 to Mr. Pendergrass (including $500 interest) on their note secured by the second deed of trust on Lot 13; $3,000 for improvements on Lot 15 (this having been borrowed from First Union National Bank, presumably upon their note secured by a third deed of trust on Lot 13, which, if it existed, has been wiped out by the above foreclosure, the Massengills having paid upon such note a total of $681.01)].

The record discloses that in the interval between the disappearance of E. S. Massengill and the institution of this action, Ralph B. Massengill was appointed Conservator of his properties. As such he was made a party to this action. Thereafter, the parties stipulated that Ralph B. Massengill, guardian for Edward S. Massengill, be made a party in lieu of Ralph B. Massengill, Conservator. The said guardian adopted the answer filed in this action by the Conservator. Process in this action was served by publication upon E. S. Massengill.

Blackwell M. Brogden for plaintiff appellants.
Claude V. Jones for Home Savings & Loan Association.
C. Horton Poe, Jr., for Margaret T. Massengill.

LAKE, J. The plaintiffs' assignments of error Nos. 3, 4 and 5, relating to certain exceptions to the admission and exclusion of evidence, are deemed abandoned, the brief filed by the plaintiffs containing no argument or citation of authority in support of these exceptions or any other reference thereto. Rule 28 of the Rules of Practice in the Supreme Court.

Assignment of error #6 relates to the admission of testimony by Mrs. Massengill. Upon questions proper in form, she was permitted, over objection, to state that the original purchase price agreed upon between Mr. Pendergrass on the one hand and the Massengills on the other was $16,000, of which the Massengills paid "down" $2,000, and that the house on Lot 15 had been completed when they moved into it. There was no error in the admission of this testimony. On cross examination, Mrs. Massengill testified that she had no personal knowledge of the amount of the down payment except for a payment of $100 when they went to look at the house and what her husband had told her. The plaintiffs did not move to strike the former testimony as a result of this admission on cross examination. In any event, the testimony that the house was completed when the Massengills moved in could not be prejudicial to the plaintiffs and there is ample evidence in the record, apart from the testimony by Mrs. Massengill, to support the court's finding that the Massengills, at the time of the original transaction, paid Mr. Pendergrass $2,000, in addition to the $8,500 borrowed from Home Savings & Loan Association. It not appearing that the trial judge rested his finding upon this testimony by Mrs. Massengill, it will be presumed that he disregarded it. *Insurance Co. v. Shaffer,* 250 N.C. 45, 108 S.E. 2d 49; *Bizzell v. Bizzell,* 247 N.C. 590, 605, 101 S.E. 2d 668. There is no merit in assignment of error #6.

Assignment of error #1 relates to 11 exceptions to findings of

fact made by the trial court and set forth in its judgment. We have carefully considered each of these exceptions. Each fact so found is amply supported by the evidence, the allegations of the plaintiffs' own complaint or reasonable and proper inferences and computations based thereon. Many of the findings are in the exact wording of the testimony of Mr. Pendergrass and his witness, Mr. Spears. The parties having waived trial by jury, the findings of fact, supported as they are by evidence, are binding upon this Court on appeal. *Young v. Insurance Co.*, 267 N.C. 339, 148 S.E. 2d 226; *Insurance Co. v. Motors*, 264 N.C. 444, 142 S.E. 2d 13; *Johnson v. Johnson*, 262 N.C. 39, 136 S.E. 2d 230; *Gasperson v. Rice*, 240 N.C. 660, 83 S.E. 2d 665. There is no merit in assignment of error #1, or any portion thereof.

Assignment of error #2 relates to the conclusions of law drawn by the trial court and to the provisions of its judgment entered thereon.

The record discloses no breach of contract, misrepresentation or other wrongdoing by, or any unjust enrichment of Home Savings & Loan Association. It made a loan to the Massengills, the entire proceeds of which were paid over to Mr. Pendergrass. It took from the Massengills a deed of trust upon a lot conveyed to them by him. When he discovered that he had conveyed the wrong lot by mistake, the Association twice acquiesced in plans conceived by his then attorney for the correction of his error. At the request of his then attorney, it caused the deed of trust securing the note held by it to be foreclosed, default having then occurred in the payments upon such note. At the foreclosure sale it placed a bid, as it had been requested by his attorney to do, for the full amount required to discharge the note secured by the deed of trust. It was Mr. Pendergrass, not the Association, who prevented the complete execution of his attorney's plan for the correction of his mistake. There is nothing to indicate that the Association would not have reconveyed Lot 13, as it had agreed with his attorney to do, if he had permitted it to become the purchaser at the foreclosure sale. No doubt, he bid at the sale due to fear that otherwise he would lose the investment made by him in constructing the new house on Lot 13 after his discovery of his original mistake. Be that as it may, the record shows no action by the Association except such as it was requested to take by the plaintiffs' then attorney. Upon Mr. Pendergrass' election to buy Lot 13 at the foreclosure sale, the Association did nothing other than to receive from the trustee that portion of the proceeds of the sale to which it was entitled under the provisions of the deed of trust. The title to Lot 13 now reposes exactly where both plaintiffs wanted

it. Any payment by them to bring about that result was due to their voluntary action without any inducement by the Association.

The plaintiffs brought this action to recover legal title to Lot 15 free from any claim of the Association. They have done so. The record does not indicate that the Association has ever had or claimed any right, title or interest in or lien upon Lot 15. There is nothing in the record to indicate that the Association instigated, brought about, advised or knew about the registration by the plaintiffs' then attorney of the deed conveying Lot 15 to the Massengills.

The plaintiffs have neither alleged nor proved any right of action against Home Savings & Loan Association. There was, therefore, no error in the dismissal of the action as to it and the judgment for the recovery by it of its costs.

The defendant Samuel F. Gantt is neither alleged in the complaint nor shown by the evidence to have had any connection whatever with any of these matters except that he prepared the original conveyances and examined the title to Lot 13 for the Massengills and Home Savings & Loan Association, he was trustee in the second deed of trust given upon Lot 13 to secure Mr. Pendergrass, and he advised Mrs. Massengill concerning the foreclosure. The deed of trust to him as trustee was wiped out by the foreclosure of the first deed of trust, as a result of which Mr. Pendergrass reacquired Lot 13. There is no suggestion that Mr. Gantt knew of, or was responsible for, the original mistake in conveying Lot 13 instead of Lot 15. It is not alleged in the complaint, or otherwise suggested in the record, that Mr. Gantt has ever claimed any right, title or interest in or lien upon Lot 15. The plaintiffs having neither alleged nor proved any right of action against Samuel F. Gantt, there was no error in the dismissal of the action as to him or in the judgment that he recover his costs.

The court having adjudged that the deed conveying Lot 15 to the Massengills is void and having ordered it cancelled upon the record, the plaintiffs have recovered legal title to Lot 15, which is the subject of this lawsuit. The only question remaining is whether the trial court erred in decreeing that the plaintiffs' title thereto be subject to an equitable lien in favor of the Massengills to the amount of $4,431.01.

With reference to the amount of this lien, so imposed, there is ample evidence, apart from the testimony of Mrs. Massengill, that the purchase price of the house and lot agreed upon originally between Mr. Pendergrass and the Massengills was $16,000. He alleged in his complaint that it was "approximately $16,000." The revenue stamps attached to the deed from him to them are consistent with such price, and are in excess of what would have been required had

it been $15,000, as he testified. It is undisputed that, contemporaneously with the conveyance to them, the Massengills executed to Home Savings & Loan Association a first deed of trust and a note for $8,500, the full proceeds of which were paid to Mr. Pendergrass, and executed and delivered to him their note for $5,500 secured by a second deed of trust. The difference between these two deeds of trust and the agreed purchase price, so established, is $2,000, which the court found as the "down payment" made by the Massengills to Mr. Pendergrass. His own testimony is that the Massengills paid to him on the note secured by the second deed of trust $1,750, including $500 on account of interest. The evidence is undisputed that after they moved into the house on Lot 15, believing they were the owners of it, the Massengills borrowed an additional $3,000 which they expended in improvements upon the house and lot. There is nothing in the record to indicate that these improvements did not increase the value of Lot 15 and the house thereon by that amount. Presumably, the note given by the Massengills for this loan was secured by a third deed of trust on Lot 13, which has been wiped out by the foreclosure sale at which Mr. Pendergrass, through his nominee, acquired title to Lot 13. However, the liability of the Massengills upon their note would not be wiped out thereby. In computing the equitable lien decreed by him, the trial judge allowed only the amount of $681.01 actually repaid by the Massengills on this improvement loan. Obviously, the plaintiffs have not been prejudiced by this computation of the increase in the value of Lot 15, and the house thereon, by these actions of the Massengills.

The plaintiffs now have the legal title to all of the land they owned before the original transaction got under way. There is no legal encumbrance, related to these transactions, upon either lot. To recover Lot 13 the plaintiffs paid out at the foreclosure sale $8,022.92 (exclusive of $100 which presumably was paid over to Mr. Pendergrass on his note secured by the second deed of trust).

The Massengills now own neither lot. They have paid to Mr. Pendergrass on account of these transactions $2,000 as "down payment," $8,500 borrowed from Home Savings & Loan Association, and $1,750 on their note given to him, a total of $12,250 in cash. In addition, they have benefited Lot 15, now restored to the plaintiffs, by an amount which the trial court conservatively computed at $681.01. Thus, the curtain falls upon the drama with the plaintiffs owning all of the land and having received a total of $4,908.09 in cash and improvements upon their property, in excess of the amount paid out by them to regain Lot 13. The equitable lien fastened upon their property by the judgment was for only $4,431.01. Clearly, the

plaintiffs have not been prejudiced by the trial court's calculation of the amount of the lien, if the lien is otherwise proper.

In *Homes, Inc. v. Holt,* 266 N.C. 467, 146 S.E. 2d 434, we held that one who in good faith, and as the result of a reasonable mistake of fact, builds an improvement upon the land of another, may recover from the landowner the amount by which the value of the land has been so increased if the landowner retains the improvement. The case for recovery is even stronger where, as here, the mistake was the result of a misdescription in a deed from the landowner to the improver.

In *Guaranty Co. v. Reagan,* 256 N.C. 1, 122 S.E. 2d 774, Parker, J., now C.J., speaking for the Court, said:

> "It is a thoroughly well established general rule that money paid to another under the influence of a mistake of fact, that is, of a mistaken belief of the existence of a specific fact material to the transaction, which would entitle the other to the money, which would not have been paid if it had been known to the payor that the fact was otherwise, may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund."

In *Tomlinson v. Bennett,* 145 N.C. 279, 59 S.E. 37, Connor, J., speaking for the Court, said:

> "The law will imply a promise to repay money received, when there is a total failure of the consideration upon which it was paid. It would be against good conscience and equity to retain it."

To the same effect, see: *Allgood v. Trust Co.,* 242 N.C. 506, 88 S.E. 2d 825; *Sparrow v. Morrell & Co.,* 215 N.C. 452, 2 S.E. 2d 365; *Morgan v. Spruill,* 214 N.C. 255, 199 S.E. 17; *Pool v. Allen,* 29 N.C. 120.

Here, by reason of the mutual mistake of the parties in the description of the land intended to be conveyed to the Massengills, there was a total failure of the consideration for which they paid Mr. Pendergrass the above sums of money. Consequently, they had a cause of action, founded upon equity and good conscience, for the recovery of the payments so made to him, against which he was entitled to set off the sum paid by him to recover Lot 13 (less the $100 thereof which came back to him as holder of the note secured by the second deed of trust), which payment extinguished the note given by the Massengills to Home Savings & Loan Association.

The plaintiffs, having invoked the equity powers of the superior court to remove a cloud upon their title to Lot 15, may be required by the court to do equity. For that purpose, the court was authorized to fasten an equitable lien upon Mr. Pendergrass' interest in Lot 15 to secure the payment by him to the Massengills of that which in equity and good conscience he should pay back to them. 53 C.J.S., Liens, § 4; 33 Am. Jur., Liens, §§ 18 and 21; 27 Am. Jur., Improvements, § 30.

Although Miss Ruth Pendergrass did not receive any of the payments made by the Massengills and it is not shown that the value of that portion of Lot 15, which reverts to her upon the cancellation of the deed, was benefited by the improvements made by the Massengills, she has been a participant in the plans and negotiations for the correction of the original mistake in the deed given by her father to the Massengills. Throughout these negotiations, she has consented to treat all of Lot 15 as if it were owned entirely by Mr. Pendergrass and to the conveying of it to the Massengills so as to correct his original mistake. The record shows clearly that, but for these negotiations so participated in and consented to by Miss Ruth Pendergrass, there would have been no default by Mrs. Massengill in the payment of the note secured by the first deed of trust on Lot 13. Because of such default Mr. Pendergrass has reacquired title to Lot 13 and the house he built thereon after discovering the mistake in the original deed to the Massengills. Miss Ruth Pendergrass is, therefore, estopped to assert that the portion of Lot 15 owned by her should not, for the purpose of the equitable lien, be treated as if it were owned by her father.

The Massengills entered into possession of Lot 15 and the house thereon in good faith, believing that they were the owners thereof. They have instituted no action to rescind their contract or to cancel any conveyance. But for Mr. Pendergrass' departure from the plan evolved by his then attorney, the confusion originating in the mistake in his deed to the Massengills would have been removed and the original contract carried out, with only such modification as was made necessary by the disappearance of E. S. Massengill. Mrs. Massengill moved out of the house as soon as practicable after the plaintiffs made it clear that they did not intend to carry out the plan, which she had been requested by their then attorney to follow, and which she had followed. The plaintiffs, having brought about the collapse of that plan, are not in a position to assert that in equity and good conscience the Massengills should now be held liable for the rental value of Lot 15, and the house thereon, during their occupancy thereof. There was, therefore, no error in the failure of the court to subtract such rental from the amount of the equit-

able lien fastened by the judgment upon Lot 15 in favor of the Massengills.

Affirmed.

STATE v. JAMES EDWARD WILLIAMS.

(Filed 3 February, 1967.)

1. Homicide § 20— Circumstantial evidence of defendant's guilt of murder held sufficient to be submitted to jury.

The evidence tended to show that defendant and deceased had had an altercation, that on the night in question they left a roadhouse in a car driven by defendant, that shortly thereafter deceased's lifeless body was found on the highway not far distant with a pistol wound causing death, that a spent .38 caliber bullet was found in defendant's car, that the bullet had been fired from a .38 caliber revolver owned by defendant and found several days later in a truck at defendant's home, etc. *held* sufficient to be submitted to the jury and to sustain a verdict of guilty of murder in the second degree.

2. Criminal Law §§ 71, 155— Ordinarily, defendant failing to object to admission of testimony may not challenge its admissibility for the first time after an adverse verdict.

It appeared that defendant, who was seen with deceased shortly before her death, voluntarily went to the police station shortly after her death, ostensibly to tell what he knew that might be of assistance in the investigation of the homicide, and that defendant made statements to the effect that an unknown person had dragged the deceased from the car and robbed defendant of his pocketbook. Defendant was not taken into custody until later when his pocketbook had been found in his car. *Held:* Testimony of defendant's statement was competent, and certainly its admission in evidence in the absence of objection by defendant was not prejudicial. *Miranda v. Arizona*, 384 U.S. 436, having been decided subsequent to trial is not applicable; *Escobedo v. Illinois*, 278 U.S. 478, does not require the trial court *sua sponte* to exclude testimony of a statement volunteered by defendant at the outset of an investigation.

3. Searches and Seizures § 1; Criminal Law §§ 79, 162—

Defendant may not object to the introduction of articles found in his car in a search made with defendant's express permission. Further, the admission of the exhibits in evidence will not be held error when there is no reasonable ground to believe that the exhibits themselves, as distinguished from evidence in regard thereto admitted without objection, were prejudicial.

4. Criminal Law § 102—

Where the indictment spells the victim's name as "Mateleane" while the record testimony spells her name "Madeleine", the variance comes within the rule of *idem sonans* and is not material.

STATE *v.* WILLIAMS.

APPEAL by defendant from *Bickett, J.,* May 1966 Session of CHATHAM.

Defendant, "James Edward Williams, alias Jesse Williams," was indicted for the first degree murder of "Mateleane Martin Bland" on or about December 25, 1965, in Chatham County. At the trial, the only evidence was that offered by the State. In the evidence, as appears in the record, the first name of the deceased is spelled Madeleine.

The State, which bases its case on circumstantial evidence, offered evidence tending to show the facts summarized, except when quoted, below.

Madeleine and her husband, Sam Bland, had separated; and for about three months she had lived in the home of Willie Robert Hill. Hill's wife and Madeleine were sisters. A driveway separated the Hill house from the Martin house where Madeleine's parents and her 15-year-old brother, Glysten Martin, then lived. Near these houses, on the same dead-end dirt road, was a frame building known as the Greasy Spoon. Originally a small dwelling, this building now contained a dance hall, a pool room and a place where "(s)ometimes they sell something to eat."

It was approximately a quarter of a mile along said dirt road from the Greasy Spoon to the paved road (RPR No. 2135) from Goldston to Gulf. Margaret McLeod lived half-way between the Greasy Spoon and the Goldston-Gulf Road.

On Christmas Eve, December 24, 1965, about 11:40 p.m., defendant's 1965 4-door Ford was in front of the Greasy Spoon. Madeleine and defendant were the only occupants. Madeleine was under the steering wheel and backed it out of the yard. Defendant was sitting beside her.

John Cotton started home from the Greasy Spoon about 12:30 Christmas morning. When he reached the paved road and turned left towards Gulf, he saw Madeleine lying, flat on her back, on the right shoulder. Her coat was spread over her stomach and her pocketbook was lying on top of the coat. He did not examine her to determine whether she was living or dead. Instead, he drove back to the Greasy Spoon and there got three others, including Brown Horton, to go back with him. They went to the home of Margaret McLeod, the mother of Brown Horton, woke her up, told her that Madeleine was dead, requesting that she go to her father's "to call the Sheriff's Department." Earlier, Margaret McLeod, whose house was some distance back from said dirt road, had observed a car traveling along said dirt road from the Greasy Spoon towards said paved road and had heard a noise, different from any other noise she heard theretofore or thereafter, which sounded like a firecracker

or a gun or possibly the backfiring of a car. She had heard this noise after "the news went off at 11:15."

John W. Emerson, Jr., Sheriff of Chatham County, and Dr. Robert Jakes, Medical Examiner of Chatham County, arrived in the area on Christmas morning about 2:00 or 2:30. Madeleine was dead. Her body was approximately seventy-five feet from the junction of said dirt road and said paved road. Her feet were just about even with the pavement and her head was towards the ditch. She had on the blue sweater identified as Exhibit 3. A top coat was lying across her body and on top of it was a lady's handbag. A photograph was taken before they "bothered anything." Upon examination of the body they "found blood and a bullet wound in the breast, not quite in the center but a little to the right." The body was removed to Griffin's Funeral Home in Pittsboro where Dr. Jakes, an admitted medical expert, about 3:30 a.m., performed an autopsy.

The autopsy disclosed one wound made by the penetration of a bullet of medium caliber, which entered the chest, went through the heart and "exited" in the lower left lumbar region. This bullet wound was the cause of death. There were "definite powder burns" in the brassiere on the body. In the opinion of Dr. Jakes, "the gun was discharged from 6 to 12 inches from the body."

On Christmas morning defendant, accompanied by one of his brothers, drove his 1965 Ford into the yard at Hill's house. Defendant asked, "was it true about Madeleine being dead," and Hill told him she was dead. That is all defendant said.

Sheriff Emerson first saw defendant on Christmas morning between 3:45 and 4:00. Defendant and his brother were in the lobby of the Police Station in Sanford (Lee County). He talked with them "for not over 10 to 15 minutes." After getting defendant's version of what had happened (set out below) they "left Sanford." Sheriff Emerson, taking defendant with him, went back "to the Goldston vicinity." Later, he took defendant to Pittsboro where defendant was lodged in the Chatham County Jail between 5:30 and 6:00 on Christmas morning. Meanwhile, Sheriff Emerson had given the keys to defendant's car to his deputies with instructions to bring it from Sanford to Pittsboro.

In talking with Sheriff Emerson, defendant told him in substance, except when quoted, the following: During the afternoon of December 24, 1965, he and Madeleine had gone to a Drive-In Theatre in or near Siler City. Afterwards they went to the Greasy Spoon. Leaving the Greasy Spoon, they traveled said dirt road. When they came to the stop sign at said paved road, "someone appeared at the right door of his automobile and there jerked Made-

leine Bland out of the automobile and then made some ugly statements to him that he was the one that had been running around with his wife." He had not seen anyone before he stopped at the stop sign. The man, whom "he couldn't see him enough to tell who it was," had on a black raincoat. When the man told him to come around, he got out, came around and the man robbed him, taking his pocketbook in which he had approximately $20.00. Thereafter he got in his car, turned left towards Gulf, went to Gulf, then to Sanford, from Sanford to the home of his brother, Lamont Williams, and from there returned to said dirt road and entered the driveway between the Hill house and the Martin house. From the time of the incident at the junction of said dirt road and said paved road involving Madeleine, he saw no person except his brother until he saw Hill. He told his said brother that "he'd had some trouble up there and he wanted him to go back with him up there."

At the Police Station in Sanford, Sheriff Emerson, with the express permission of defendant, made a hurried examination of defendant's car. He opened the right-hand front door, ran his hand along the seat between it and the back as far as he could reach, and about a foot from the edge of the seat he found a man's wallet. "It contained the defendant's name and about $10.00 in money." He also found under the right front seat "an Italian made .22 caliber pistol, automatic." He locked the car. The car was brought to the jail in Pittsboro about daybreak. Deputy Sheriff Farrell made a further examination thereof about noon on Christmas day. He found "a .38 slug," identified as Exhibit 2, on the front seat. "It was pushed down on the driver's side . . . between the cushion and the back."

On December 29, 1965, Sheriff Emerson went to the home of defendant, in Lee County about five to seven miles below Sanford. On this occasion, he was accompanied by the Sheriff of Lee County and two of his deputies and also by a deputy sheriff of Chatham County. He was talking to defendant's wife when Sheriff Holder of Lee County called him. The gun identified as State's Exhibit 1 "was found in a paper sack under the front seat of a truck parked right behind and about 8 or 10 feet from the defendant's house." It was not loaded.

A witness testified Exhibit 1 looked "just like the .38 caliber revolver" defendant had purchased from him in 1965. Another witness testified that, in the summer of 1965, when defendant showed him, a prospective purchaser (who did not buy), "a .22 pearl-handled pistol," he also showed him "a nickel plated bone-handled .38 revolver" that looked like it was "the same one" as Exhibit 1.

Exhibits 1, 2 and 3 were examined by S. B. I. experts. A ballistics expert testified Exhibit 1 was "a .38 caliber Smith & Wes-

son revolver" and that Exhibit 2 was "a .38 caliber spent bullet." In his opinion, "this bullet (Exhibit 2) was fired from this weapon (Exhibit 1)"; that a bullet hole in the upper right mid-section of the blue sweater (Exhibit 3) was that of "a .38 caliber bullet"; and that, based on tests he had made and described, the weapon was fired at a distance of approximately six inches from where the bullet penetrated the sweater.

An expert in the field of analytical chemistry testified he found blood on Exhibit 2; that he found "microscopic spatters of blood on the barrel and hand grip area above the cylinder" of Exhibit 1; and that he was unable to tell the age of the blood or whether it was human blood. This witness, based on his examination on December 28, 1965, of defendant's 1965 Ford, testified: "I found on the front seat, on the right-hand side, and about 4 to 6 inches above the seat, a trail or smear of blood extending from approximately the center across the seat to the right-hand side of the car. And on the door post a hair and trace of blood at the same level as the smear across the back of the seat. I also found on the left-hand side of the car a hand or finger print, five finger prints in which the second and third fingers were very clear and the others were smeared bloody prints. There were traces of blood on the steering wheel and also some very small traces on the head liner at the top of the automobile. An amount of blood on the right front seat was of sufficient quantity to identify it as human blood."

Prior to the departure of Madeleine and defendant from the Greasy Spoon about 11:40 on Christmas Eve, the following had occurred:

Claude Horton first observed defendant at the Greasy Spoon about 9:15. Defendant was in his car under the steering wheel. Later he talked with defendant inside the Greasy Spoon. Earlier that night, at a barber shop in Sanford, he and defendant had spoken of Sam Bland, Madeleine's husband. Defendant asked Horton if Sam was at home and stated he was going to Goldston because Sam owed him some money. Two or three weeks earlier Horton had been on a house party with Madeleine and defendant at Goldston. Horton testified: "On the night at the Greasy Spoon the defendant told me that if I saw him and Madeleine having trouble, I was not to have anything to do with his business, with his or her affairs. What he was talking about was that a week or two before I saw him and Madeleine have a kind of 'sputterment,' something like an argument. He was not hurting her. What he told was that if I saw them having trouble, not to stick my nose in it."

When Glysten Martin got to the Greasy Spoon about 10:30, defendant walked out of the kitchen, went to the window where Made-

leine was standing, and Madeleine and defendant "stood there talking at the window." Martin heard defendant say: "I don't give a damn if your brother is in there." After defendant made this statement, Madeleine tried to get him to leave. He gave her the key to his car and she went out and started the car. Soon thereafter Madeleine came back in the Greasy Spoon, got defendant and told him, "let's go." She got defendant by the arm and they went on out together.

When Tommy Rives got to the Greasy Spoon about 11:30, defendant's car was in the yard. Madeleine was under the steering wheel and defendant was on the right front seat. Defendant had his hand on Madeleine's chest up at her throat and said: "'You'll feel sorry for it' or something; 'You'll really hate it,' or something like that." Later, when he saw them leaving, Madeleine was driving the car towards said paved road.

The jury returned a verdict of guilty of murder in the second degree; and the court pronounced judgment that defendant be imprisoned for a term of not less than twelve nor more than twenty years. Defendant excepted and appealed.

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

Harry P. Horton and George M. McDermott for defendant appellant.

BOBBITT, J. Defendant assigns as error the denial of his motion for judgment as of nonsuit, contending the State's evidence "at most raises mere suspicion and conjecture of (defendant's) guilt."

There was ample evidence to warrant, although not compel, these findings: Madeleine's death was caused by a .38 caliber bullet fired at a distance of from six to twelve inches; that a spent .38 caliber bullet (slug) was found in defendant's car soon after Madeleine's lifeless and deserted body was found on the shoulder of the highway; that the .38 caliber bullet had been fired from the .38 caliber Smith & Wesson revolver owned by defendant and found several days later in a truck at defendant's home; that there was blood on the spent bullet, the revolver and the front seat of defendant's car; that Madeleine, when last seen alive, was with defendant in the area where her body was found; that a week or so prior to Christmas Eve Madeleine and defendant had had a "sputterment" and defendant had warned Horton not to interfere if he saw Madeleine and defendant "having trouble"; and that, at the Greasy Spoon shortly before Madeleine's death, defendant had spoken to her sharply and in terms of threat or warning. In addition, Sheriff

Emerson's testimony as to finding the wallet containing defendant's name and $10.00 in defendant's car would seem in conflict with what defendant told him about being robbed by an unknown man in a black raincoat.

When tested by the rule of this jurisdiction in respect of the sufficiency of circumstantial evidence to warrant submission of a criminal case to the jury, stated by Higgins, J., in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, and approved in numerous subsequent decisions, *S. v. Roux,* 266 N.C. 555, 562-563, 146 S.E. 2d 654, 659-660, and cases there cited, the evidence, when considered in the light most favorable to the State, 1 Strong, N. C. Index, Criminal Law § 101, was sufficient to warrant submission of the case to the jury and to sustain the verdict.

Defendant contends the court erred in admitting the testimony "of the investigating officer" as to "incriminating statements" allegedly made by defendant to said officer "before defendant was advised of his right to remain silent and at a time when defendant was not represented by counsel." The investigating officer was Sheriff Emerson. At trial, no objection was made to any portion of his testimony as to what defendant had told him early Christmas morning in the course of his investigation of the homicide. In his statement of case on appeal, defendant's counsel, for the first time, challenges the admissibility of this portion of Sheriff Emerson's testimony. In the only portion of the charge to which defendant excepts, the court, in referring to this testimony, clearly implies that defendant was *then* contending before the jury that Madeleine was taken from defendant's car and that defendant himself was robbed in the very manner defendant had reported to Sheriff Emerson. Defendant's counsel did not object to or protest this interpretation by the court of defendant's contention. Whether the admission of this testimony was favorable or unfavorable to defendant need not be determined. Absent this testimony, the only contention available to defendant, unimpressive under the circumstances, was that the State's evidence was insufficient to warrant conviction. Frequently defendant's counsel must consider whether the admission or the exclusion of testimony proffered by the State would be more favorable to his client. Absent extraordinary circumstances, a defendant cannot obtain whatever benefit may accrue to him from the admission of testimony without objection and in the event of an adverse verdict challenge for the first time the admissibility of such testimony.

Defendant cites *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602. However, in *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772, it was held that *Miranda* was applicable only to cases in which the trial began after June 13,

1966, the date the decision in *Miranda* was announced. Defendant having been tried and convicted prior to June 13, 1966, *Miranda* does not apply and need not be considered in connection with defendant's appeal.

Escobedo v. Illinois, 278 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964), although applicable to trials conducted at said May 1966 Session, did not require the trial judge, either on objection or *sua sponte,* to exclude Sheriff Emerson's testimony as to the statement made to him by defendant at the outset of his investigation of the homicide.

The evidence is silent as to defendant's actions between his appearance with his brother at the Hill house and their appearance in the lobby of the Police Station in Sanford. There is no evidence defendant had been arrested prior to the arrival of Sheriff Emerson. Apparently, defendant, who, according to all the evidence, had been with Madeleine at the Greasy Spoon until nearly midnight, had gone to said Police Station to report the circumstances under which he and Madeleine separated. There is no evidence of prolonged interrogation, duress, inducements, etc. On the contrary, what defendant, in the presence of his brother, told Sheriff Emerson, if it were true, completely absolved defendant from guilt in connection with Madeleine's death. Nothing indicates defendant was taken into custody by Sheriff Emerson until after the sheriff had examined defendant's car and had found a wallet containing defendant's name and $10.00 and also a .22 caliber pistol. The fact that this wallet and its contents were in defendant's car indicated strongly that defendant's statement, particularly the portion thereof to the effect he had been robbed of his pocketbook containing $20.00, was false.

True, there is no evidence to the effect the sheriff warned defendant in respect of his constitutional right to counsel, to remain silent, etc., before defendant made his statement as to what had occurred. No questions were asked either by the prosecuting attorney or by defense counsel bearing upon whether defendant was so advised. Defendant made no request that he be permitted to confer with counsel. It does not appear that defendant was charged with homicide or in custody when he talked with Sheriff Emerson in the lobby of the Police Station in Sanford. It would appear that defendant, accompanied by his brother, went to the Police Station in Sanford ostensibly for the purpose of telling what he knew that would or might be of assistance in the general investigation of a homicide. Under these circumstances, the testimony *now* challenged was competent; *a fortiori,* its admission *without objection* was not prejudicial error.

Defendant contends the court erred in admitting into evidence the State's exhibits.

None of these exhibits has been brought to this Court as a part of the record on appeal. They are identified in the evidence as follows: Exhibits 1, 2 and 3 are the .38 revolver, the .38 slug, and the sweater, respectively. Exhibit 4 is a piece of paper identified by the ballistics expert as used in his tests. Exhibit 10 is the wallet. Exhibit 11 is the .22 pistol. Remaining exhibits are photographs admitted to illustrate the testimony of certain witnesses.

No objection was made when the testimony concerning these exhibits was offered. Near the conclusion of the evidence, the State offered Exhibits 1 through 12 and defendant objected to these exhibits "being accepted into evidence." The court inquired: "On what grounds?" Counsel for defendant answered: "No reason at this time."

The contention now made is that, notwithstanding the preliminary search of defendant's car by Sheriff Emerson was made with defendant's express permission, the legality of this and later searches was nullified by the fact there is no evidence Sheriff Emerson, prior or subsequent to the preliminary search, advised defendant of his constitutional rights in respect of searches and seizures. *Miranda* is the only decision cited by defendant to support this contention.

With reference to the preliminary search by Sheriff Emerson in Sanford: "Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated." *S. v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501, cert. den. 351 U.S. 919, 100 L. Ed. 1451, 76 S. Ct. 712; *S. v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506. Whether the search of defendant's car at Pittsboro or the search of the truck at defendant's home in Lee County were by permission, under search warrants or otherwise legally permissible does not appear. No inquiry was made or requested with reference thereto. The evidence fails to show these exhibits or any of them should have been excluded. In any event, there is no reasonable ground to believe that the exhibits themselves, as distinguished from evidence admitted without objection with reference thereto, were prejudicial to defendant.

Defendant makes no contention with reference to the variance between the spelling of the first name of the victim in the indictment, "Mateleane," and the spelling of her name in the testimony, "Madeleine." There is no uncertainty as to her identity. The variance comes within the rule of *idem sonans* and is not material. See *S. v. Utley,* 223 N.C. 39, 48, 25 S.E. 2d 195, 202, and cases cited.

The record leaves the impression that defendant was treated with fairness and consideration during the investigation and at all

stages of his trial. There being no prejudicial error, the verdict and judgment will not be disturbed.

No error.

J. A. O'QUINN, PLAINTIFF, v. RAY SOUTHARD AND ACME PETROLEUM AND FUEL, INC., DEFENDANTS.

(Filed 3 February, 1967.)

1. Negligence § 5—

The doctrine of *res ipsa loquitur* applies when a thing which causes injury is shown to be under the exclusive control of defendant and the accident is one which does not occur in the ordinary course of events if the person in control uses proper care; it does not apply when the premises are not under the exclusive control of defendant or when more than one inference of causation arises upon the evidence.

2. Negligence § 21—

There is no presumption of negligence from the mere fact of an accident or injury.

3. Negligence §§ 4, 5— Res ipsa loquitur held not applicable to explosion occurring during delivery of gasoline to underground tanks.

The evidence was to the effect that in the delivery of gasoline to plaintiff's underground storage tanks on a still, hot day, fumes from the gasoline collected near the ground about defendant's delivery truck, that the gasoline was being delivered by gravity and no motor or engine was in operation on the delivery truck, and that suddenly the fumes were ignited, causing the injury in suit. The evidence further tended to show that plaintiff had several electric motors on the premises. *Held:* The doctrine of *res ipsa loquitur* is not applicable, since the cause of the explosion and fire is left in conjecture, and since defendant was not in exclusive control of all factors which could have caused the accident.

4. Negligence § 24a—

Plaintiff's evidence was to the effect that his premises were damaged by fire resulting when gasoline fumes which collected around defendant's tank-truck during the delivery of gasoline to plaintiff's underground tanks, suddenly ignited. *Held:* The doctrine of *res ipsa loquitur* being inapplicable and plaintiff having offered no direct and positive evidence supporting the inference that defendant's negligence was a proximate cause of the fire and resulting explosion, nonsuit should have been allowed.

APPEAL by defendants from *Houk, J.*, June 1966 Civil Session of GASTON.

Action to recover damages resulting from a fire and explosion occurring at a gasoline filling station while its underground tanks were being refilled.

These facts are undisputed: Plaintiff owns a small shopping center at Lowell, in which, on September 11, 1963, he was operating a filling station. On that day, between 9:00 and 10:00 a.m., defendant Ray Southard, an employee of defendant Acme Petroleum and Fuel, Inc., backed its aluminum tanker, loaded with 8,200 gallons of gasoline, onto plaintiff's premises — between the pumps and the station — in order to refill three underground tanks. While the gasoline was being delivered, a fire and explosion occurred which extensively damaged the shopping center and completely destroyed the filling station, a small brick building, 30 feet long.

Plaintiff alleges that the fire and explosion was proximately caused by the manner in which defendants refilled the tanks in that they "negligently caused or negligently permitted to be caused an accumulation of gasoline fumes and an explosion of said fumes beneath the tractor-trailer unit while the same was refilling plaintiff's underground tanks. . . ."

Defendants denied any negligence, but alleged that, if they were negligent in any respect, plaintiff was contributorily negligent in that, while the gasoline was being unloaded, he permitted electric motors to be operated; that they emitted sparks; that he struck steel and iron tools against the concrete, likewise causing sparks; and that these sparks ignited the gasoline fumes.

Plaintiff's evidence tends to show: On September 11, 1963, the sun was shining brightly; it was a hot, quiet day with no air stirring — "one of those suffering days." When Acme's tanker arrived, plaintiff was engaged, directly in front of the station, in balancing the wheels on an automobile belonging to Jack Messer. To give the tanker access to the 3-inch fill pipes located in front of the station, Messer moved the car to the lower side of the station to a point about 8 feet to the right side of the tanker and 10-12 feet from the northernmost fill pipes. Plaintiff moved the balancing machine to the front of the car, jacked up the right-front wheel, and started it spinning in order to ascertain — before the tanker started unloading — where he should put the last weight. When Southard began pulling the hoses from the right side of the tanker, plaintiff marked the place on the tire, pulled the wheel balancer from the car, and moved it 3-4 feet away in order to put it against the building, where it ordinarily remained when not in use. It was never unplugged from the electric outlet on the north side of the building. The wheel-balancing machine (plaintiff insisted positively) had been stopped and moved from the car before Southard began unloading the gasoline.

Plaintiff had had the wheel balancer at the station for 3-4 years. For its motive force, the balancer used an electric motor,

which was controlled by a lever and encased in a metal housing. The motor ran as long as the lever was held down; when it was released the motor stopped. The switch was inside the motor.

Before connecting his lines to the tanks, Southard warned plaintiff against smoking, and plaintiff cautioned Messer against lighting cigarettes or striking a match while the gasoline was being delivered. Southard said nothing to them whatever about discontinuing work on the car. Southard then uncapped two of the fill pipes and, in the usual manner, put in the 1½-inch filler pipe. Plaintiff went back to his wheel balancer to search for a quarter-ounce weight. Placing it was all that remained to be done. He had been standing in front of Messer's car, searching for the weight 4-5 minutes, when he heard a "whoosh." Fire gushed out from under the tractor behind plaintiff, burning him on the right arm and right side of his face, which was toward the tanker. He first saw the fire "in behind the back wheels behind the muffler." It immediately flashed to the hose and the filler pipes. Southard ran to the cut-off valves on the tanker and told plaintiff "to get a fire truck." In some manner the hose from the tanker was pulled out of the ground, or burned in two. When this occurred, burning gasoline ran down the gutters alongside the highway for two blocks.

Plaintiff called the fire department from a store and warned the other occupants of the shopping center to get out. By that time the tanker had melted down to the ground. Messer's automobile, the jack, and the wheel balancer were likewise destroyed.

In front of the station, on the north side of the pumps, were two refrigerated cold drink boxes. Each had a one-fourth horsepower hermetically sealed compressor, and the motor was "on the inside of the dome." The fire damaged plaintiff in the sum of $16,088.68.

Jack Messer testified: When the fire broke out, he was facing the front of his car and looking toward the tractor-part of the tanker (which was facing north). He heard a blowing noise and fire broke out at his feet. At that time plaintiff was looking for a weight, and the wheel balancer was not in operation. It had been pulled away from the car. When Messer saw the fire, he ran and did not return to the scene for four hours.

At the close of plaintiff's evidence, defendant's motion for nonsuit was denied.

Defendant then offered evidence which tends to show: When Southard arrived at plaintiff's station, he had driven 36 miles at a speed of 50-60 MPH with the load of gasoline. The day was hot and humid, and on such a day gasoline fumes tend to stay close to the ground. He not only asked plaintiff and Messer not to smoke, but he also cautioned plaintiff "to be careful about working on that au-

tomobile." After measuring the contents of the three tanks — one for high-test and two for regular gasoline —, Southard, in order to discharge any static electricity he might have had in his body, put his hand on the truck before he began to fill the tanks. The tanker itself was equipped with an anti-static device. Southard began to fill the southernmost tank (high-test) and the middle tank (regular) simultaneously. When the high-test tank was filled in about five minutes, he detached and drained that hose and, with it, began to fill the northernmost tank. There were no motors on the tanker; it was "unloaded by gravity flow."

All the time the tanks were being filled, plaintiff, with his back to the tanker, continued to run the balancing machine as he worked on the Messer car. Southard noticed the motor; he could see the armature. When he began to fill the northernmost tank, plaintiff was still working with the wheel balancer and Messer was in the automobile holding the steering wheel. The intake to the tank was only 2-3 feet from the wheel balancer, and the car was about 5 feet from the tractor.

The fumes became so heavy that Southard went to the back of the tanker to escape them. He again told plaintiff "no smoking," but he said nothing about the motor. Just before the fire broke out, plaintiff cut off the wheel balancer and reached back to get a weight. When he did there was a "whishing noise" and fire broke out where he and Messer were working and it flew everywhere. "It was like a bolt of lightning flashed out of the sky; that's how quick it was." Southard jerked the hose out of one tank and cut off one valve. He put his foot over the hole and thereby smothered the fire at that point. By then, there was so much fire on the other hose that he could not get to it. Nor could he get to the 32-foot tanker's emergency valves or to its fire extinguisher. When the main power line to Lowell fell, Southard ran. When he was about 100 feet away, the tanker exploded. Prior to that time, no gasoline had run down the highway.

Two hours later, plaintiff told Southard that he was under the impression that a spark from the wheel balancing machine had caused the fire. He made this same statement to reporters for the Charlotte Observer and the Gastonia Gazette.

An expert electrical engineer, testifying for defendant, said that if plaintiff was using the wheel-balancing machine and cut off the motor by pulling down the lever while the gasoline was being delivered, in his opinion, the operation of the machine could have started the fire.

The jury answered the issues of negligence and contributory

negligence in favor of plaintiff and awarded $6,100.00 damages. From the judgment entered upon the verdict, defendants appealed.

Hollowell & Stott; Horace M. DuBose, III, for plaintiff.
Mullen, Holland & Harrell for defendants.

SHARP, J. This appeal presents the question whether the trial judge erred in overruling defendants' motions for nonsuit, *i. e.*, whether all the evidence, considered in the light most favorable to plaintiff, is sufficient to establish defendants' actionable negligence. *Hubbard v. Oil Co.*, 268 N.C. 489, 151 S.E. 2d 71.

Plaintiff offered no evidence as to what ignited the gasoline. Neither Southard, nor plaintiff, nor Messer (the only three persons on the premises) was smoking; no one struck a match; no tool was dropped on the concrete to create a spark. Both plaintiff and Messer insisted most positively that the wheel-balancing machine was not in operation at any time during the delivery of the gasoline. The only evidence with reference to the *motors* in the two refrigerated drink boxes tended to show that they were on the inside of a dome. The static electricity which had been generated by the movement of the gasoline in transit had been discharged before Southard attempted to deliver any gasoline at all. Furthermore, one tank had been completely filled and the other two were partially filled when the fire started. If the tanker or its equipment used for unloading the gasoline was substandard, the evidence does not so disclose. The driver was at all times in attendance, and no gasoline had been spilled prior to the fire. There is no evidence that Southard himself did anything to cause the fire — except to fill plaintiff's tanks as usual.

Plaintiff argues, however, that it was negligence to deliver gasoline on a hot, humid day when fumes were collecting at the site. Notwithstanding, he offered no evidence that the temperature at the filling station or the heat from the tanker was high enough to ignite gasoline fumes or that spontaneous ignition was a hazard inherent in the delivery of gasoline on a hot day. If such were the case, it would seem that plaintiff, an experienced filling-station operator, would have known of the danger and would have forbidden the delivery. So far as our research can determine, a flame, a spark, or heat of at least 700°-800° F. is required to ignite fumes from gasoline such as was being put into plaintiff's tanks. See Robert H. Perry's Chemical Engineer's Handbook (4th Ed.) Table 9-19, p. 9-33, Basic Considerations on the Combustion of Hydrocarbon Fuels, and the third edition of this handbook at p. 1584. See also *Moore v. Beard-Laney, Inc.*, 263 N.C. 601, 139 S.E. 2d 879; *Hopkins v. Comer*, 240

N.C. 143, 149, 81 S.E. 2d 368, 373. Patently, neither the heat from the tanker nor the temperature at the filling station reached any such height.

Defendants' explanation of the fire — that it was caused by a spark emitted by the motor of the wheel-balancing machine when plaintiff cut it off while the two regular-gasoline tanks were being filled — is the only specific solution which the evidence provides. Plaintiff rejects this explication and concedes that he must depend upon the doctrine of *res ipsa loquitur* to overcome the motion for nonsuit. This doctrine and the rules governing its application have often been stated by this Court: When a thing which causes injury is shown to be under the exclusive management of the defendant and the accident is one which in the ordinary course of events does not happen if those in control of it use proper care, the accident itself is sufficient to carry the case to the jury on the issue of the defendant's negligence. *Lea v. Light Co.*, 246 N.C. 287, 98 S.E. 2d 9; *Harris v. Mangum*, 183 N.C. 235, 111 S.E. 177; *Ridge v. R. R.*, 167 N.C. 510, 83 S.E. 762; Stansbury, N. C. Evidence § 227 (2d Ed. 1963). For an itemization of the situations in which *res ipsa loquitur* does not apply, see *Springs v. Doll*, 197 N.C. 240, 242, 148 S.E. 251, 252-3.

No inference of negligence arises from the mere fact of accident or injury, *Lea v. Light Co., supra*, and, as pointed out in *Etheridge v. Etheridge*, 222 N.C. 616, 619, 24 S.E. 2d 477, 480:

> "It *(res ipsa loquitur)* does not apply where the evidence discloses that the injury might have occurred by reason of the concurrent negligence of two or more persons, or that the accident might have happened as a result of one or more causes, or where the facts will permit an inference that it was due to a cause other than defendant's negligence as reasonably as that it was due to the negligence of the defendant, or where the supervening cause is disclosed as a positive fact. . . ."

Accord, 38 Am. Jur., Negligence § 300 (1941); 65A C.J.S., Negligence §§ 220.12-.13 (1966). The doctrine of *res ipsa loquitur, a fortiori*, has no application if the fire was due to any voluntary action or contribution on the part of plaintiff, or "if it appears from the evidence that the accident might reasonably have been caused by plaintiff's own negligence." 65A C.J.S., Negligence § 220.13 (1966).

Applying these rules to the evidence in this case, it is clear that the doctrine of *res ipsa loquitur* is inapplicable. Defendants did not own or control the premises where the fire originated and, taking plaintiff's evidence in the light most favorable to him — which means that we assume he did not run the wheel balancer — its cause re-

mains a matter for divination. ". . . (T)he trier of the fact could only indulge in conjecture as to the cause of the fire. In such case the doctrine of *res ipsa loquitur* should not be applied." *Starks Food Markets, Inc. v. El Dorado Refining Co.*, 156 Kan. 577, 583, 134 P. 2d 1102, 1106. In holding that the doctrine of *res ipsa loquitur* did not apply to a fire occurring at the plaintiff's filling station while the defendant was delivering gasoline, a Louisiana court said in *Bruchis v. Victory Oil Co.*, 179 La. 242, 257, 153 So. 828, 832, "Here the defendant did not own or control the premises where the fire originated, but owned and controlled only the truck (tanker) and its parts."

In *Mullins v. Baker*, 144 W. Va. 92, 107 S.E. 2d 57, the plaintiff sued for damages which occurred when his filling station was destroyed by a fire which occurred while the defendant's driver was filling his storage tanks. In holding the doctrine of *res ipsa loquitur* inapplicable, the court said:

> "The defendants did not have exclusive control of the premises and buildings where this fire occurred. It may have occurred from causes over which the defendants had no control. . . . 'The doctrine of *res ipsa loquitur* cannot be invoked if defendant does not have control or management of the premises or operations where the accident occurred; or where there is divided responsibility, and the unexplained accident may have been the result of causes over which defendant had no control.' . . .
>
> "It has been held by this Court that the doctrine *res ipsa loquitur* does not apply unless the only reasonable conclusion is that the accident happened through the negligence of the defendant. . . .
>
> "The gasoline had been delivered by the defendants to the plaintiff in the same manner and at the same place for a period of at least ten years and no fire had occurred during this period. Therefore, the gas or gas fumes alone could not have been the proximate cause of the fire and this is another reason why the doctrine of *res ipsa loquitur* would not be applicable, as the fumes or vapor must have been ignited by some flame or spark. . . . '* * * It is not only necessary to show that the offending instrumentality was under the management of the defendant, but it must be shown that it proximately caused the injury, * * *' Where an unexplained accident can be attributed to one of several causes, or in a case of divided responsibility and the defendant is not wholly responsible, the doctrine is not applicable." *Id.* at 99-100, 107 S.E. 2d at 62-3.

In Annot., Negligence — Delivery of Petroleum, 151 A.L.R. 1261, 1272, it is said: "Under most circumstances which have attended the delivery of petroleum products, the rule of *res ipsa loquitur* has been regarded as not applicable." Such holdings are a corollary of the rule that "*res ipsa loquitur* does not apply in explosion cases unless the thing that exploded was in the exclusive control of the defendant who is to be made liable; and where either of two persons, wholly independent of each other, may be responsible for an injury, the cause is one for affirmative proof and not for presumption." 22 Am. Jur., Explosives § 95 (1939).

Plaintiff's evidence and allegations disclose no negligence on the part of defendants. If Southard was guilty of negligence in unloading the gasoline while plaintiff was running the wheel balancer with its unenclosed motor or in failing to warn plaintiff of the danger in doing so, it is not so alleged. The occurrence of the fire does not support the inference that defendants' negligence was the most reasonable probability, nor does it exclude the idea that it was due to a cause with which defendant was not connected. 65A C.J.S., Negligence § 220.12 (1966). Even if the wheel balancer was not in operation, the refrigerated drink boxes were working. There is no evidence that the controls containing the thermostats (a possible source of sparks) were sealed.

The fire and explosion cases cited by plaintiff in which the doctrine was applied are all cases in which the equipment *and* premises were in the *exclusive* control of defendants. *Howard v. Texas Co.*, 205 N.C. 20, 169 S.E. 832; *Harris v. Mangum, supra; Newton v. Texas Co.*, 180 N.C. 561, 105 S.E. 433. Where the gasoline tank which exploded was not under the exclusive control of the defendant, *res ipsa loquitur* has not been applied. *Hopkins v. Comer, supra.*

Plaintiff having offered no direct and positive evidence from which it can reasonably be inferred that defendants' negligence proximately caused the fire and resulting explosion, and the doctrine of *res ipsa loquitur* being inapplicable, defendants' motion for nonsuit should have been allowed. *Hubbard v. Oil Co., supra.*

The judgment of the court below is

Reversed.

ATLAS TABRON, EMPLOYEE, v. GOLD LEAF FARMS, INC., EMPLOYER, AND GREAT AMERICAN INSURANCE COMPANY, INSURER.

(Filed 3 February, 1967.)

1. Master and Servant § 82—

The jurisdiction of the Industrial Commission may be invoked either by filing a claim for compensation or by submission of a voluntary settlement for approval before a claim is filed. G.S. 97-82.

2. Master and Servant § 91—

A voluntary settlement for the payment of compensation executed by the employer, employee, and insurance carrier, when duly approved by the Industrial Commission, is as binding on the parties as an award by the Commission in an adversary proceeding.

3. Same; Master and Servant § 84—

Where an employee has received benefits from an agreement for compensation executed by himself, his employer, and the insurance carrier, which agreement was duly approved by the Industrial Commission, he may attack and have such agreement set aside only for fraud, misrepresentation, undue influence or mutual mistake, G.S. 97-17, and he may not attack it on the ground that the jurisdictional facts therein alleged in regard to the relationship of employer and employee and that the accident arose out of and in the course of the employment were untrue.

APPEAL by plaintiff from a judgment entered in chambers on June 22, 1966, by *Peel, J.*, as *Presiding Judge* of the Seventh Judicial District. From NASH.

On Tuesday, January 26, 1965, about 7:30 a.m., Atlas Tabron, plaintiff herein, while riding on a pickup truck operated by C. S. Bunn, sustained personal injuries as the result of a collision on N. C. Highway No. 97 between said pickup and another motor vehicle.

On said date, a policy issued by defendant Insurance Company, covering the liability of defendant Farms, Inc., to its employees under the North Carolina Workmen's Compensation Act, was in effect. Farms, Inc., filed with the North Carolina Industrial Commission I.C. Form 19, "Employer's Report of Accident to Employee," dated January 27, 1965, (defendants' Exhibit 1) in which it reported said accident as arising out of and in the course of plaintiff's employment by Farms, Inc., and that plaintiff's average weekly wage under his employment by Farms, Inc., was $24.00.

I.C. Form 21, "Agreement for Compensation for Disability," dated March 2, 1965, (defendants' Exhibit 2) was executed by plaintiff, as employee, by Farms, Inc., as employer, and by Insurance Company, as the employer's compensation carrier. The execution thereof by plaintiff was by making his mark. His name was written by Elizabeth Tabron, his wife.

In said agreement on I.C. Form 21, plaintiff, Farms, Inc., and

defendant Insurance Company, stipulated and agreed: That all parties were subject to and bound by the provisions of the Workmen's Compensation Act; that plaintiff's said accident on January 26, 1965, arose out of and in the course of his employment by Farms, Inc.; that plaintiff received "head lacerations and 4 rib fractures" as a result of said accident; that plaintiff's actual average weekly wage at the time of said accident was $24.00; that, as of March 2, 1965, plaintiff had not returned to work; and that the employer and carrier agreed to pay compensation to the employee at the rate of $14.00 per week beginning February 2, 1965.

The agreement on I.C. Form 21 was approved by the Commission on March 16, 1965. Plaintiff received compensation payments in accordance therewith. On September 2, 1965, Insurance Company reported to the Commission (defendants' Exhibit 8) that plaintiff had returned to work on July 10, 1965; that the "total amount of Compensation paid" was $345.60; and that the "total medical paid" was $699.93.

On October 5, 1965, plaintiff, through counsel, moved that the Commission fix a date for a hearing to determine whether it had jurisdiction in respect of a claim based on injuries sustained by plaintiff as a result of said accident of January 26, 1965. Pursuant thereto, the matter was set for hearing on November 22, 1965, before J. M. Caldwell, Esq., Deputy Commissioner. At said hearing, prior to the introduction of evidence, counsel for plaintiff made a motion that the Commission "rescind or set aside the jurisdiction it originally assumed in this matter," on these grounds: (1) Relationship of employer and employee did not exist between plaintiff and Farms, Inc.; (2) plaintiff and C. S. Bunn, the driver of the pickup and also president of Farms, Inc., were neither in fact nor in law fellow employees; (3) plaintiff's injury did not arise out of and in the course of his employment by Farms, Inc.; and (4) the routine procedures pursued by the employer and the carrier did not confer jurisdiction on the Industrial Commission. No ruling was made on said motion until the hearing was concluded.

At the hearing, evidence was offered both by plaintiff and by defendants bearing upon whether the relationship of employer and employee subsisted between Farms, Inc., and plaintiff, at the time of the accident of January 26, 1965, and, if so, whether plaintiff's injuries were by accident arising out of and in the course of said employment.

The hearing commissioner, based on particular findings of fact set forth in his order, found and concluded that the parties were subject to and bound by the provisions of the Workmen's Compensation Act; that plaintiff was injured by accident arising out of and

in the course of his employment by Farms, Inc.; that the agreement on I.C. Form 21 approved by the Commission on March 16, 1965, had the status of an award of the Commission; and that plaintiff had failed to show said agreement should be set aside on account of "error due to fraud, misrepresentation, undue influence, mutual mistake, or any other sufficient reason." On these grounds, the hearing commissioner denied plaintiff's motion to "rescind or set aside the jurisdiction it originally assumed in this matter."

Plaintiff appealed to the full Commission, setting forth in his application for review that the hearing commissioner's said findings as to the employer-employee relationship, and as to plaintiff's injuries being by accident arising out of and in the course of his employment by Farms, Inc., were not supported by evidence.

The full Commission overruled plaintiff's exceptions. It adopted as its own the findings of fact and conclusions of law of the hearing commissioner and affirmed his decision. Plaintiff appealed therefrom to the superior court, bringing forward his exceptions to said findings and conclusions.

Judgment entered by Judge Peel, after reviewing the facts and proceedings narrated above, states that plaintiff did not contend before the hearing commissioner that the "Agreement for Compensation for Disability" should be set aside by reason of "error due to fraud, misrepresentation, undue influence or mutual mistake," or except to the findings and conclusions of the hearing commissioner, adopted by the full Commission, with reference thereto, and did not so contend before the full Commission or before the court.

Judge Peel's findings of fact conclude as follows: "Independently of the findings of Commissioner Caldwell and the Full Commission, this Court concludes from the full record that there is no evidence before the Commission or this Court to justify the setting aside of the Agreement and Award hereinabove referred to, because of fraud, misrepresentation, undue influence, mutual mistake or excusable neglect." The judgment proper (1) denies plaintiff's motion to set aside the "Agreement for Compensation for Disability"; (2) dismisses plaintiff's appeal, and (3) remands the cause to the Commission.

Plaintiff excepted and appealed.

Herman L. Taylor and Mitchell & Murphy for plaintiff appellant.

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

BOBBITT, J. Plaintiff's brief states the question involved is whether the court committed "prejudicial and reversible error by

failing to find that the employer-employee relationship did not exist between appellant and appellee and that appellant's injury did not arise out of compensable employment." The judgment of Judge Peel is not based on findings of fact and conclusions of law relating to these questions. It is based on his conclusion, after consideration of the full record, there was no evidence before the full Commission or before him to justify setting aside the "Agreement for Compensation for Disability," approved by the Commission on March 16, 1965, because of fraud, misrepresentation, undue influence, mutual mistake or excusable neglect.

The jurisdiction of the Commission may be invoked either by filing a claim for compensation or by submission of a voluntary settlement for approval before a claim is filed as provided by G.S. 97-82. *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777. "In approving settlements the Commission acts in its judicial capacity." *Letterlough v. Atkins,* 258 N.C. 166, 128 S.E. 2d 215. As stated in *Biddix, supra* at 663, by Barnhill, J. (later C.J.): "In a judicial proceeding the determinative facts upon which the rights of the parties must be made to rest must be found from admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard." "An agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an order of the Commission affirmed on appeal. G.S. 97-87." *Tucker v. Lowdermilk,* 233 N.C. 185, 188, 63 S.E. 2d 109, 111; *Smith v. Red Cross,* 245 N.C. 116, 120, 95 S.E. 2d 559, 562; *Neal v. Clary,* 259 N.C. 163, 166, 130 S.E. 2d 39, 41.

Unquestionably, the matters set forth on I.C. Form 21, "Agreement for Compensation for Disability," if true, conferred jurisdiction on the Commission.

G.S. 97-17 provides: "Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission: *Provided, however, that no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission*

may set aside such agreement." (Our italics.) The proviso was added to G.S. 97-17 (by Session Laws of 1963, Chapter 436) subsequent to our decision in *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673 (1956).

In *Neal v. Clary, supra,* a car operated by the defendant, in which the plaintiff was a passenger, was involved in a collision. The plaintiff alleged the collision and her injuries were proximately caused by the defendant's negligence. The defendant pleaded the Workmen's Compensation Act in bar of the plaintiff's action. It was admitted that both the plaintiff and the defendant were employees of a corporation having more than five regular employees; also, that I.C. Form 21, "Agreement for Compensation for Disability," signed by the plaintiff, her employer and its compensation carrier, had been approved by the Industrial Commission. A judgment dismissing the plaintiff's action for lack of jurisdiction was affirmed by this Court. With reference to the motion by the plaintiff for leave to amend her pleadings, Denny, J. (later C.J.), said: "The motion to amend filed in this Court is denied without prejudice to move before the Industrial Commission, after notice to all interested parties, to set aside the agreement contained in Form No. 21, . . . as well as the award made pursuant thereto, *on the grounds of mutual mistake, misrepresentation and fraudulent statements.* (Citation) If such agreement is set aside by the Industrial Commission *on the aforesaid grounds,* the plaintiff may, if so advised, institute a new action and allege the facts with respect to jurisdiction as they may then exist." (Our italics.)

Reference is made to *Stanley v. Brown,* 261 N.C. 243, 134 S.E. 2d 321, for a full statement of the factual situation considered therein. The injured plaintiff, his employer and the employer's compensation carrier had executed an agreement on I.C. Form 21 which the Commission had approved on June 13, 1960. Defendant Brown, a fellow-employee of the plaintiff, was not subject to common law liability if the plaintiff and Brown were acting in the course of their employment when the plaintiff was injured. On March 8, 1962, based on stipulations *then* submitted by the plaintiff, his employer and the employer's compensation carrier, a deputy commissioner, without notice to Brown, signed an order purporting to set aside the 1960 agreement. This Court held the 1962 order was void as to Brown and that the plaintiff's action for personal injuries against Brown should have been nonsuited. Rodman, J., for the Court, said: "The Commission's approval of the stipulated facts and payment was as conclusive as if made upon a determination of facts in an adversary proceeding." Moore, J., in a concurring opinion, said: "An agreement for the payment of workmen's compensation, set-

ting out jurisdictional facts and that the employee was injured by accident arising out of and in the course of his employment, when approved by the Industrial Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed on appeal. (Citation) Such agreement may be set aside for fraud, misrepresentation or mutual mistake at the instance of a party or parties thereto. (Citation)"

Judge Peel found, and rightly so, there was no evidence the "Agreement for Compensation for Disability" on I.C. Form 21, approved by the Commission on March 16, 1965, was entered into and executed by plaintiff because of fraud, misrepresentation, undue influence, mutual mistake, or excusable neglect. Indeed, plaintiff's motion was not predicated on such grounds; and, as stated in Judge Peel's order, plaintiff has not contended at any stage of the proceedings that said agreement should be set aside on any of these grounds or that there was evidence sufficient to support such contention if made. Plaintiff contends the Commission should "rescind and set aside the jurisdiction it originally assumed in this matter" on the ground the matters set forth in said agreement are untrue; that the Commission did not have jurisdiction because, contrary to the stipulations in said agreement, plaintiff was not an employee of Farms, Inc., and was not injured by accident arising out of and in the course of such employment.

If the matter were before us as an original proposition, a difficult question would confront us as to whether the evidence was sufficient to support the finding that the employer-employee relationship existed between Farms, Inc., and plaintiff at the time plaintiff was injured and, if so, whether plaintiff's injury was compensable.

Questions as to the Commission's jurisdiction have been presented often when an employer and its compensation carrier are contesting a claim by asserting nonliability under the Workmen's Compensation Act, *e. g.*, on the ground the injured person was an independent contractor and not an employee, etc. See decisions cited and discussed in *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301, and in *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280.

Here plaintiff, having received all the benefits to which he would be entitled for an injury compensable under the Workmen's Compensation Act, seeks to attack the jurisdiction of the Commission by asserting that the factual stipulations set forth in the "Agreement for Compensation for Disability" are untrue. The law will not permit him to deny the truth of the matters set forth in said agreement unless, as now provided in G.S. 97-17, there was error therein due to fraud, misrepresentation, undue influence or mutual mistake.

It is noteworthy, although not a basis of decision, that plaintiff's

motion that the Commission "rescind or set aside the jurisdiction it originally assumed in this matter" was made after the proceedings before the Industrial Commission had been pleaded as a defense in a negligence action instituted by plaintiff against C. S. Bunn in the Superior Court of Nash County.

In our opinion, Judge Peel's judgment is correct and is affirmed.

Affirmed.

S. E. WILSON v. G. GAY McCLENNY, D. F. McDAVID, WALTER G. MASON AND WILLIAM M. McCLENNY.

(Filed 3 February, 1967.)

1. Appeal and Error § 60—

Decision on appeal becomes the law of the case, controlling in all subsequent proceedings, and when such decision holds that only one defense was available to defendants, the decision is the law of the case as then constituted by the pleadings; however, if defendants, after the decision, are allowed to amend their answer, and such amendment states another affirmative defense, the former decision does not preclude such further defense.

2. Pleadings § 25—

The trial judge in term, in his discretion, may allow amendments.

3. Master and Servant § 10; Corporations § 3— Alcoholism and mismanagement of corporate funds are separate defenses excusing breach of agreement to elect plaintiff president of corporation for five year term.

Plaintiff declared on a written contract under which defendants agreed to vote their stock and use their influence to have plaintiff elected president of a corporation for a period of five years, alleging defendants' wrongful breach of the agreement. Defendants alleged that they breached the agreement because plaintiff's alcoholism and plaintiff's mismanagement of the corporate funds rendered plaintiff unfit to hold the position of president, and filed a bill of particulars specifying expenditures made by plaintiff of the corporate funds in alleged unauthorized rebates or commissions in excess of that allowed by law. *Held:* Defendants have alleged separate and independent defenses, and therefore an instruction that if the jury answered in the negative the issue as to whether plaintiff's alcoholism justified the breach of the agreement, the jury should answer the issue of whether defendants wrongfully breached their contract in the affirmative, must be held for prejudicial error as amounting to a peremptory instruction withdrawing from the jury defendants' defense of mismanagement of corporate funds on the part of plaintiff. As to whether defendants, stockholders, would be estopped to raise the issue of mismanagement by their acquiescence in the acts of mismanagement relied on, *quaere*?

4. Trial § 40—

In the absence of waiver, the court must submit such issues as are raised by the pleadings and supported by law, including new matter alleged in the answer.

APPEAL by defendants from *Bone, E.J.,* June 13, 1966 Special Civil Session, NASH Superior Court.

The defendant Mason listed in the caption was not served and has never appeared in the case.

The plaintiff instituted this civil action on May 15, 1961. His complaint joined two causes of action. In the first he alleged a breach of a written contract. In the second he alleged a tortious interference with another separate and distinct contract. The parties made many motions which resulted in orders to strike and to amend.

Trial on the merits at the September Term, 1963, resulted in a judgment of involuntary nonsuit as to both causes of action. On appeal, this Court reversed the judgment as to the first cause and affirmed the nonsuit as to the second. The opinion of this Court was filed June 12, 1964, and the case remanded to the Superior Court for trial on the first cause of action.

On October 26, 1965, the defendants moved to amend their fourth further defense. Judge Bundy signed an order permitting the amendment. At the same time the Judge ordered the defendants to furnish the plaintiff a bill of particulars setting forth "each instance of improper expenditures and insurance company practices on which they rely." The defendants filed a bill of particulars alleging that the plaintiff issued 11 checks totaling $6,569.59 on the company's account, giving date, amount, and payee of each. The concluding paragraph of the bill of particulars is here quoted:

> "13. That on each of the occasions set out above the plaintiff, S. E. Wilson, made, or caused to be made, expenditures which had not been authorized by the Board of Directors of Gateway Life Insurance Company and which were not necessary to the operation of the home office of Gateway Life Insurance Company, and which were expenditures, as these defendants are advised and informed, and upon such information allege, that were made to individuals or corporations as unauthorized rebates or commissions in excess of that which is allowed by law and proper insurance practices."

The plaintiff filed a long reply to the defendants' fourth further defense in which he alleged all the expenditures made and the practices followed were known to, acquiesced in, and in some instances actually initiated by the defendants who, by their participation

are estopped to object. The defendants' motion to strike was overruled, except to immaterial matters.

The fourth further defense at the time of trial is here quoted:

"That the plaintiff held himself out to the defendants as a capable, experienced insurance person, who was sober, industrious and who could attract business to the proposed life insurance company; that these facts given by the plaintiff were false and proved to be false; that the true facts concerning the plaintiff were not known to the defendants until a later date; that he failed to have insurance policies ready for use when the charter was granted and Gateway Life Insurance Company had no policies to use for several months after the charter was granted; that because the plaintiff was derelict in his duty, the Gateway Life Insurance Company nearly lost its license to do business in the State of Virginia; that instead of being a sober person, it developed that the plaintiff was addicted to the use of alcohol; that the defendants and other directors of Gateway Life Insurance Company tried to overlook these matters until it became obvious that the plaintiff was an alcoholic; that the plaintiff made a public spectacle of himself by his uncontrolled use of alcohol and he was admitted to a North Carolina institution for alcoholism; that the plaintiff neglected his duties as president of Gateway Life Insurance Company and permitted improper expenditures and insurance company practices and attempted to place his brother in charge of matters when he did not have sufficient knowledge of the operation of an insurance company to carry out the duties imposed on the President.

"2. That because of the conduct of the plaintiff, his inability and his neglect of his duties as President of the Gateway Life Insurance Company, the insurance company was not being properly operated; that it was necessary that the plaintiff be not re-elected to his position as President for the welfare of Gateway Life Insurance; that the stockholders of the company failed to re-elect the plaintiff as a director or as President of the meeting of the stockholders and Board of Directors at the meeting of April 10, 1961, solely because of his misconduct, inability and actions of the plaintiff."

The plaintiff offered evidence tending to support the material allegations of the complaint and of his reply to the fourth further defense as amended. At the conclusion of his evidence, each of the three defendants entered a separate motion for judgment of involuntary nonsuit. The motions were denied.

The defendants introduced evidence tending to support the material allegations of fact remaining in their pleadings. At the conclusion they renewed the motions to dismiss, which were again denied. The defendants tendered issues which the court refused to submit, but they did not enter exception to the refusal. The court prepared and submitted these issues:

"1. Did defendants enter into a written contract with plaintiff on or about November 21, 1958, as alleged in the complaint?"

The jury, on the court's peremptory instruction, answered the issue, Yes.

"2. Did the plaintiff drink alcoholic beverages to such an extent that it interfered with the proper discharge of his duties as a director and president of Gateway Life Insurance Company so as to justify the defendants in not performing the contract as alleged in the answer?"

The jury answered the issue, No.

"3. Did the defendants wrongfully breach their contract as alleged in the complaint?"

Answer: Yes.

"4. What damages, if any, is the plaintiff entitled to recover of the defendants?"

Answer: $30,166.00.

From a judgment in accordance with the verdict, the defendants appealed.

Battle, Winslow, Merrell, Scott & Wiley by Robert M. Wiley for plaintiff appellee.

Bridgers, Horton & Britt and Dill & Fountain by Thomas G. Dill for defendant appellants.

HIGGINS, J. The pleadings before the Court at the first trial are carefully analyzed and the evidence thereon reviewed in detail by Justice Sharp on the first appeal. *Wilson v. McClenny,* 262 N.C. 121, 136 S.E. 2d 569. With respect to the questions therein answered, that opinion is the law of the case.

The former decision established the paper writing dated November 21, 1958, as the valid contract of the parties. A copy was attached to the complaint and the original was introduced in evidence, and its due execution was admitted. Judge Bone, therefore, correctly instructed the jury to answer the first issue, Yes. Likewise, the former opinion holds as a matter of law that further defenses 1, 2, and 3 set up in the defendants' answer are not sufficient to invalidate the contract nor

to relieve the defendants of responsibility under it. Hence, only the fourth further defense was available to the defendants.

Our former decision correctly holds, "If the defendants are to be released from their obligations under the agreement they must establish their fourth defense, *i. e.*, that the plaintiff failed to perform his duties as president because of alcoholism." On the basis of this holding, Judge Bone submitted issue No. 2. However, after the case was remanded to the Superior Court for a new trial on the first cause of action, and before the second trial, Judge Bundy, in his discretion, allowed the defendants to amend their fourth further defense. The Judge in term, in his discretion, may allow amendments. *Chappell v. Winslow*, 258 N.C. 617, 129 S.E. 2d 101. The amended version is quoted in the statement of facts.

At the time of the amendment, on plaintiff's motion, the court ordered the defendants to file a bill of particulars. With this order they complied, alleging, among other things, that plaintiff as president had paid more than $6,000.00 of company funds "to individuals or corporations as unauthorized rebates or commissions in excess of that which is allowed by law and proper insurance practices." The bill of particulars gives the date, the amount, the payee of each check, and sometimes the account for which it purported to be in payment. Some of these checks were marked for furniture and office equipment. No such account appears to have been set up on the books; and no such equipment was present or listed in the company's supplies. The defendants charged that the plaintiff used these company funds for unlawful rebates and not for furniture and equipment.

By reply, the plaintiff alleged the defendants knew about the rebates and the giving of company checks to pay them; and that they participated in, and in some instances initiated the payments. He pleaded this knowledge and participation as an estoppel and as a bar to the defendants' right to assert them as acts of justification for the breach of their contract to vote for him as president.

If the jury should find the plaintiff was guilty of such mismanagement of the company business as disqualified him to discharge the duties of President, the finding would absolve them of liability under their contract even though the acts of mismanagement were committed while the plaintiff was sober.

From the foregoing it seems clear that the amended fourth further defense alleges mismanagement in addition to the excessive use of alcohol as a bar to the plaintiff's right to recover. At first blush, it appears this additional charge of mismanagement is embraced in the third issue which the Judge submitted. However, Judge Bone instructed the jury as follows: "So I charge you that if you answer the second issue. Yes, then you should answer the third issue, No. But if you have

answered the second issue, No, then you would answer the third issue, Yes."

The foregoing is equivalent to a peremptory instruction to decide both issues on the finding with respect to the plaintiff's excessive use of alcohol. When the jurors answered the first issue No, the instruction compelled them to answer the third issue, Yes. Mismanagement sufficient to warrant discharge or the refusal to re-employ would be a good defense regardless of the use of alcohol.

We are doubtful whether the plea of estoppel raised by the plaintiff's reply is good. The plaintiff and the three defendants were not the only stockholders of the company. All had a duty to the other stockholders, to the company's creditors, and to its policy holders to see to it that the company was not mismanaged. Any participation in mismanagement would be a breach of trust. Perhaps neither the defendants' knowledge nor even their participation in the mismanagement would compel them to vote for one whose conduct rendered him disqualified. These are matters to be considered by the court when the evidence is in and the issues are to be determined.

We are submitting these views for the consideration of the trial judge in determining the issues at the next trial. The court will submit such issues as are raised by the pleadings and supported by the law and the evidence. G.S. 1-200; *Carland v. Allison*, 221 N.C. 120, 19 S.E. 2d 245; *King v. Coley*, 229 N.C. 258, 49 S.E. 2d 648; *Wheeler v. Wheeler*, 239 N.C. 646, 80 S.E. 2d 755. All material issues must be tried unless waived, and it is error not to try them. *Porter v. R. R.*, 97 N.C. 66, 2 S.E. 581. The rule applies to new matter alleged in the answer. *Griffin v. Ins. Co.*, 225 N.C. 684, 36 S.E. 2d 225.

The court's charge that issue No. 3 should be answered, Yes, if the jury answered issue No. 2, No, was error in that it took away from the defendants their charge of mismanagement raised by their amended fourth further defense.

This case was first tried in September, 1963, and again in June, 1966. Between these two dates a mistrial was ordered in the Superior Court. We regret the necessity of returning the case for another trial; however, the peremptory instruction took from the defendants their defense of mismanagement and the violation of proper insurance practices alleged in the amended fourth further defense. Such mismanagement may be found to be a complete defense even if the plaintiff was always sober. For this error, we order a

New trial.

MICHAEL COLIN KAYLER, PLAINTIFF, v. VICTOR TYSON GALLIMORE, DEFENDANT.

(Filed 3 February, 1967.)

1. Judgments § 29—

Where one of the parties to an action is dismissed therefrom prior to the entry of judgment adjudicating the rights as between the other parties he is not bound by the judgment therein. The fact that he is a witness in the trial of the action is immaterial upon the question of estoppel by judgment.

2. Same—

Only parties and those in privity with them are estopped by a judgment, and privity denotes a mutual or successive relationship to the same right; the relationship of principal and agent or master and servant does not create such privity; cases in which the principal or master is sought to be held liable solely on the doctrine of *respondeat superior* being exceptions to the rule that privity is required for estoppel by judgment.

3. Same—

Estoppel by judgment must be mutual, and a person not estopped by a prior judgment may not assert such prior judgment as an estoppel against another.

4. Same; Automobiles § 35—

A driver of a vehicle seeking to recover for personal injuries in an action against the driver of the other vehicle involved in the collision may not assert that the adjudication of the issues of negligence and contributory negligence in favor of the owner in a prior action by the owner against the same defendant, was conclusive, leaving only the issue of damages to be determined, since plaintiff driver was not a party to the prior action and, not being estopped by the judgment, cannot assert it as an estoppel against defendant.

5. Pleadings § 25; Appeal and Error § 7—

The Supreme Court on appeal may allow a party to amend so as to make his pleadings conform to the stipulations of the parties and the theory upon which the case was tried in the lower court, G.S. 7-13, Rule of Practice in the Supreme Court 20(4), but the Supreme Court will not allow an amendment which would not make the record conform to the facts developed on the trial but would present matter relating to a theory different from that upon which the trial court proceeded.

APPEAL by plaintiff from *Gambill, J.*, at the 9 May 1966 Civil Session of STANLY.

This is an action for personal injuries received by Kayler, the driver of an automobile owned by Edward Stewart, in a collision between it and the automobile of the defendant.

The case of *Stewart v. Gallimore*, 265 N.C. 696, 144 S.E. 2d 862, arose out of the same collision. In that action, Stewart, the owner of the automobile driven by Kayler, the present plaintiff, recovered

judgment for damage to his automobile, the jury having answered the issues of negligence and contributory negligence in his favor. That judgment was affirmed on appeal to this Court. In that action it was alleged and stipulated that the Stewart automobile was a family purpose car and was being driven by Kayler under circumstances such that any negligence by Kayler would be attributable to Stewart. Gallimore made Kayler a party defendant to the suit so brought by Stewart and filed a cross action against Kayler for contribution and Kayler filed a counterclaim for personal injuries against Gallimore. However, both the cross action and the counterclaim were dismissed by judgments of voluntary nonsuit so that, at the time of the verdict and the judgment thereon, Kayler was not a party to the *Stewart* case.

The present action was instituted and the complaint and answer were filed before the judgment in the *Stewart* case was rendered. In this action, the allegations of the complaint as to negligence by Gallimore and those of the answer as to contributory negligence by Kayler are substantially the same as those in the pleadings in the *Stewart* case.

In the present action, Kayler moved in the court below for a ruling that the issues of negligence and contributory negligence having been adjudicated in the *Stewart* case adversely to *Gallimore*, the only issue for determination by the jury in the present case is that of damages. From the denial of this motion Kayler appeals.

The motion sets forth the procedural history of the *Stewart* case, and the pleadings therein are attached to the motion as exhibits. The order denying the motion recites that the parties to this action agreed that the court might find these statements in the motion to be factually correct.

D. D. Smith and Hobart Morton for plaintiff appellant.

Richard L. Brown, Jr., and Charles P. Brown for defendant appellee.

LAKE, J. The fact that Kayler was at one time a party to the suit between Stewart and Gallimore has no present significance. He was dismissed from that suit prior to the entry of the judgment upon which he now relies. The effect of that judgment upon the present action is, therefore, to be determined as if Kayler had never been made a party to the *Stewart* case. *Bank v. Casualty Co.*, 268 N.C. 234, 150 S.E. 2d 396. It is also immaterial to the determination of the question now before us that Kayler was a witness in the trial of the action brought by Stewart. Idem; *Meacham v. Larus & Brothers Co.*, 212 N.C. 646, 194 S.E. 99.

It is well settled that, ordinarily, one is not estopped by a judgment to relitigate issues of fact determined in the former action unless he was a party thereto or is a privy of a party thereto. *Light Co. v. Insurance Co.*, 238 N.C. 679, 79 S.E. 2d 167; *Rabil v. Farris*, 213 N.C. 414, 196 S.E. 321; *Meacham v. Larus & Brothers Co., supra.* It is equally well settled that, ordinarily, an estoppel by judgment must be mutual. Thus, a party to the subsequent action, who was not a party to the former action and, therefore, is not estopped by the judgment therein, cannot assert that judgment as an estoppel against his opponent, even though the opponent was a party to the action in which the judgment was rendered. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574; *Meacham v. Larus & Brothers Co., supra.*

Applying these principles, Parker, J., now C.J., speaking for the Court in *Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E. 2d 688, said:

> "The great weight of authority seems to be that a judgment for the plaintiff in an action growing out of an accident is not *res judicata*, or conclusive as to issues of negligence or contributory negligence, in a subsequent action growing out of the same accident by a different plaintiff against the same defendant."

In *Meacham v. Larus & Brothers Co., supra*, a passenger in an automobile involved in a collision sued the owner of the adverse vehicle and its driver. The defendants pleaded, in bar of his right to recover, a judgment rendered in their favor in a suit by another passenger in the same automobile in which the plaintiff was riding. In holding that the second plaintiff was not estopped by the judgment in the former action to which he was not a party, even though he had testified as a witness therein, Schenck, J., speaking for the Court, said:

> "An estoppel must be mutual, *Peebles v. Pate*, 90 N.C. 348, and one who is not bound by an estoppel cannot take advantage of it, *LeRoy v. Steamboat Co., supra.* It is hardly supposed that had the issue as to the defendant Bivens' (the driver of the adverse vehicle) negligence been answered in favor of the plaintiff in Sedberry's (the former plaintiff) case, that the plaintiff Meacham could be heard to say that such answer was *res judicata* in the trial of his action."

In *Gentry v. Farrugia*, 132 W. Va. 809, 53 S.E. 2d 741, quoted with approval by this Court in *Coach Co. v. Burrell, supra*, the plaintiff, as here, sued for personal injuries sustained in an automobile

collision and the defendant pleaded in bar a judgment rendered in favor of the defendant in a former action brought by the owner of the automobile driven by Gentry. In denying the validity of the plea of *res judicata,* the West Virginia Court said the plea failed for lack of mutuality of the alleged estoppel since the plaintiff (the driver-agent) would not have been entitled to judgment based upon the mere proof that his employer (the owner of the automobile) had recovered damages in his action against the same defendant.

It is also well settled that the privity, which will create an estoppel by judgment against one not a party to the former action, denotes a mutual or successive relationship to the same right. *Masters v. Dunstan, supra; Light Co. v. Insurance Co., supra; Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570; *Rabil v. Farris, supra.* The relationship of principal and agent or master and servant does not create such privity.

It is true that a principal or master, sued for damages by reason of the alleged negligence of his agent or servant, may plead, in bar of such action, a judgment in favor of the agent or servant in a former action by or against the present plaintiff, which judgment establishes that the agent or servant was not negligent. *Leary v. Land Bank, supra.* This is not on the ground of privity between the agent or servant on the one hand and the principal or master on the other. This is an exception to the general rule above stated and arises out of the fact that the liability of the principal or master, if any, rests upon the doctrine of *respondeat superior. Coach Co. v. Burrell, supra; Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366.

Coach Co. v. Burrell, supra, was a suit by the principal-owner against the owner of the adverse vehicle. It was held that the defendant could not plead, in bar of the action, a judgment rendered in his favor in a former action brought by the driver-agent for personal injuries, the jury in such former action having found that the driver-agent was not injured by the negligence of the defendant. Again, in *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492, this Court held that the principal-owner is not estopped by a judgment obtained by the same plaintiff in a former action brought against the agent-driver, the principal-owner not having participated in the defense of the former action.

Clearly, had Gallimore prevailed in the suit brought against him by Stewart, such judgment would not estop Kayler, who was not a party to that case. Consequently, the judgment in favor of Stewart, in the former action, does not estop Gallimore from relitigating the issues of negligence and contributory negligence when sued by Kayler. "A party will not be concluded by a former judgment unless he could have used it as a protection, or as a foundation of a

claim, had the judgment been the other way." *Masters v. Dunstan, supra.*

The plaintiff filed two motions in this Court. In the first, he requests that he be allowed to file a reply alleging the facts concerning the procedural history of the *Stewart* case, as contained in the motion which he filed in the superior court and upon which that court entered the order from which this appeal is taken. Those facts were stipulated by the defendant in the superior court and the order from which this appeal was taken was entered thereon. In order that the pleadings may conform to such stipulation and to the theory upon which the matter was presented to the trial court, we allow this motion. G.S. 7-13; Rule 20(4) of the Rules of Practice in the Supreme Court.

In the second motion, the plaintiff seeks permission to file another reply. In the answer the defendant denies his own negligence and pleads contributory negligence by the plaintiff. The proposed reply would assert that each of these issues is *res judicata* by reason of a judgment entered in the superior court in still another suit arising out of this collision. That suit was brought on behalf of Daisy Mae Hatley by her next friend against Gallimore, Miss Hatley having been a passenger in the automobile driven by Kayler. Kayler proposes now to allege in this second proposed reply: Gallimore brought Kayler into the *Hatley* suit as an additional defendant and filed a cross action against him for contribution; Kayler filed an answer in the *Hatley* suit and asserted a counterclaim against Gallimore; following our affirmance of the judgment in the *Stewart* case, Kayler amended his answer in the *Hatley* case to plead *res judicata,* as to the issues of negligence of Gallimore and negligence of Kayler, on the basis of the judgment in the *Stewart* case; he was permitted to do so and judgment was entered dismissing the cross action against Kayler on the ground that each of these issues, as between Gallimore and Kayler in the *Hatley* case, was *res judicata* by reason of the *Stewart* judgment; thereupon, Kayler took a judgment of voluntary nonsuit as to his counterclaim against Gallimore in the *Hatley* case. Thus, his present motion before us is that he be permitted in the proposed reply now to allege the procedural history and judgment in the *Hatley* case as basis for his contention that the superior court erred in refusing to order that the issues of negligence and contributory negligence in his own suit against Gallimore are each *res judicata,* by reason of the judgment in the *Stewart* case.

The effect of the judgment in the *Hatley* case upon the issues now to be litigated in the present action was not presented to the superior court and has not been passed upon by it, although it ap-

pears that the judgment in the *Hatley* case was entered by the superior court on the same day that it entered in this suit the order from which this appeal was taken.

With reference to a motion in this Court to amend the appellant's complaint, Walker, J., speaking for the Court in *Bonner v. Stotesbury,* 139 N.C. 3, 51 S.E. 781, said:

> "Plaintiff moved in this Court to amend his complaint. As the amendment would, perhaps, present a case substantially different from the one which was tried below and raise a question of law not involved in the present appeal, we could not allow the motion if in other respects we had the power to do so. * * * This Court undoubtedly has the power of amendment, but this is not a case which calls for its exercise."

In *Whitehead v. Spivey,* 103 N.C. 66, 9 S.E. 319, Merrimon, J., speaking for the Court, said:

> "The appellant seeks to help his cause of action and his case in this Court by introducing here, summarily, substantially a new cause of action, one that has arisen since this action began and since this appeal was taken. The defendant has had no opportunity to contest its application or bearing in this action. Indeed the effect of allowing the motion as to this Court might, probably would be, to recast the action in material respects, and allow the plaintiff to assign new grounds of error as to rulings never made in the court below. This could not be thought of for a moment."

In *Howard v. Insurance Co.,* 125 N.C. 49, 34 S.E. 199, Montgomery, J., speaking for the Court, said:

> "In this Court, a motion was made by the counsel of plaintiff to amend the complaint. * * * The amendment involved questions of fact and a matter of law entirely foreign to the case as made up on appeal, and it is on those accounts denied."

In *Manufacturing Co. v. Gray,* 126 N.C. 108, 35 S.E. 236, permission to amend in this Court was denied for the reason that the proposed amendment would not make the record conform to the facts developed on the trial, but would present the matter on a theory different from that upon which the trial court proceeded.

We, therefore, deny the motion for permission to file the proposed reply with reference to the judgment in the *Hatley* case. This action must now go back to the superior court for trial and the plaintiff may, if he be so advised, move that court, in its discretion,

to permit him to file such amendment or such further pleading as he deems proper.

Affirmed.

KENCO PETROLEUM MARKETERS, INC., v. STATE HIGHWAY COMMISSION.

(Filed 3 February, 1967.)

1. Highways § 5—

The State Highway Commission has authority to construct controlled access highways and to forbid the construction or use of a driveway affording direct access to the highway from adjoining property when such access would be an obstruction to the free flow of traffic or a hazard to the safety of travelers upon the highway. G.S. 136-89.49, G.S. 136-89.51.

2. Same; Eminent Domain § 1—

Where the denial by the State Highway Commission of access to a limited access highway does not involve the taking or destruction of a property right, the owner of land diminished in value by such limitation of access is not entitled to compensation; if the limitation of access involves a taking or destruction of a preexisting property right, the owner of the land is entitled to compensation for its taking or destruction, the remedy being by proceedings under Chapter 136 of the General Statutes.

3. Same—

Where the Highway Commission, by agreement for compensation for the taking of a part of a tract of land, stipulates the right of such owner to access to the highway, the right of access as to the owner and his grantees by *mesne* conveyance are governed by the stipulations.

4. Same—

Direct access from plaintiff's land to a ramp is direct access to the highway, since the ramp is a part of such highway.

5. Same— Right to access to road and thence along such road some distance to a ramp, is deprivation of direct access to highway.

The agreement between the owner and the Highway Commission for a taking of a part of land stipulated that the owner should have no right of access to the highway except at a designated survey station. The Highway Commission denied direct access at the designated survey station, leaving access from the land to the highway by way of a driveway to a street or road and thence along such street or road 300 feet to a ramp, entering the highway at the designated survey station, thus giving the land owner access enjoyed by the public in general. *Held:* The agreement for access, in order to have any meaning, must perforce contemplate direct access by the owner to the highway or to a ramp at or near the designated survey station, and the denial of such direct access constitutes a taking, either of an easement appurtenant or of a right con-

ferred by the agreement, entitling the owner or those claiming under him to compensation.

APPEAL by plaintiff from *Clark, S.J.*, at the 1 August 1966 Non-jury Session of GUILFORD, Greensboro Division.

This is a proceeding brought under the provisions of Chapter 136 of the General Statutes to recover damages for the refusal by the defendant to permit the plaintiff to construct a driveway giving direct access from the plaintiff's property to U. S. Highway 29-70 Bypass, hereinafter called the highway. The complaint prays that the court appoint commissioners to determine the amount of compensation which the defendant should pay and that such compensation be awarded.

The complaint alleges that through *mesne* conveyances from Mildred J. Shelton the plaintiff became the owner of a tract of land which abuts upon the right of way of the highway. Although this is denied in the answer for lack of information and the evidence, submitted for the consideration of the court by agreement, is not sufficient to establish the chain of title from Mrs. Shelton to the plaintiff, it is conceded in the brief of the defendant that the plaintiff is the owner of the land. We, therefore, treat this as a fact for the purposes of this appeal.

The land in question is an irregularly shaped tract of slightly more than four acres. Its southern boundary abuts on the right of way of the highway. Its northeast boundary abuts on Kivett Drive, which crosses the highway at an overpass. The eastern boundary of the land follows the curve of a ramp upon which traffic moves from Kivett Drive down to and onto the southwestbound lanes of the highway.

The plaintiff has permission from the Highway Commission to construct driveways in the boundary of its land upon Kivett Drive, thus affording ingress and egress to and from its property by way of Kivett Drive. Thus, a vehicle at the south boundary of the plaintiff's land could proceed over the plaintiff's land northeast to Kivett Drive, approximately 400 feet, then turn right on Kivett Drive, go along it approximately 300 feet in a southeasterly direction and then go down the ramp in a southwesterly direction to the highway, reaching it in the vicinity of a point known as "Station 350+00." It appears that ingress from the highway to the plaintiff's property can be had only by other ramps leading from the highway up onto Kivett Drive and thence along Kivett Drive to the plaintiff's driveway.

On 13 February 1952, Mildred J. Shelton, the plaintiff's predecessor in title, and the Highway Commission entered into a "Right of Way Agreement." By this she, "recognizing the benefits to said

property by reason of the construction of the proposed highway development in accordance with the survey and plans proposed for the same," granted to the Commission a right of way "for said highway project," and released the Commission from all claims for damages "by reason of said right of way across the lands" of Mrs. Shelton. This agreement described the right of way in terms of width at designated survey stations "as shown in said survey, and in accordance with plans for said project in the office of the State Highway and Public Works Commission." For the purposes of this appeal, it is assumed that those plans disclosed the above mentioned ramps, reference being made in the agreement to "the connecting ramps in the southwest and southeast quadrant." The agreement between Mrs. Shelton and the Commission stated:

> "It is further understood and agreed that the undersigned and their heirs and assigns shall have no right of access to the highway constructed on said right of way except at the following survey stations: 350 + 00."

On 8 October 1964 the plaintiff requested permission of the Commission to construct a driveway giving access from its property to the highway "at station 350+00."

On 4 December 1964 the Commission adopted a resolution reciting that to permit direct access from the plaintiff's land to the highway at survey station 350+00 would be "very hazardous to the traveling public," and that reasonable access from the plaintiff's land to the highway at such survey station was afforded by Kivett Drive and the above mentioned ramps. The resolution, therefore, provided, "IT IS HEREBY RESOLVED AND ORDAINED that the controverted access point * * * be eliminated under the police powers of the Commission * * * and that access to U. S. Highways 29 and 70 be permitted only by use of the ramp entrances leading from Kivett Drive into U. S. Highways 29 and 70."

The superior court, "being of the opinion from the evidence that the plaintiff is not entitled to direct access to Highway 29 & 70 Bypass at Station 350+00," adjudged that the plaintiff is not entitled to have commissioners appointed as provided in G.S. 136-109 and ordered the action to be dismissed.

Walser, Brinkley, Walser & McGirt for plaintiff appellant.

Attorney General Bruton, Deputy Attorney General Lewis, Assistant Attorney General McDaniel and Seymour, Rollins & Rollins for defendant appellee.

LAKE, J. U.S. Highway 29-70 Bypass, at the location in question on this appeal, is a controlled access facility. G.S. 136-89.49(2).

There can be no doubt of the authority of the State Highway Commission, upon its finding that the construction and use of a driveway, affording direct access from adjoining property onto such highway, would be or is an obstruction to the free flow of traffic thereon, or a hazard to the safety of travelers upon the highway, to forbid the construction of the driveway or to prohibit its further use. G.S. 136-89.51; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129. It is equally clear that when the Commission, in the interest of the public safety, convenience and general welfare, without the taking or destruction of a property right, regulates the right to enter upon or to proceed along such a highway, the owner of land which is thereby diminished in value, such as by the diminution in volume of traffic upon the highway in front of it, is not entitled to compensation. *Wofford v. Highway Commission,* 263 N.C. 677, 140 S.E. 2d 376. Conversely, if such action by the Commission is a taking or destruction of a preexisting property right, the owner of such right is entitled to compensation for its taking or destruction. *Hedrick v. Graham, supra.* In the latter event, the remedy of such property owner is by a proceeding under Chapter 136 of the General Statutes. This is the remedy sought by the plaintiff in the present proceeding.

In determining whether the plaintiff had a property right which has been taken or destroyed by the resolution of the Highway Commission, we are not controlled by the provision in G.S. 136-89.52 that "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 right of access shall be considered in determining general damages." This statute was not enacted until 1957, four years after the right of way agreement between the Commission and the plaintiff's predecessor in title. It is also not necessary for us to determine upon this appeal what would have been the rights of the parties without such agreement. The agreement was made and the rights of the parties are fixed thereby, the plaintiff having the rights of its predecessor in title and no others. *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81. We turn, therefore, to the construction of the following provision in that agreement:

> "It is further understood and agreed that the undersigned and their heirs and assigns shall have no right of access to the highway constructed on said right of way except at the following survey stations: 350+00."

The identical language was used in the right of way agreement involved in *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782, where the Court, speaking through Winborne, C.J., said:

"The agreement provided the owners $2500 cash, a highway constructed across their land, and a right of access at survey station 761+00 right. This right of access was an easement, a property right, and as such was subject to condemnation. Defendant's refusal to allow plaintiffs to enter upon the highway at the point of the easement constituted a taking or appropriation of private property. For such taking or appropriation, an adequate statutory remedy in the nature of a special proceeding is provided."

If the Commission, by its resolution, has deprived the plaintiff of a right reserved by or conferred upon the plaintiff's predecessor in title by her agreement with the Commission, the plaintiff is entitled to maintain this proceeding and to the appointment of commissioners to ascertain its damages as provided in Chapter 136 of the General Statutes.

The agreement in this case refers to the plans in the office of the Commission and to "connecting ramps." The parties must, therefore, be deemed to have had in mind the construction of such ramps when they agreed that the plaintiff's predecessor in title, her heirs and assigns, would have a right of access to the highway at survey station 350+00. The Commission now contends that they must be deemed to have meant by the above quoted provision that the owner of the plaintiff's land would have the right to descend the ramp from Kivett Drive and thus enter upon the south or westbound lanes of Highway 29-70. Since all the world has this right, such a construction of the agreement between this landowner and the Commission would be most unreasonable. Such construction would give to the landowner no greater right of access than he would have had if there had been omitted entirely from the agreement the words "except at the following survey stations: 350+00." These words in the agreement meant something. It was intended thereby to leave in or confer upon the landowner a right of access which the general public did not have, and which the landowner would not have had if the excepting phrase had been omitted from the agreement. It will be observed that the agreement in this case did not provide, as did the agreement in *Abdalla v. Highway Commission, supra,* "grantors * * * shall have no right of access to the highway constructed on said right of way except *by way of service roads and ramps* built in connection with this project in the vicinity of survey stations 0+00." (Emphasis added.)

We think the plain meaning of the agreement between the Commission and Mrs. Shelton is that she surrendered whatever claim she, and her successor in interest, might otherwise have to a direct access to Highway 29-70 at other points along the southern bound-

ary of this tract in exchange for a cash consideration and a reservation or grant of a right of direct access "to the highway constructed on said right of way" at the designated point. The amount of the cash consideration paid to Mrs. Shelton was unquestionably affected by the insertion of this provision in the agreement.

The ramp is part of such highway. See *Moses v. Highway Commission,* 261 N.C. 316, 134 S.E. 2d 664. Direct access from the plaintiff's land to the ramp is, therefore, a compliance with the provision of the agreement between the Commission and Mrs. Shelton.

This right of direct access from the plaintiff's land to the highway, whether it existed prior to the agreement or was created by it, was an easement appurtenant to the plaintiff's land and was a private property right in the plaintiff, over and above the plaintiff's right, as a member of the public, to use this ramp as a means of getting to the southwestbound lanes of the highway. See: *Highway Commission v. Farmers Market,* 263 N.C. 622, 139 S.E. 2d 904; *Wofford v. Highway Commission, supra; Snow v. Highway Commission,* 262 N.C. 169, 136 S.E. 2d 678; *Abdalla v. Highway Commission, supra; Williams v. Highway Commission, supra; Hedrick v. Graham, supra.* While the owner of land abutting upon a highway does not have a right of direct access thereto at all points at which his land touches the highway right of way, and the Commission, nothing else appearing, can determine the point at which such access right shall be exercised so long as its determination is reasonable, this does not apply where the parties have by their agreement fixed the point of access. In *Abdalla v. Highway Commission, supra,* in which there was a right of way agreement specifying the place and manner of such access, this Court said, "The rights of the parties are fixed and controlled by the right of way agreement."

The plaintiff, by virtue of the agreement between the Commission and his predecessor in title, had an easement for direct access to the highway at the designated point. This property right the Commission has destroyed. It was authorized to do so in the public interest, but for such a taking of its property the plaintiff is entitled to compensation. The statute provides for the appointment of commissioners to determine the compensation to be paid. G.S. 136-89.52; G.S. 136-109.

The court erred in its decree that the plaintiff is not entitled to have such commissioners appointed, and in dismissing the action. The judgment of the superior court is, therefore, reversed and the matter is remanded for the entry of an order in conformity with this opinion.

Reversed and remanded.

LOIS TODD, BY HER NEXT FRIEND, WILLIAM KELLY TODD, v. EARL KEITH WATTS AND ETHEL WATTS.

(Filed 3 February, 1967.)

1. Automobiles §§ 43, 48— Passenger in one car may recover of driver of other car involved in collision if his negligence constitutes a proximate cause of collision.

In this action by a passenger in an automobile against the driver of the other vehicle involved in the collision, plaintiff's evidence was to the effect that the car in which she was a passenger was travelling west, that defendant's vehicle had a veneer board in its left window where glass should have been, obstructing the driver's view to the left, and that defendant entered the intersection from the north as the automobile in which plaintiff was riding was clearing the intersection, and a collision occurred between the left corner of the cab of defendant's truck and the right fender and headlight of the automobile in which plaintiff was riding. *Held:* Nonsuit was correctly denied, notwithstanding evidence of negligence on the part of plaintiff's driver in entering the intersection as the traffic control light was changing to red, since defendant is liable to plaintiff if defendant driver was guilty of any negligence constituting a proximate cause of the accident.

2. Evidence § 42—

The opinion of an expert must be based upon facts within the personal knowledge of the expert or upon facts, supported by evidence, stated in a proper hypothetical question.

3. Evidence § 51—

Testimony of a medical expert to the effect that plaintiff's lumbo-sacral strain and persistent headaches were the result of the automobile accident in suit is incompetent when the testimony is not based upon facts within the personal knowledge of the witness or upon proper hypothetical questions based upon facts in evidence as to the accident and the injuries received by plaintiff therein.

PARKER, C.J., dissenting.

APPEAL by defendants from *McKinnon, J.*, April 7, 1966 Civil Session of COLUMBUS.

Personal injury action growing out of a two-vehicle collision at an intersection.

Between 4:00 and 5:00 during the afternoon of October 27, 1962, plaintiff — then 16 years old — was a passenger in the front seat of the Ford automobile being operated by her father, W. K. Todd. The Todd automobile was proceeding in a westerly direction on Highway No. 701, approaching its intersection with Stake Road. This intersection was controlled by an electric traffic signal, which was operated by a trip on Stake Road. Within the intersection a collision occurred between the Todd automobile and a pickup truck owned by defendant Ethel Watts and operated by her son, Earl Keith

Watts (Earl) who, with his wife and baby, was then living with his mother.

Plaintiff alleges: Mrs. Watts maintained the truck for the use and convenience of her family, and, at the time of the collision, Earl was operating it as her agent and within the scope of the purpose for which she kept the truck. The collision was caused by the negligence of Earl in that, *inter alia,* (1) he failed to keep a proper lookout; (2) he failed to yield the right of way to the Ford automobile, which was already in the intersection; and (3) he operated the truck when the glass in its left front window had been replaced by a board, which obscured his vision. In the collision plaintiff sustained permanent injuries.

Answering, defendants denied all material allegations of the complaint and alleged that the collision was proximately caused by the sole negligence of W. K. Todd in that he entered the intersection without keeping a proper lookout at a time when the traffic light facing him was red.

Plaintiff's evidence tended to show: Todd approached the intersection at 20 MPH. When he was 150 feet away, the light facing him was green, but he was expecting it to change. Thirty yards away, he observed the Watts' truck waiting in Stake Road on the north side of the intersection. Its engine was turned to the west toward Tabor City. Todd noticed a piece of veneer board in its left window, where a glass should have been. About the time Todd went under the light, it changed. When he was 10-12 feet from the truck, it pulled into the intersection. The right fender and headlight of the Todd vehicle struck the left corner of the cab of the truck just under the gasoline spout. Plaintiff was thrown forward; her head broke the windshield, and her knees hit the dashboard. She was given first aid by a local physician, who bandaged her knees; she was not hospitalized. Thereafter, she began to have continuous headaches and backaches. About five months after the accident, on March 23, 1963, plaintiff consulted Dr. J. Burr Piggott, Jr., an orthopedic surgeon of Florence, South Carolina. He found the "suggestion of a spinal bifida at S-1 posterior neural arch" and some straightening of the lumbar spine and a mild reversal of same, conditions which, he thought, were congenital and capable of producing discomfort. Trauma, however, was usually required to make them painful. Plaintiff's low back motion was limited in flexion and in extension, but Dr. Piggott found no true spasm. He prescribed a hard bed, girdle support, use of a heating pad, deep heat treatment by her physician, and limitation of stooping, bending, and heavy lifting. He saw plaintiff once more in October 1964, when he found

her condition essentially unchanged. In Dr. Piggott's opinion, plaintiff would have some "minimal permanent disability".

In the spring of 1963, plaintiff graduated from high school. Because she "didn't feel well at all," she did not take a job until December 1963. From then until April 1964, she worked as a receptionist. From April until September 1964, she worked as a sewing machine operator, although she lost 25-30 days because of headaches and backaches. In September 1964, she gave up that job to get married. Since November 1964, she has worked for Mullins Textile.

Defendants' evidence tended to show: Earl stopped on the north side of the intersection in obedience to the red light then facing him. While thus stopped, he observed the Todd vehicle slowing down as it approached the intersection. When the light for Stake Road changed to green, Earl pulled into the intersection and made a right turn toward Tabor City. When his wife "hollered," Earl whirled around to his left to see what was happening and the right front of the automobile hit the left side of the cab of defendants' truck. The left window of the cab had been broken out and replaced with a piece of veneer board. The driver's only view to the left was "a little vent window (8-10 inches wide) which was in the front of the door." Earl did not own a motor vehicle.

The jury answered the issues of negligence, agency, and damages in favor of plaintiff. From judgment on the verdict, defendants appealed, assigning errors.

Williamson & Walton for plaintiff.
Marshall & Williams for defendants.

SHARP, J. Plaintiff's evidence was ample to overcome both defendants' motions for nonsuit. 3 Strong, N. C. Index, Negligence § 8 (1960). There must, however, be a new trial for errors in the admission of evidence. The court overruled defendants' objections to the following questions, which plaintiff's counsel asked Dr. Piggott, and denied defendants' motions to strike the answers elicited:

"Q. Doctor, will you state what diagnosis you made as a result of your examination on March 23rd, 1963?

"A. Yes, sir; my diagnosis reads, from my records: Auto accident with original contusion injuries of forehead and scalp and skull, without fractures, plus abrasion injuries of the knee that have healed, plus wrenching and contusion injuries of the low back with persistent chronic low back pain.

"Q. Doctor, as a result of talking to Mrs. Batten on March 23rd, 1963, did you form an opinion, or do you have an impres-

sion as to whether she will have any type permanent disability as a result of her injuries she sustained in the accident on October 26th *(sic)*, 1962?

"A. Yes, sir.

"Q. What is that opinion?

"A. I felt patient would have some minimal permanent disability — minimal residual permanent disability as regards her low back wrenching injuries and her persistent headaches. I went on to state I made no attempt to examine the patient's eyes, or evaluate patient's ocular complaints.

". . . My impression was she had some continuing lumbosacral strain and persistent headaches as a result of her auto accident.

"Q. Doctor, did you find any scars on her knees which she received in the accident, or any scars on her legs?

"A. There were no major scars. She had abrasion injuries and I have no record of any major scarring of her knees or legs.

* * *

"Q. The congenital finding that you made on Mrs. Batten's back, could it have been aggravated by an injury or blow she received in this automobile accident?

"A. Yes, sir."

Since it is the jury's province to find the facts, the data upon which an expert witness bases his opinion must be presented to the jury in accordance with established rules of evidence. Stansbury, N. C. Evidence § 136 (2d Ed. 1963). "It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question." *Spivey v. Newman,* 232 N.C. 281, 284, 59 S.E. 2d 844, 847. A witness is not permitted to base an opinion upon facts of which he has no knowledge. *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884. This, however, is what Dr. Piggott purported to do. He had no personal knowledge that plaintiff was involved in an automobile accident on October 27, 1962, or, if she was, that she sustained any injuries in the accident. Yet, he stated to the jury as a fact that, in the accident in suit, plaintiff had sustained, *inter alia,* "wrenching and contusion injuries of the low back with persistent chronic low back pain"; that she had "continuing lumbo sacral strain and persistent headaches as a result of her automobile accident"; and that her congenital spinal defects could "have been aggravated by an injury or blow she received in

this automobile accident." Whether plaintiff had persistent headaches and continuous backaches and, if so, whether the collision caused them, were crucial questions in the case.

The doctor could not assume the cause or source of the symptoms which plaintiff reported to him and which he found five months after the accident in suit. His opinion as to the possible cause of these symptoms and their probable permanency, should have been elicited as the response to a properly phrased hypothetical question which included all material facts necessary to enable him to form a satisfactory opinion. Stansbury, N. C. Evidence § 137 (2d Ed. 1963).

New trial.

PARKER, C.J., dissenting: This action was commenced by the issuance of summons on 11 August 1964.

The record shows that Dr. J. Burr Piggott, Jr., testified before the quoted part of his testimony in the majority opinion in substance, except when quoted: On 23 March 1963 he first saw plaintiff and made an examination of her in his office in South Carolina. He testified:

> "At the time of my examination, I obtained a history of her injuries or her complaints. (Defendants requested and the Court instructed the Jury, that any statement by the witness as to what the Plaintiff said to him is to be considered by the Jury as it may tend to corroborate or support her testimony as she has previously testified here in Court, if the Jury finds that it does corroborate her testimony. It is not substantive evidence.) The patient gave a history of having been involved in a two car collision or auto accident on the 26th of October, 1962, at 4:00 p.m. in the afternoon when she was riding in the front right hand seat of a car driven by her father. The patient told me she was thrown forward when the collision occurred, striking her head and forehead against the front windshield glass, breaking the glass and abrading her forehead. She told me she was dazed for a few minutes, and she also wrenched and contused both knees and her low back. The patient further stated she was taken to her family physician immediately, Dr. Charles Simpson, Tabor City, who rendered first aid, cleaned up and treated her abrasions, and advised conservative treatment. She told me she had been up and around since the accident and had continued her schooling, but had not participated in any sports activities. She had continued complaining of pain in her back and complained of frontal headaches with difficulty in vision. The wrenching injuries to her knees has largely subsided. Pa-

tient had been up and around but she said she was having trouble with her low back and headaches."

In *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432, Johnson, J., writing for the Court said:

> "The defendants in their brief concede that the direct testimony of Dr. Chapman, 'standing alone, if competent, would support an award.' However, the defendants contend that Dr. Chapman's opinions as to plaintiff's alleged disability should be disregarded and treated as incompetent evidence in view of the witness' admissions made on cross-examination to the effect that the testimony was based upon 'subjective statements made by the claimant.'
>
> "As to this contention, the rule is that ordinarily the opinion of a physician is not rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, if those statements are made, as in the instant case, in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure. 'In such cases statements of an injured or diseased person, while not admissible as evidence of the facts stated, may be testified to by the physician to show the basis of his opinion.' 20 Am. Jur., Evidence, Sec. 866, p. 729; Annotation: 65 A.L.R. 1217, p. 1223 *et seq.* See also: Annotations: 67 A.L.R. 10, 11, 18; 80 A.L.R. 1527; 130 A.L.R. 977; Wigmore on Evidence, Third Ed., Sections 688, 1718, and 1720; Rogers on Expert Testimony, Third Ed., Section 131, p. 301 *et seq.;* McCormick on Evidence (Hornbook), Sec. 266; *Bryant v. Construction Co.*, 197 N.C. 639, 150 S.E. 122, and cases there cited; *Martin v. P. H. Hanes Knitting Co.*, 189 N.C. 644, 127 S.E. 688."

The testimony of Dr. Piggott I have quoted above was admitted in evidence without objection by defendant. In my opinion, the testimony of Dr. Piggott, as quoted in the majority opinion, was competent and properly admitted in evidence. I do not agree with the majority that such testimony was inadmissible in evidence, and necessitates a new trial. To hold, as the majority opinion does, that Dr. Piggott's diagnosis and opinion are inadmissible in evidence because based in part on statements given to him in 1963 by plaintiff when she was examined by him for the purpose of rendering to her medical assistance, is unpractical, because a doctor customarily relies upon such statements made to him by a patient in the practice

of his profession, and such a holding defies the usual processes of medical thought.

I vote to sustain the verdict and judgment below.

WATT CONNOLLY AND LARRY G. CONNOLLY, D/B/A WATT CONNOLLY & SON, A PARTNERSHIP, v. ASHEVILLE CONTRACTING COMPANY, A CORPORATION.

(Filed 3 February, 1967.)

1. Pleadings § 12—

Where an additional defendant, joined and made a party to the action on motion of the original defendant, demurs to the original defendant's cross-action on the ground that the facts alleged therein are insufficient to state a cause of action against the additional defendant, the original defendant may not contend that the additional defendant was at least a proper party, since the demurrer does not challenge the joinder of the additional defendant but only the sufficiency of the allegations of the cross-action.

2. Pleadings § 8; Contracts § 33— In this action by subcontractor against prime contractor, allegations of prime contractor held insufficient to state cross-action against owner.

Plaintiff, a subcontractor, brought this action against the prime contractor to recover for loss of profits resulting when the prime contractor ordered the subcontractor to cease work under the subcontract before the completion of work, the subcontractor being paid on a unit basis for work done under the contract. The prime contractor had the owner joined as an additional party, filed a cross-action against it, and attached the prime contract as a part of its pleading. The prime contract provided that the owner might make alterations in the plans provided such alterations did not materially change the original plans, and that in the event permissible alterations resulted in a decrease in the quantity of work to be performed, the prime contractor should accept payment at the contract unit price for work actually done. *Held:* Even if the reduction of the work under the subcontract constituted a material alteration of the subcontract, such fact would not necessarily constitute a material alteration of the prime contract, and in the absence of allegation that the reduction in the amount of work called for in the subcontract constituted a material alteration of the prime contract, no cause of action is stated in favor of the prime contractor against the owner, and demurrer to the cross-action was properly sustained.

APPEAL by Asheville Contracting Company from *Lupton, J.*, May, 1966 Civil Session of IREDELL.

This appeal is from a judgment which sustained the demurrer of additional defendant, Duke Power Company, to the cross action al-

leged against Power Company by original defendant, Asheville Contracting Company.

Plaintiffs (Connolly) instituted this action against Contracting Company, alleging in substance: Contracting Company, as general contractor, entered into a contract with Power Company on or about April 22, 1964, for the construction of an access railroad to Power Company's Plant Marshall in Catawba County; that Connolly, as subcontractor, entered into a contract with Contracting Company on or about July 30, 1964, for the paving of the slope drains and intercept ditches referred to in Contracting Company's said contract with Power Company; that Connolly was to pour 50,000 square feet of concrete and Contracting Company was to pay therefor a unit price of sixty-five cents per square foot, a total of $32,500.00; that on or about December 1, 1964, at which time Connolly had poured 12,150 square feet of concrete, Contracting Company notified Connolly to cease all work under said subcontract; that Connolly's work was done on schedule and was approved and accepted; that Connolly was ready, able and willing to perform the subcontract in its entirety and had gone to considerable trouble, time and expense in making preparations to do so; that Contracting Company owed Connolly a balance of $2,031.76 for the work it had performed; and that, on account of loss of the profits Connolly would have received if permitted to perform the subcontract in its entirety, Connolly was entitled to recover from Contracting Company the additional sum of $15,138.50 as damages for its breach of said subcontract.

Plaintiffs alleged a second cause of action to recover $500.00 for work not covered by said subcontract and not involved in this appeal.

In amended answer, Contracting Company denied all allegations in plaintiffs' first cause of action relating to damages for alleged breach of contract. Allegations in the answer proper and in the first further answer and defense relating to Contracting Company's obligation to Connolly on account of work performed under the subcontract and on account of the item of $500.00 not covered by the subcontract are not germane to this appeal.

Contracting Company, "FOR A SECOND FURTHER ANSWER AND DEFENSE AND BY WAY OF CROSS ACTION AGAINST DUKE POWER COMPANY," alleged in substance, except when quoted, the matters set forth in the following numbered (our numbering) paragraphs:

1. Attached to and made a part of said pleading are the prime contract between Contracting Company and Power Company (Exhibit A); modification of Item 6 thereof (Exhibit B); and the subcontract between plaintiffs and Contracting Company (Exhibit C).

2. Paragraph 10 of the prime contract provides: "The Engi-

neer may make such alterations in the plans of construction, or in the quantity of work, as may be considered necessary or desirable during the progress of the work to complete fully and acceptably the proposed work, provided that such alterations do not materially change the original plans. Should such alterations result in an increase or decrease in the quantity of the work to be performed, the Contractor shall accept payment at the contract unit price for actual work done in the same manner as if such work had been included in the original estimated quantity."

3. The quantities of concrete referred to in said subcontract were "approximate estimated quantities only" and Contracting Company was not obligated to pay "in all events" for such estimated quantities; nor was Power Company obligated by the terms of the prime contract to pour or pay for any specific quantities.

4. The subcontract incorporates by reference all terms and conditions of the prime contract.

5. If there was an underrun in the quantity of concrete to be poured, this being the basis of plaintiffs' action, "alterations resulting in an increase or decrease in the quantity of the work performed would not give rise to claim on the part of the plaintiffs for any more than the unit price for work actually performed."

6. "(I)f the plaintiffs are entitled to recover any amount whatever from the defendant by reason of underrun in the estimated square foot quantities of concrete to be poured pursuant to said subcontract, which is specifically denied, the same are *(sic)* only recoverable pursuant to the provisions of Paragraph 10 of the prime contract between Duke Power Company and the defendant on the basis that alterations materially changed the original plans and in such event, this defendant would be entitled to recover over and against Duke Power Company for any such recovery on the part of the plaintiffs, on the same basis; . . ." (Excerpt from Paragraph K of cross action.)

Contracting Company moved, in its prayer for relief, that Power Company be made a party defendant. At March 14, 1966 Session, an order entered by His Honor J. William Copeland granted said motion. No exception to this order was noted then or later either by Connolly or by Power Company, and neither Connolly nor Power Company has moved that said order be vacated.

Power Company, having been served with process as provided in Judge Copeland's order, filed a demurrer to Contracting Company's alleged cross action, asserting as grounds therefor (1) a failure to allege facts sufficient to state a cause of action, and (2) a misjoinder of parties and causes of action.

Judge Lupton entered judgment sustaining said demurrer. Contracting Company excepted and appealed.

Harold K. Bennett and E. Glenn Kelly for defendant Asheville Contracting Company, appellant.

George W. Ferguson, Jr., Carl Horn, Jr., Wm. I. Ward, Jr., and Sowers, Avery & Crosswhite for additional defendant Duke Power Company, appellee.

BOBBITT, J. Plaintiffs' action is against Contracting Company for alleged breach of its contract with plaintiffs. They assert no claim against Power Company. They are not parties to and do not participate in this appeal.

Power Company, pursuant to Judge Copeland's unchallenged order, is now a party to this action. Hence, whether Power Company is a necessary or proper party is not presented; and *Simon v. Board of Education,* 258 N.C. 381, 128 S.E. 2d 785, cited and stressed by Contracting Company, is not pertinent. The sole question for decision is whether the court erred in sustaining Power Company's demurrer to Contracting Company's cross action.

The gist of plaintiffs' alleged cause of action (for loss of profits) against Contracting Company, based on their contractual relations *inter se,* is that, notwithstanding their contract called for 50,000 square feet of paving, Contracting Company breached the contract by its refusal to permit plaintiffs to provide paving in excess of 12,150 square feet. Although the documents constituting the prime contract are made a part of the subcontract, whether any provisions of such documents bear significantly upon plaintiffs' right to recover from Contracting Company is not presented by this appeal.

The rights and obligations of Contracting Company and of Power Company *inter se* are to be determined by the provisions of the prime contract. Paragraph 10 thereof is quoted in our preliminary statement. Contracting Company asserts the validity of Paragraph 10 in both its answer and cross action and relies thereon as a defense to plaintiffs' action. Whether it has significance in connection with Contracting Company's defense to plaintiffs' action is not presented by this appeal. Unquestionably it has significance in the determination of the rights and obligations of Contracting Company and of Power Company *inter se.*

Reference is made to the excerpt from Paragraph K of the cross action quoted in our preliminary statement. This is the only portion of the cross action in which Contracting Company purports to allege a (conditional) cause of action against Power Company.

The subcontract relates solely to the installation of (approxi-

mately) 50,000 square feet of paving, this being only one of many items covered by the prime contract. Paragraph 10 of the prime contract relates to all items covered thereby. Plaintiffs base their cause of action on the provisions of the subcontract. Their allegations imply a contention that Paragraph 10 of the prime contract is inapplicable to them or in any event is not a bar to their action against Contracting Company. Whether, as between Contracting Company and Power Company, the reduction in the quantity of paving was such an alteration as to constitute a material change in the original plans within the meaning of said Paragraph 10 must be determined with reference to the prime contract in its entirety, not with reference to the one item relating to paving. The documents comprising the prime contract call for numerous items at unit prices, the original estimated total amounting to $958,528.23. Item 6 called for "Installation of paved slope drains & intercept ditches (Quantity) 10,000 Lin ft (Unit Price) 4.00 (Amount) 40,000.00," which, prior to the execution of the subcontract, was modified by substituting as Item 6 the following: "50,000 S. F. Paved Slope Drains @ 0.75 per square foot." What would constitute an alteration materially changing the original plans when considered in relation to all work called for by the prime contract and what would constitute such material alteration if considered only in relation to "Item 6" are different questions.

Contracting Company does not allege in its cross action, conditionally or otherwise, that the reduction in the quantity of paving was such an alteration as to constitute a material change in the original plans of the prime contract within the meaning of Paragraph 10 thereof. Indeed, Contracting Company's reliance upon Paragraph 10 of the prime contract as a defense to plaintiffs' action indicates strongly that Contracting Company agreed or acquiesced in the decision of Power Company's engineer with reference to the quantity of concrete to be poured. Moreover, nothing in Contracting Company's allegations dispels the possibility that a full and complete settlement has been made between Power Company and Contracting Company. Whether Power Company is obligated to Contracting Company does not depend solely upon the provisions of the prime contract but in material part upon their course of dealings during the progress of the work and in relation to settlement therefor. Contracting Company's purported cross action alleges no facts pertinent to these material matters. Obviously, a recovery by plaintiff from Contracting Company, standing alone, would not entitle Contracting Company to recover a like amount or any amount from Power Company. In short, Contracting Company's cross action does not allege facts sufficient to state a cause

of action, conditionally or otherwise, against Power Company. Hence, Power Company's demurrer to said cross action was properly sustained.

Having reached the conclusion that Contracting Company's purported cross action fails to state a cause of action against Power Company, whether there would be a misjoinder of parties and causes of action if a cause of action had been alleged need not be considered. *Batts v. Faggart,* 260 N.C. 641, 644, 133 S.E. 2d 504, 506, and cases cited.

Affirmed.

R. H. NORTHCUTT, TRADING AS PREMIUM CREDIT COMPANY, v. I. L. CLAYTON, COMMISSIONER OF REVENUE FOR THE STATE OF NORTH CAROLINA.

(Filed 3 February, 1967.)

Taxation § 26—

The fact that the activity of a company is limited to insurance premium financing renders it no less a finance company, and the authority given by a borrower to such finance company to cancel the policy and collect the unearned premium upon the borrower's default, is security analogous to a chattel mortgage or a conditional sale, and therefore an insurance premium financing company comes within the purview of G.S. 105-88(a) and is liable for the privilege license tax imposed by that section for the purpose of revenue in addition to the license fee imposed by G.S. 53-56 for the purpose of defraying expenses of regulation.

APPEAL by plaintiff from *Gambill, J.,* in chambers at Carthage, April 26, 1966. From ANSON.

This civil action, instituted under G.S. 105-266.1 to recover license taxes paid under protest, was heard by the court without a jury upon an agreed statement of facts. These facts, supplemented by reference to pertinent statutes, *Finance Co. v. Currie, Commissioner of Revenue,* 254 N.C. 129, 118 S.E. 2d 543, are summarized as follows:

Plaintiff, operating as Premium Credit Company, is engaged in the business of insurance premium financing as defined and regulated by Article 4, Chapter 58 of the North Carolina General Statutes, G.S. 58-55 to -61.1 (the Article), and is subject to its provisions. He has paid to the Commissioner of Insurance the license fees required by G.S. 58-56. In insurance premium financing, a person or business entity lends money to pay the premium on an insurance policy, and the borrower-insured executes an "insurance

premium finance agreement," in which he undertakes to repay the finance company the amount advanced, plus service charges, in monthly installments. G. S. 58-55. To secure repayment of the loan, the insured also executes a power of attorney authorizing the finance company to cancel the insurance if he fails to pay any installment as it becomes due and to receive the refund of any unearned premiums. G.S. 58-60.

The following persons and business entities are exempt from the provisions of the Article: "banks, trust companies, installment paper dealers, auto finance companies, savings and loan associations, cooperative credit unions, agricultural credit corporations or associations, organized under the laws of North Carolina or any person, firm or corporation subject to the provisions of the North Carolina Consumer Finance Act and the North Carolina Motor Vehicle Dealers and Manufacturers Licensing Law, article 12, chapter 20, of the General Statutes of North Carolina. . . ." G.S. 58-56.1.

Plaintiff operates his own insurance agency in addition to Premium Credit Company. The latter finances premiums on policies that his insurance agency writes as well as those issued by other insurance agents. Other agents provide approximately one-half of Premium Credit Company's business. Plaintiff does no financing except insurance premium financing.

For the years 1964 and 1965, defendant Commissioner of Revenue, required plaintiff to pay the Schedule B license tax of $750.00 levied by G.S. 105-88 upon loan agencies or brokers as defined therein. Plaintiff, contending that the license fee imposed by G.S. 58-56 was the limit of his liability, paid defendant the sum of $1,500.00 under protest. On November 24, 1965, he instituted this action to recover the payment. He has met all procedural requirements.

Judge Gambill, after hearing the cause, concluded that plaintiff is liable for both the tax levied by G.S. 105-88 and the license fee required by G.S. 58-56. He entered judgment dismissing the action and taxing plaintiff with the costs, and plaintiff appealed.

Taylor, McLendon & Jones for plaintiff.

Thomas Wade Bruton, Attorney General, and Peyton B. Abbott, Deputy Attorney General, for defendant.

SHARP, J. This appeal presents one question: Must the operator of an insurance premium financing business pay to the Commissioner of Revenue a privilege license tax under G.S. 105-88 in addition to the license fee which G.S. 58-56 requires him to pay to the Commissioner of Insurance? In pertinent part, G.S. 105-88 provides:

"Loan agencies or brokers. — (a) Every person, firm or corporation engaged in the regular business of making loans or lending money, accepting liens on, or contracts of assignments of, salaries or wages, or any part thereof, or other security or evidence of debt for repayment of such loans in installment payment or otherwise, and maintaining in connection with same any office or other located or established place for the conduct, negotiation, or transaction of such business and/or advertising or soliciting such business in any manner whatsoever, shall be deemed a loan agency, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting or negotiating such business at each office or place so maintained, and shall pay for such license a tax of seven hundred fifty dollars ($750.00).

"(b) Nothing in this section shall be construed to apply to banks, industrial banks, trust companies, building and loan associations, co-operative credit unions nor installment paper dealers defined and taxed under other sections of this article, nor shall it apply to the business of negotiating loans on real estate as described in § 105-41, nor to pawnbrokers lending or advancing money on specific articles of personal property. It shall apply to those persons or concerns operating what are commonly known as loan companies or finance companies and whose business is as hereinbefore described, and those persons, firms, or corporations pursuing the business of lending money and taking as security for the payment of such loan and interest an assignment of wages or an assignment of wages with power of attorney to collect same, or other order or chattel mortgage or bill of sale upon household or kitchen furniture."

Plaintiff, although conceding in his brief that he is engaged in "a type of financing which indirectly amounts to lending money," contends that he is not engaged in the *regular* business of making loans and that his business is not one of those "commonly known as loan companies or finance companies." This contention, however, will not stand scrutiny. Plaintiff is no less a finance company because he lends money for one purpose only, *i. e.*, financing insurance premiums; and certainly he takes security for the repayment of his loan when he accepts a power of attorney authorizing him to cancel his debtor's insurance and to collect the unearned premium on the policy upon the debtor's default. G.S. 58-60. Plaintiff's insurance premium finance agreement, prepared pursuant to G.S. 58-58.1, provides, *inter alia*, that the borrower's failure to pay any installment within five days from the due date empowers plaintiff to "begin

proper action as set forth in G.S. 58-60." As a consequence of these agreements, the purposes of the State's motor vehicle financial responsibility acts are sometimes thwarted. See *Daniels v. Insurance Co.*, 258 N.C. 660, 129 S.E. 2d 314, and *Griffin v. Indemnity Co.*, 265 N.C. 443, 144 S.E. 2d 201; *Griffin v. Indemnity Co.*, 264 N.C. 212, 141 S.E. 2d 300.

In practical effect, plaintiff's security is as much a purchase-money mortgage on the commodity which his debtor has bought as any chattel mortgage or conditional sales agreement could be. He is, therefore, a person described in section (a) of G.S. 105-88, and insurance premium finance companies are not specifically exempted by section (b). Notwithstanding, plaintiff contends that when the Consumers Finance Act (G.S. 53-164 to -191), the Article, and G.S. 105-88 are considered together, they disclose the legislative intent not to require the $750.00 license tax of insurance premium financiers.

The Consumer Finance Act requires all persons — a generic term embodying any business entity — who engage in the business of lending money in amounts of $600.00 or less and who receive in connection with such loans interest and other compensation or expenses aggregating more than six per cent per annum to secure a license from the Commissioner of Banks. He supervises the activities of these small loan companies in a manner similar to that in which the Commissioner of Insurance supervises the activities of insurance premium financing companies. To cover the expenses of the Commissioner of Banks and to defray the costs of his investigations, each licensee is required by G.S. 53-167 to pay fees as specified in G.S. 53-122. These fees are similar in purpose to those required of insurance premium financiers by G.S. 58-56. In addition to the fee, each licensee under the Consumer Finance Act also pays the $750.00 privilege tax exacted by G.S. 105-88. Chapter 1053 of the Public Laws of 1961 rewrote the North Carolina Small Loan Act and specifically provided in section 3: "All laws and clauses of laws in conflict with this Act are hereby repealed; provided, however, G.S. 105-88 is not hereby repealed. . . ." As an administrative practice, the Commissioner of Banks and the Commissioner of Revenue exchange lists to ensure that all loan agencies pay the privilege tax and to ensure that the Commissioner of Banks is cognizant of all agencies subject to his regulation.

The convolution of plaintiff's theory of nonliability for a privilege tax is this: All loan agencies subject to the provisions of G.S. 105-88 are likewise subject to the provisions of the Consumer Finance Act, which does not exempt the business of insurance premium financing from its coverage. If plaintiff is subject to G.S. 105-88,

and thus controlled by the Consumer Finance Act, the Article would not apply to him because it specifically exempts from its coverage those who come under the Consumer Finance Act. The legislature obviously intended no such result; therefore, G.S. 105-88 has no application to plaintiff.

Plaintiff has put the cart before the horse, and his attempted rationalization will not support the conclusion he purports to found upon it. All loan agencies subject to the provisions of G.S. 105-88 are not subject to the provisions of the Consumer Finance Act, and G.S. 105-88 applies to *all* the loan agencies specified therein, irrespective of the amounts which they lend or the interest they charge. The tax it imposes on loan agencies or brokers is merely one of the Schedule B license taxes imposed by Article 2 of Chapter 105 of the General Statutes for the privilege of carrying on a particular business, and its purpose is to raise revenue. G.S. 105-33 expressly provides that the issuance of a license under Art. 2, ch. 105 "shall not of itself authorize the practice of a profession, business, or trade for which a state qualification license is required." The fees exacted of insurance premium financiers by G.S. 58-56 and of persons engaged in business under the Consumer Finance Act by G.S. 53-167 are intended to pay the necessary expenses of licensing, regulating, and supervising the business. True, any surplus reverts to the general treasury of the State, G.S. 58-61.1, but this is merely an incidental budgetary provision. There is no injustice and nothing unusual in requiring a business to contribute both to the general fund of the State and to the cost of enforcing the laws regulating it. G.S. 105-41 imposes a privilege license upon attorneys, physicians, and many other professionals, most of whom are also required to pay an annual fee to the regulatory board which licensed them.

Plaintiff concedes that he is subject to the Article. Had the legislature intended to subject to the provisions of the Consumer Finance Act those who make loans solely to finance insurance premiums, surely it would not have enacted the Article (N. C. Pub. Laws 1963, ch. 1118) in the first instance, since it exempts from its provisions those subject to the Consumer Finance Act. G.S. 58-56.1. Obviously, the legislature did not deem it necessary for both the Commissioner of Banks and the Commissioner of Insurance to supervise an insurance premium financing company.

There is another matter which has a proper place in our consideration of the legislative intent. At the 1965 Regular Session of the General Assembly, House Bill 1182, "a bill to exempt insurance premium finance companies from the payment of privilege license taxes under General Statutes 105-88" was defeated in the Senate on its second reading. Senate Journal, Regular Session 1965, p. 735.

The rejection of this bill strengthens our conclusion that the legislature never intended to exempt the business of insurance financing from the privilege license tax imposed by G.S. 105-88. *Yacht Co. v. High, Commissioner of Revenue,* 265 N.C. 653, 144 S.E. 2d 821; *Bosley v. Dorsey,* 191 Md. 229, 60 A. 2d 691; *Nutter v. City of Santa Monica,* 74 Cal. App. 2d 292, 168 P. 2d 741; *Safeway Stores v. Bowles,* 145 F. 2d 836 (U. S. Emer. Ct. App. 1944), *cert. denied,* 324 U.S. 847; 82 C.J.S., Statutes § 360, p. 787, n. 47.

We hold that plaintiff is required to pay the privilege tax imposed by G.S. 105-88. The judgment of the court below is

Affirmed.

ROBERT CHALMERS, LOUISE C. LOWERY, BESSIE C. WALKER, AMIE C. CLARK, CLARA C. CLARK, MARY C. CLARK, ELIZABETH C. BARNES AND FANNIE C. CALDWELL, v. LILLIAN GERTRUDE WOMACK.

(Filed 3 February, 1967.)

1. Trial § 40—

The number, form and phraseology of the issues rest in the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all controversies and to enable the court to render judgment fully determining the cause.

2. Descent and Distribution § 3.1; Quieting Title § 2—

In the heirs' action to remove cloud on title upon allegation that defendant claimed an interest as the widow of intestate and that her purported marriage to intestate is void because at the time of such marriage she was already married and there had been no divorce dissolving the first marriage, the marital status of the defendant at the time of intestate's death is the sole issue necessary to determine the rights of the parties, and the submission of such issue is sufficient.

3. Appeal and Error § 24—

An assignment of error that the court failed to declare the law arising on the evidence as required by G.S. 1-180, is a broadside exception and ineffectual. Rule of Practice in the Supreme Court 19(3).

4. Marriage § 2—

A subsequent marriage is presumed valid with the burden upon the parties attacking the validity of the second marriage to prove its invalidity, which presumption prevails over the presumption of the continuance of the first marriage, and therefore the issue of the validity of the second marriage in such instance is for the determination of the jury, even though the parties attacking the marriage introduce uncontradicted evidence of the prior marriage with evidence supporting the conclusion

that the prior marriage had not been terminated by divorce at the time of the second marriage.

5. Trial § 31—

Where the issue is for the determination of the jury, the court may not direct a verdict, and plaintiffs' uncontradicted evidence cannot entitle them to more than a peremptory instruction permitting the jury to answer the issue in the negative if the jury should fail to find from the greater weight of the evidence the facts to be as all of the evidence tended to show.

6. Trial § 51—

A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court, and where the issue is for the determination of the jury, the fact that the jury answered the issue in the negative, notwithstanding peremptory instruction of the court to answer it in the affirmative, does not in itself tend to show abuse of discretion in the court's refusal to set aside the verdict.

7. Appeal and Error § 38—

An assignment of error not brought forward and discussed in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by plaintiffs from *Bailey, J.*, June 1966 Civil Session of HARNETT.

Civil action to remove a cloud from title to real property.

Plaintiffs, brothers and sisters of James Richard Chalmers, who died intestate 16 August 1962, claim the land as sole heirs of deceased; defendant claims an interest in the land as widow of James Richard Chalmers. Plaintiffs allege that defendant was married to one Lee Womack on 13 May 1920 and that upon her subsequent purported marriage to Chalmers she was still the lawful wife of Lee Womack.

Plaintiffs offered evidence substantially, except where quoted, as follows:

Lee Womack testified: He was 68 years old and had always lived in North Carolina. He married defendant at Sanford, North Carolina, in 1920 and they lived together in Onslow County. Three children were born of this marriage, and each time the defendant was with child she returned to her home in Harnett County to give birth to the child, and thereafter returned to Onslow County. After the birth of the third child she did not return to her husband, and they have lived separate and apart since that time. He has seen the defendant only twice since the birth of the last child, once when he returned to Harnett County for his father's funeral and once when the child was still a baby. This child is now 39 years old. Womack further stated that he has never instituted action for divorce against defendant, nor has he ever been served with "any divorce papers." He remarried in 1949 in South Carolina.

Mary Chalmers Clark testified: She was a sister of Richard Chalmers, deceased, and was living at the home place with her brother and defendant when her brother died. Defendant lived with Chalmers at the home place from 1950 to the date of his death. He was buried on a Tuesday and defendant left the following Saturday and never returned. Defendant was the beneficiary of a $1,000 insurance policy which was turned over to another sister to take care of burial and other expenses.

J. Chandler Eakes testified: He is Register of Deeds of Lee County, and there is a record in Lee County of a marriage between Lee Womack and Lillian McNeill. The license was issued for this marriage on 13 May 1920.

Lillian Womack testified: She married Lee Womack in 1920 and there were three children by the marriage. After the birth of the third child she never returned to live with Womack and has seen him only once since that time. "I have never inquired of his people, his brothers and sisters, where Lee was. After he was gone so long, I just tried to forget it. I never tried to write him. I never made any inquiry about where Lee was or anything about him. I never wrote anybody in Onslow County where he was living and asked if he was living or dead. . . . I thought I had a divorce after he was gone so long." She did not testify as to whether she had been served with summons or complaint for divorce.

Fannie Caldwell testified: She was a sister of Richard Chalmers and took care of certain of his business affairs. Defendant turned over the proceeds of a life insurance policy to her to pay her brother's hospital and funeral expenses.

At the close of plaintiffs' evidence defendant moved for judgment of nonsuit, which was denied. Defendant offered no evidence and renewed her motion for nonsuit, which was again denied. Plaintiffs moved for a directed verdict, which was also denied. The court submitted the following issue to the jury: "Was the defendant, Lillian Gertrude Womack, the lawful wedded wife of Richard Chalmers at the time he died on August 16, 1962?" The jury answered the issue in the affirmative. Plaintiffs appeal from the judgment entered thereon.

M. O. Lee for plaintiffs.
Robert B. Morgan and Gerald Arnold for defendant.

BRANCH, J. Plaintiffs' first assignment of error is that the court submitted insufficient and incorrect issues to the jury.

The number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held

for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause. *Conference v. Miles,* 259 N.C. 1, 129 S.E. 2d 600; *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601; G.S. 1-200.

The only issue for decision in order to determine the rights of the parties in this cause was the marital status of defendant and James Richard Chalmers at the time of his death. The issue submitted by the trial judge was sufficient to embrace all facts in dispute, for the parties to present every material phase of the case, and to enable judgment to be entered which fully determined the case. Objection to the issue submitted is therefore groundless.

Appellants also contend that the trial judge erred "for that the court failed to charge the jury in accordance with G.S. 1-180 by explaining and declaring the law arising on the evidence." This assignment is broadside and untenable. It is insufficient in that it does not present error relied upon without the necessity of going beyond the assignment itself to learn what the question is. The portions of the charge objected to are not specifically set out. *Creed v. Whitlock,* 252 N.C. 336, 113 S.E. 2d 421; *State v. Corl,* 250 N.C. 262, 108 S.E. 2d 613; Rule 19(3), Rules of Practice in the Supreme Court, 254 N.C. 783, 797.

Plaintiffs' assignment of error that the court erred in failing to grant their motion to set aside the verdict as being against the greater weight of the evidence cannot be sustained. The issue was properly submitted to the jury. " 'A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage.' . . . (I)t is always for the jury where the demand is for an affirmative finding in favor of the party having the burden, even though the evidence may be uncontradicted. . . . Moreover, proof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon which property rights growing out of its validity must be based." *Kearney v. Thomas,* 225 N.C. 156, 33 S.E. 2d 871; *Stewart v. Rogers,* 260 N.C. 475, 133 S.E. 2d 155.

Plaintiffs argue in their brief that the court abused its discretion in failing to set aside the verdict as being contrary to the court's instructions. The court charged the jury as follows:

> "Gentlemen of the jury, if you believe the evidence in this case, then you would answer the First Issue 'No.' That is to say, that if you believe what the witnesses have said about it,

then you would find, it would be your duty to find that Lillian Gertrude Womack was not the lawful wedded wife of Richard Chalmers at the time he died, but it is within your province to believe all of the evidence, to believe none of the evidence, or to believe it in part and disbelieve it in part, as the case may be, as you see it in your own minds when come to consider and make up your verdict.

"Therefore, Gentlemen of the jury, if you find from the evidence, and by its greater weight, that Lillian Gertrude Womack was married to Lee Womack in the year 1920 and that that marriage was never dissolved by divorce, and find that she is still the lawful wedded wife of Lee Womack, then you would answer, it would be your duty to answer this issue 'No,' and that is to say, that she was not the lawful wedded wife of James Richard Chalmers. If, on the other hand, you disbelieve the evidence, you would answer it in the affirmative, that is to say, that she was, because there is a presumption of the validity of the second marriage."

Since this was a matter for the jury, plaintiffs were not entitled to more than peremptory instruction. The correct form of peremptory instruction is that the jury should answer the issue as specified if they should find from the greater weight of the evidence the facts to be as all the evidence tends to show. *Wesley v. Lea,* 252 N.C. 540, 114 S.E. 2d 350; *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892. And the court should also charge that if the jury does not so find, *they should answer the issue in the opposite manner. Roach v. Insurance Co.,* 248 N.C. 699, 104 S.E. 2d 823. Although the court's language was not in the exact words approved by this Court, it was substantially correct and does not constitute reversible error since the plaintiffs were not prejudiced, but to the contrary were benefited, by the variance from the Court's approved form. *Brooks v. Mill Co.,* 182 N.C. 258, 108 S.E. 725.

In the instant case the trial judge left it to the jury to determine the issue submitted, and in the exercise of his discretion refused to set aside the verdict. A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court, and its ruling thereon will not be reviewed in the absence of a showing of abuse. *Wilkins v. Turlington,* 266 N.C. 328, 145 S.E. 2d 892.

Passing on this question in the case of *Mangum v. Yow,* 263 N.C. 525, 139 S.E. 2d 537, this Court said: "History teaches that a jury can best settle factual controversies, and for that reason jury trials 'ought to remain sacred and inviolable.' N. C. Constitution,

Art. 1, § 19. . . . The jury had the responsibility of weighing all of the evidence . . . We find nothing in the record to show a failure by the jury to perform its duty. That being so, it follows the trial judge was not under a duty to set the verdict aside."

In the case now before us the jury heard the evidence, observed the demeanor of the witnesses, and answered the issue submitted. The trial judge had the same opportunity to observe the witnesses and hear the evidence as did the jury. We find no manifest abuse of discretion, and it therefore follows that the judge was under no duty to set the verdict aside.

Plaintiffs' assignment of error as to the court's failure to grant the motion for a directed verdict is not brought forward and discussed in their brief and is deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

For reasons stated, we find

No error.

DAN DOLAN, MINOR BY HIS NEXT FRIEND, WILLIAM C. DOLAN, v. HELEN LYNN SIMPSON; ALEXANDER OLDHAM McCARLEY; JOHN D. McCARLEY, JR., AND JOHN D. McCARLEY, III, T/A ECHO FARM DAIRY.

(Filed 3 February, 1967.)

1. Evidence § 54—

Where plaintiff introduces in evidence the adverse examination of a defendant, plaintiff represents that the evidence is worthy of belief.

2. Automobiles §§ 43, 48— Left turn at intersection across path of approaching vehicle held sole proximate cause of intersection collision.

Plaintiff's evidence to the effect that he was a passenger in a car traveling on a four-lane highway, that the driver stopped before attempting to make a left turn into a two-lane highway, forming a T intersection, that she then turned left across the path of a vehicle approaching from the opposite direction at 45 to 50 miles per hour when such other vehicle was only 75 feet away although there was nothing to obstruct the view of the approaching vehicle, and that the front of such other vehicle struck the right side of the vehicle in which plaintiff was riding while its rear was still blocking the other vehicle's lane of travel, *held* to disclose that the negligence of the driver of the car in which plaintiff was riding was the sole proximate cause of the collision, and nonsuit was correctly entered as to the driver and owner of the other vehicle.

3. Damages §§ 3, 14—

The burden is on plaintiff claiming damages for permanent injury to establish the permanency of the injury by the greater weight of the evidence, and when one of plaintiff's experts testifies that he could not be

positive but that there was a likelihood that plaintiff's headaches and disability would recur, and defendant's other expert testifies that he could not state either way as to whether plaintiff had suffered any permanent injury, plaintiff has left the permanency of his injury in the realm of speculation, and the exclusion of the statutory table of life expectancy is not error.

4. Appeal and Error § 41—

The exclusion of testimony will not be held prejudicial when testimony of similar import is thereafter given by the same witness.

APPEAL by plaintiff from *Mintz, J.*, February 3, 1966 Civil Session of NEW HANOVER.

Action for personal injuries sustained by plaintiff in a two-car collision between Wilmington and Wrightsville Beach. In addition to other testimony, plaintiff offered the adverse examination of defendants Simpson and Alexander Oldham McCarley. Defendants offered no evidence.

Plaintiff's evidence tends to show: On October 7, 1960, about 7:30 p.m., plaintiff, then three years old, was a passenger in the Plymouth automobile which his grandmother, defendant Simpson, was operating in an easterly direction on Oleander Drive, approaching its intersection with Hawthorne Drive, a servient road. Oleander Drive, which is also U. S. Highway No. 76, runs east and west with two lanes for travel in each direction. Hawthorne Drive is a two-lane, rural paved road interlinking with Oleander on the north to form a T intersection. The traveled portion of Oleander is 44 feet wide; including shoulders, its entire width is 60 feet. The traveled portion of Hawthorne is 22 feet wide. At the intersection visibility is two miles in either direction, and, at that time, the maximum speed permitted by law was 55 MPH. The intersection is not controlled by electrical signals. The road was wet and it was drizzling. The weather, however, did not interfere with visibility. Defendant Simpson approached the intersection in the inside lane and attempted a left turn into Hawthorne. At the same time, defendant Alexander Oldham McCarley, operating a Chevrolet station wagon owned by defendants John D. McCarley, Jr., and John D. McCarley, III, was approaching the intersection from the east in the outside lane for westbound traffic. As the front of the Simpson car entered Hawthorne Drive, there was a collision between the two vehicles on the extreme right in the McCarley lane of travel. The front of the station wagon hit the right side of the Simpson car, damaging it from the front door back. The investigating officer found debris scattered over a wide area with chrome strips lying on the east edge of Hawthorne Drive.

Defendant Simpson's version of the accident: Before she made

the left turn, she came to a complete stop in Oleander Drive and looked afore and aft. She saw nothing at all coming. With her "blinking lights" on, she made "a curved turn" into Hawthorne. At the time of the collision she was not going 10 MPH. After starting to turn and crossing the yellow center line of the highway, she saw the lights of the approaching McCarley vehicle for the first time. She said, "The road is level. It is a nice road. You can see the headlights of approaching cars for a long way down that highway."

Mrs. Simpson told the investigating officer that she thought the McCarley car was far enough away for her to make the turn and that it appeared to be traveling at a higher rate of speed than she had figured.

Alexander Oldham McCarley's version of the accident: He approached the intersection in the outside, or northernmost, lane for westbound travel at a speed of 45-50 MPH. He observed the lights of the Simpson car in a group of approaching headlights. He first saw the automobile itself when it started a long sweeping turn in front of him, when he was about 50 feet from the intersection and when the two cars were about 75 feet apart. He applied his brakes, blew his horn, and pulled to the right, getting two wheels off the pavement onto the shoulder. Notwithstanding, he hit the Simpson vehicle in the right side near the center when its front end was a few feet into the middle of Hawthorne, and its back end was in his lane of travel. The Simpson car at no time had any light blinking on the front of it, and he did not observe Mrs. Simpson give any sort of turn signal.

Plaintiff's evidence further tended to show: At the time of the collision, Mrs. Simpson was taking a group of children home from a bowling alley. There were four in the back seat and three, including plaintiff, in front. After the accident, all were taken to the emergency room at the Cape Fear General Hospital. When plaintiff's mother saw him there about 8:00, he appeared to be completely lifeless. Although his eyes were open, he was unable to see or hear her. When she stood him up, his eyes went back in his head and he vomited. He had no cuts, but a wide red mark went from his hairline down the right side of his head. After an hour in the emergency room, plaintiff's parents took him home, where he continued to be stuporous and nauseated for four or five days before he was seen by Dr. Koseruba, a pediatrician. Dr. Koseruba found evidence of cerebral concussion, which he related to the accident. He ordered that plaintiff be kept completely quiet until he ceased to complain of headaches. Instead of improving, plaintiff's condition became worse. His headaches continued; he cried in his sleep; and he had nightmares which caused him to wake up screaming. He developed

noises in his head. He began to walk in his sleep, and other alarming habits appeared. When he began to have symptoms of a convulsive disorder, Dr. Koseruba sent him to Memorial Hospital at Chapel Hill. There he was treated by Dr. Robert Moore, a neurosurgeon, whose findings suggested that plaintiff was suffering from a convulsive disorder of the petit mal type. Anticonvulsion medications, phenobarbital and dilantin, were prescribed.

Prior to the accident, plaintiff was a healthy, normal, alert child with none of the disorders which were manifest after the accident. In Dr. Koseruba's opinion, the accident was directly responsible for the symptoms which followed it. In Dr. Moore's opinion, it is probable that the symptoms resulted from the accident.

Plaintiff was born in May 1957. At the time of the trial, he was 8 years old and in the third grade. He is a good student, but it takes him longer than it does the other children to finish his work. He has been off any sort of medication for three years, but he continues to have headaches on an average of twice a week. When they occur, he has to go to sleep. With reference to plaintiff's prognosis, Dr. Koseruba said, "I feel there is no guarantee whatever but what those symptoms can reoccur in the future." He could not be positive, but said, "There is a likelihood." Dr. Moore said that he did not know whether plaintiff had suffered any permanent injuries, and he could not state either way.

At the close of all the evidence, the court allowed the defendants McCarleys' motion for nonsuit. The jury awarded plaintiff damages in the sum of $5,000.00 against defendant Simpson. From judgment dismissing this action as to defendants McCarley and judgment that he recover $5,000.00 from defendant Simpson, plaintiff appeals.

Burnett & Burnett and Aaron Goldberg for plaintiff.

R. S. McClelland and W. Allen Cobb for Helen Lynn Simpson, defendant.

Marshall & Williams for Alexander Oldham McCarley, John D. McCarley, Jr., and John D. McCarley, III, defendants.

SHARP, J. Appellant's first assignment of error challenges the court's judgment nonsuiting him as to defendants McCarley. In his complaint, plaintiff alleges that the driver of the McCarley station wagon was negligent in that he operated it at an excessive rate of speed, without having it under proper control, without keeping a proper lookout, and in that he failed to yield the right of way to the Simpson vehicle, which was first in the intersection. He further alleges that McCarley's negligence, combined with that of Mrs. Simp-

son, caused the collision. Plaintiff's evidence, however, does not sustain these allegations.

McCarley was traveling in the northernmost lane for westbound traffic on a perfectly straight road at a speed of 45-50 MPH in a 55 MPH speed zone. The only evidence of McCarley's speed and the distances between the two automobiles came from his adverse examination, which plaintiff introduced in evidence. In doing so plaintiff represented McCarley as worthy of belief. *Cline v. Atwood,* 267 N.C. 182, 147 S.E. 2d 885. It is true that McCarley was approaching an intersection, but, so far as the evidence reveals, it was an unmarked intersection. In any event, Oleander was the dominant highway. At a point where visibility was two miles in each direction, and when McCarley was only 75 feet away, defendant Simpson turned her vehicle across his path. She says that before she attempted to turn left into Hawthorne, she stopped, looked to the east, and saw no approaching headlights. It was, of course, impossible for McCarley to have traveled two miles while Mrs. Simpson crossed the two westbound lanes, each eleven feet wide — even if she crossed them at an angle.

McCarley says that Mrs. Simpson gave no signal of her intention to turn. She says that she had the "blinking lights" on at the time she was making the left turn, but she did not say when she turned them on. The conclusion is inescapable that Mrs. Simpson either did not see the lights of the approaching McCarley vehicle or that, if she did, she misjudged his speed. Her report to the patrolman suggests the latter. In any event, it appears that the conduct of Mrs. Simpson, who, after coming to a complete stop, turned across the path of a vehicle traveling at 45-50 MPH when it was only 75 feet away, constituted the sole proximate cause of the collision. *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919. Plaintiff's case against defendants McCarley is controlled by *Cline v. Atwood, supra,* and the cases cited therein. See also *Harris v. Parris,* 260 N.C. 524, 133 S.E. 2d 195. The nonsuit was properly entered, and plaintiff's first assignment of error is overruled.

As a basis of his contention that he is entitled to a new trial against defendant Simpson, plaintiff assigns as error the court's refusal to permit the jury to consider the mortuary table as evidence of plaintiff's life expectancy — at age 3, 65.1 years. G.S. 8-46. The burden is on a plaintiff claiming damages for a permanent injury to establish it by the greater weight of the evidence, and, unless there is some evidence of a permanent injury, the mortuary table is inadmissible. *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753. Plaintiff's evidence left the permanency of his injuries and symptoms

within the realm of speculation. The exclusion of the table, therefore, cannot be held for error.

Plaintiff's other assignments of error relate to the exclusion of evidence which would not, in our opinion, have altered the verdict if admitted. Testimony of similar import was thereafter given by the same witness, or the excluded evidence was of negligible import when compared with other testimony pertaining to plaintiff's injuries.

In the trial below we find no error sufficient to disturb the verdict.

No error.

JERRY AYERS v. LOUISE MARIE NIXON AYERS, BY HER GUARDIAN AD LITEM, JERRY M. SHUPING.

(Filed 3 February, 1967.)

1. Pleadings § 19—

Demurrer to a cross-action set forth in the answer on the ground that the facts therein alleged are insufficient to constitute a cause of action in defendant's favor, is properly overruled if the facts alleged in the answer are sufficient to entitle defendant to any affirmative relief, even though the matters relied upon for affirmative relief and the matters relied upon as a defense are not separately stated.

2. Husband and Wife § 9—

A wife may maintain an action against her husband for assault and battery. G.S. 52-5.

3. Divorce and Alimony § 5—

In plaintiff's action for divorce on the ground of separation, defendant filed answer alleging that while the parties were living together as man and wife, plaintiff repeatedly assaulted defendant, and that on one specified occasion plaintiff knocked defendant across a counter at plaintiff's place of business. *Held:* Demurrer to the cross-action on the ground that it failed to allege facts sufficient to constitute a cause of action in defendant's favor should have been overruled. Whether cross-action for assault is appropriate in an action for divorce is not presented or decided.

4. Abatement and Revival § 4—

Where it does not appear from the pleadings that another prior action for substantially the same cause of action was then pending, the pendency of a prior action may not be raised by demurrer.

5. Divorce and Alimony § 18—

In the husband's action for divorce, the court should duly hear and pass upon defendant's application for attorney's fees *pendente lite*.

AYERS *v.* AYERS.

APPEAL by defendant from *Latham, S.J.*, July-August, 1966 Term of RANDOLPH County Superior Court.

This is a civil action in which the plaintiff filed an action for absolute divorce on the grounds of one-year separation. He alleges that he and Louise Marie Nixon Ayers were lawfully married on 21 July, 1956, and thereafter lived together as husband and wife, except for occasional separations, until on or about 14 January, 1962, when they separated, and that said separation is evidenced by a deed of separation dated 3 February, 1962, and recorded in Book 791, page 303, Randolph County Registry.

Upon application by attorneys representing the purported wife of the plaintiff, the Clerk of Superior Court found that she was a person *non compos mentis,* having a mentality of the moron level and therefore appointed a Guardian *ad Litem* to defend the divorce action of the husband.

Upon plaintiff's appeal to the Superior Court the presiding judge upheld the action of the Clerk.

Subsequently the defendant, Jerry M. Shuping, as Guardian *ad Litem* for his ward, Louise Marie Nixon Ayers, filed an Answer, further defense and cross-action. The further defense alleged that at the time of the purported marriage the plaintiff was a 36-year old business man, and that the ward was a girl 15 years of age with a third grade education, and had the mental level of a moron; that during the years the parties lived together the plaintiff's treatment of her was such that it became intolerable to the extent that, against her will and under duress, threats and fear for her life, she executed the paper referred to by the plaintiff as a deed of separation. She alleges that she received nothing for signing it and that it was not executed as required by G.S. 52-6. She described her physical condition as being such that she was unable to work except as a domestic servant, and asked that she be given an order of support and counsel fees pending the trial.

In the cross-action the Guardian *ad Litem* alleges that the plaintiff had illicit sexual relations with his ward prior to their purported marriage from which she bore him a child, and that later a second child was born. He alleged that on one occasion the plaintiff knocked her across a counter and on numerous other occasions assaulted her; that on the first day of February, 1962, which was just two days before they separated, he assaulted his ward and did everything possible to make life unbearable and as a result she was forced to leave their home; that she was at all times a dutiful wife and that the plaintiff's mistreatment was without any provocation whatever on her part, and seeks damages in the sum of $100,000, or permanent support.

The plaintiff demurred to the cross-action on the grounds that the further defense and cross-action did not state facts sufficient to state a cause of action. An order was entered sustaining the demurrer and the defendant appealed.

Miller & Beck, Walker, Anderson, Bell & Ogburn for plaintiff appellee.

Ottway Burton, J. C. Barefoot, Jr., for defendant appellant.

PLESS, J. The demurrer filed by the plaintiff to the defendant's further defense and cross-action is based upon his contentions that the defendant's pleadings do not state facts sufficient to constitute a defense against the plaintiff's action upon grounds of separation as alleged in the complaint, and do not state facts sufficient to constitute an action against the plaintiff for damages as prayed or the suit money demanded by her counsel.

This brings the plaintiff squarely within the succinct statement in 3 Strong's N. C. Index, Pleadings, Sec. 19: "The same rules apply to a demurrer to a counterclaim or cross-action set up in the answer (as apply to a complaint), and a demurrer to the counterclaim must be overruled if sufficient facts can be gathered from the entire answer to entitle the defendant to some relief, notwithstanding that the answer fails to state separately the matters relied upon as defenses and the matters relied on for affirmative relief."

And in *Pearce v. Pearce,* 226 N.C. 307, 37 S.E. 2d 904, the Court said: "The demurrer will not be sustained if facts sufficient to entitle her to some relief can be gathered therefrom".

In the same section Strong says: "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. It is sufficient if the facts alleged entitle plaintiff to some relief, even though they are insufficient to entitle plaintiff to the relief prayed or to relief upon another theory of liability. Thus where the complaint alleges several causes of action, a general demurrer must be overruled if any one of the causes is sufficiently stated."

The above would, of course, apply to a demurrer to a counterclaim or cross-action.

"It is a well established rule in this jurisdiction that a complaint is sufficient to withstand a demurrer if it in any part or to any extent presents a cause of action, or if sufficient facts in support of a cause of action can be fairly gathered therefrom. *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807; *Mills Co. v. Shaw, Comr. of Revenue,*

supra; Brewer v. Wynne, 154 N.C. 467, 70 S.E. 947. It is also held that a complaint which alleges two or more causes of action is good against a demurrer, if only one cause of action is sufficiently stated. *Meyer v. Fenner,* 196 N.C. 476, 146 S.E. 82; *Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214." *Deaton v. Deaton,* 234 N.C. 538, at 540, 67 S.E. 2d 626.

Under G.S. 52-5: "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried." Referring to this statute, we said in *Shaw v. Lee,* 258 N.C. 609, 129 S.E. 2d 288: "At common law one spouse could not sue the other for personal injuries negligently inflicted. Our Legislature by statute modified the common law and permitted the wife to sue the husband for injuries tortiously inflicted." See also 2 Strong's Index, Husband and wife, § 9.

Paragraph VI of the defendant's further defense and cross-action says in part: "That the plaintiff has threatened on numerous occasions to kill the defendant's ward and that on one occasion knocked the defendant's ward across a counter at the place of business the plaintiff runs, and on numerous occasions he has assaulted the defendant's ward and more particularly on or about the 1st day of February, 1962, he assaulted the defendant's ward."

The defendant has thus stated a good cause of action against the plaintiff for an assault upon her, and the demurrer cannot be sustained as to that phase of the pleadings, and for the reasons earlier stated the demurrer must be overruled.

It will be noted that the question of whether a cross-action for an assault is appropriate as a counterclaim in an action for divorce is not presented and, therefore, not determined.

Plaintiff also demurred upon the ground that at the time the cross-action was filed another action begun by the defendant against the plaintiff and for substantially the same purported cause of action, was pending. Since this does not appear from the pleadings, it is not appropriate ground for demurrer at this time.

The defendant in a motion says that the attorneys representing her in this action have been awarded no attorneys' fees, and that her application therefor has been ignored. She excepts to the court's failure to rule on this motion. Upon these pleadings the court should take appropriate action without delay.

Inasmuch as the action instituted by the wife for support which is referred to in plaintiff's affidavit was instituted prior to this action, it would appear that it should have preference in time of trying it over this proceeding. The results of that trial would have substantial bearing upon the present action.

For the reasons above stated, the ruling of the court in sustaining the plaintiff's demurrer to defendant's cross-action is hereby Reversed.

STATE OF NORTH CAROLINA, EX REL GLENN T. WEST, v. LEE H. INGLE, EARL J. BURCH, AND FIDELITY & DEPOSIT COMPANY OF MARYLAND, THEIR SURETY.

(Filed 3 February, 1967.)

1. Pleadings § 15; Public Officers § 9—

Where, in an action on the bonds of public officers or employees, the bonds are not attached to the complaint or included in the case on appeal, demurrer on the ground that the bonds were not public official bonds as contemplated by G.S. 109-34, but were solely for the protection of the governmental agency employing the officers or employees, should be overruled, since the demurrer relies on matters *de hors* the pleading and is therefore bad as a "speaking demurrer."

2. Pleadings § 19; Public Officers § 9; Convicts and Prisoners § 3— Joint demurrer of defendants must be overruled if complaint states cause of action against any one of them.

Plaintiff alleged that he was a prisoner assigned by the superintendent of prison farms to work, over his protest, on a garbage truck while plaintiff's arm was in a cast so that his capacity to hold on to the sides of the truck and protect his own safety was impaired, and that the driver of the truck drove same into a hole or depression, causing plaintiff to be thrown off the bed of the truck onto the ground, resulting in serious injury. *Held:* The complaint alleges a cause of action for negligence against the driver of the truck, and therefore the joint demurrer of the driver, the superintendent of prison farms, and the surety on their bonds should have been overruled.

APPEAL by plaintiff from *Armstrong, J.*, at 12 September, 1966 Civil Term of GUILFORD County Superior Court.

West was a prisoner assigned to work under the custody of the Superintendent of the prison farms of Guilford County (Ingle). On 6 July, 1965, he alleges he was required to work on a garbage truck being driven by Burch, that Burch negligently drove the truck into a hole and threw him to the ground, causing injury. He alleges further the Fidelity & Deposit Company of Maryland was surety on Ingle's and Burch's bond under G.S. 109-34, which made it liable for the latter's negligence.

He brings an action entitled *"State of North Carolina ex rel Glenn T. West"*.

The defendants demurred on the grounds that the complaint does not state a cause of action in that the bonds are not public official bonds; that they are for the benefit of Guilford County only and that any forfeiture can only be rendered in favor of the County.

The demurrer was sustained and the plaintiff appealed.

Hines & Dettor for plaintiff appellant.

Ralph A. Walker, Henri R. Mazzoli for defendants appellees.

PLESS, J. Paragraph 3 of the complaint is as follows: "That on or about the 6th day of July, 1965, the plaintiff was a prisoner assigned to work under the custody and control of the superintendent of the prison farms of Guilford County at which time he had sustained a fracture of his left radius and had a cast on his left hand and forearm. That on the date aforesaid plaintiff, while under the supervision, custody and control of the defendant Ingle and his assistant, the defendant Burch, and over the plaintiff's protest, was required to work on a truck belonging to Guilford County and driven by the defendant Burch in the course of picking up garbage at the Greensboro-Guilford County Country Park which said garbage was in metal drums being handed up to the plaintiff on the bed of said truck where he was required to dump said barrels and return them to the prisoners on the ground; that while plaintiff was standing on the bed of said truck, which said bed was wet and slippery from water and garbage, said Burch drove the truck into a hole or depression, the plaintiff's feet slipped, he could not hold on on account of his left hand and forearm being in a cast and he was thrown off the bed of said truck onto the ground hitting the same on his head and neck and causing severe and permanent injuries on account thereof."

In paragraph 4 the plaintiff alleges that Ingle and Burch were negligent in compelling him to work with a cast on his arm on a slippery floor of a moving truck when he was unable to hold on safely, and that he had protested that he was unable to care for his own safety and, further, that Burch negligently drove the truck into a depression which caused it to tilt suddenly and threw the plaintiff head foremost against the ground causing severe injuries.

There can be no question that if the action were solely against the defendant Burch the plaintiff has stated a good cause of action based upon actionable negligence. That being true, the demurrer as to Burch should not have been sustained.

The three defendants filed a joint demurrer for that "the complaint does not state facts sufficient to constitute cause of action against the defendants in that the bonds which cover the defend-

ants Burch and Ingle are not public official bonds as contemplated by General Statutes 109-34. That the bonds which cover defendants, Burch and Ingle, protect and are for the benefit of Guilford County only, and any forfeiture under said bonds can only be rendered in favor of Guilford County." The ruling was that "The demurrer should be sustained; that the complaint of the plaintiff fails to state a cause of action".

The bond was not attached to the complaint or included in the case on appeal. The joint demurrer is therefore based upon matters not appearing in the record.

Toomes v. Toomes, 254 N.C. 624, 119 S.E. 2d 442, at page 626, says: "A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face of the pleading attacked. (Citing authorities). A demurrer which requires reference to facts not appearing on the face of the pleading attacked is a 'speaking demurrer', and is bad. * * * If the matter *de hors* the pleading conflicts with the facts alleged, the court has no choice but to resolve the matter on the basis of the pleading. Extraneous matters may be considered only when the cause is heard on its merits."

3 Strong's North Carolina Index, Pleadings, § 15, page 631: "Where the grounds for demurrer invoke matters not appearing on the face of the complaint, the demurrer is bad as a 'speaking' demurrer, since matter *de hors* the pleading may not be considered in passing upon a demurrer."

The defendants could, of course, have filed separate demurrers which would have entitled each to a separate ruling. McIntosh Practice & Procedure, Demurrer, § 1195, page 655. But they filed a joint demurrer and thus became subject to the rule stated in McIntosh, *supra.* "If there are two or more defendants and they join in a demurrer, and the complaint is sufficient as to any one of them, the demurrer will be overruled as to all; 'they all placed themselves in the same boat, and must sink or swim together', 'a demurrer cannot be good in part and bad in part.' "

In *Paul v. Dixon,* 249 N.C. 621, 107 S.E. 2d 141, Chief Justice Winborne brought together a number of cases in which the foregoing rule was used. He said: "Where all the defendants join in a demurrer to the complaint upon the grounds that it does not set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to any one of the defendants * * * the current of authority is in favor of this just and salutary rule of pleading * * * a demurrer by two or more if there is a cause of action against any one of them will be overruled * * * the defendants having joined in the demurrer if the

complaint states a cause of action against either of them it must be overruled."

Since the demurrer as to Burch should have been overruled, it follows that under the above ruling as to joint demurrers that it should have been overruled as to the other defendants also. We express no opinion as to the validity of separate demurrers if interposed by Ingle and the Fidelity Company, since under the conditions of this record those questions are not here presented.

Reversed.

HUBERT QUICK v. HIGH POINT MEMORIAL HOSPITAL, INC.

(Filed 3 February 1967.)

1. Pleadings § 34—

A motion to strike an entire defense on the ground that the facts alleged do not constitute a proper defense, is in substance a demurrer to such defense.

2. Appeal and Error § 3—

An appeal lies immediately from an order sustaining a demurrer, G.S. 1-277, and likewise from an order striking an entire further defense from the answer, since such order amounts to an order sustaining a demurrer.

3. Hospitals § 3; Dead Bodies § 1—

In an action by a father against a hospital to recover for the unauthorized act of the hospital in incinerating the body of his son, who had been a patient in the hospital, the doctrine of charitable immunity does not apply, even in those cases arising prior to the decision in *Rabon v. Hospital*, 269 N.C. 1, since such doctrine has never been applied to those who were not beneficiaries of the charity.

APPEAL by defendant from *Riddle, S.J.*, September 12, 1966 Civil Session of GUILFORD (High Point Division).

Civil action to recover damages for alleged breach of contract.

Plaintiff alleged that on 24 September 1962 his one-month old son was carried to the defendant hospital for treatment. On 25 September 1962 the infant died as a result of congenital heart disease, bronchopneumonia, and other complications. On the following day plaintiff was informed by certain staff members and agents of the hospital that they desired to perform an autopsy on the body and that the body would be returned to the plaintiff on the next day for burial. On this condition, plaintiff consented to the autopsy.

When plaintiff returned on 27 September to accept delivery of the body, he was informed by hospital officials that the body had been incinerated and it would therefore be impossible to deliver the body to the plaintiff. Plaintiff alleged on information and belief that the doctor who performed the autopsy wrapped the body in newspaper and returned it to the morgue icebox, leaving directions for the housekeeper to have the morgue cleaned up; that the assistant housekeeper removed the body from the icebox and disposed of it in the incinerator. Plaintiff prayed for recovery in the amount of $75,000, alleging intense grief, mental agony and distress as a result of the action of the hospital.

Defendant answered and in its further answer and defense alleged, *inter alia,* "(I) The defendant hospital is a non-profit corporation operated as an eleemosynary or charitable institution. (II) The plaintiff's cause of action, although denominated as a 'breach of contract' suit, is actually a negligence action, if a cause of action is alleged at all."

Upon motion of plaintiff, Judge Walker, under date of 17 August 1965, ordered that defendant's first and second further answers be stricken and allowed the defendant twenty days within which to amend its pleadings.

Pursuant to the order, and in due time, the defendant amended its first Further Answer and Defense so as to read as follows: "(I) The defendant hospital is a non-stock, non-profit corporation and operates an eleemosynary or charitable institution. (II) Even though plaintiff's cause of action is denominated as a 'breach of contract' suit, said action is barred because the defendant hospital is a non-stock non-profit corporation, and operates as an eleemosynary or charitable institution."

Plaintiff then moved to strike paragraphs I and II of the first Further Answer and Defense as amended, and upon hearing Judge Riddle entered order 13 September 1966 striking paragraphs I and II of the first Further Answer and Defense as amended. Defendant appealed.

Schoch, Schoch and Schoch for plaintiff.
Smith, Moore, Smith, Schell & Hunter for defendant.

BRANCH, J. The sole question presented for decision on this appeal is: Did the trial court err in striking from the defendant's answer and amendment to its answer that it is an eleemosynary or charitable institution, being a non-stock, non-profit hospital corporation?

Plaintiff's motion to strike defendant's entire Further Answer and Defense on the ground that facts alleged do not constitute a proper defense to plaintiff's action is in substance a demurrer to defendant's Further Answer and Defense. G.S. 1-141, in pertinent part, provides: "The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a . . . defense; and he may demur to one or more of such defenses . . ., and reply to the residue." *Williams v. Hospital Asso.*, 234 N.C. 536, 67 S.E. 2d 662; *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908.

An order or judgment which *sustains* a demurrer affects a substantial right and a defendant may appeal therefrom. G.S. 1-277. Rule 4(a), Rules of Practice in the Supreme Court, 242 N.C. 766, when otherwise applicable, limits the right of immediate appeal only in instances where the demurrer is *overruled.*

The defendant's Further Answer and Defense pleaded charitable immunity.

Even before this Court held in *Rabon v. Hospital, ante* 1, that the doctrine of charitable immunity no longer applies to hospitals, the doctrine applied only to *beneficiaries of the charity.* In the case of *Cowans v. Hospitals,* 197 N.C. 41, 147 S.E. 672, the Court held that a charitable institution was liable in damages for a negligent injury inflicted by it on an employee, as distinguished from a *beneficiary of its charity, i. e.,* a patient. All the cases in this jurisdiction which have applied the doctrine of charitable immunity involve *beneficiaries of the charity. Williams v. Hospital,* 237 N.C. 387, 75 S.E. 2d 303; *Barden v. R. R.*, 152 N.C. 318, 67 S.E. 971; *Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807.

Williams v. Hospital, supra, and all other cases of similar import were overruled by *Rabon v. Hospital, supra.* In the instant case, however, plaintiff was not a beneficiary of defendant's charity. The doctrine of charitable immunity therefore had no application at the time defendant's answer was filed.

The order allowing plaintiff's motion to strike is

Affirmed.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1967

STATE v. GARY DAVID OVERMAN, HARVEY CLAYTON OVERMAN, JOHN MARVIN OVERMAN.

(Filed 1 March, 1967.)

1. Criminal Law § 160—

The presumption is in favor of the regularity of the proceedings in the lower court, and when the record fails to show the proceedings culminating in the denial of defendant's plea in abatement on the ground of improper venue, defendant has failed to show error in the denial of the plea.

2. Criminal Law § 15—

In this prosecution of defendants for raping, successively, prosecutrix, the State's evidence, without contradiction, showed that prosecutrix was forced from the car of her companion into a car in possession of defendants and that the first act of rape began immediately thereafter in the county in which the indictment was laid. *Held:* It was not error for the court to deny plea in abatement by one defendant for improper venue in the absence of evidence by such defendant that the offense with which he was charged occurred in another county. G.S. 15-134.

3. Criminal Law § 26—

A defendant may not be put in jeopardy for any offense of which he could lawfully have been convicted upon the trial under a former indictment, but where a defendant could not be lawfully convicted under the former indictment of the offense of which he is charged in the second indictment, plea of former jeopardy will not lie, even though the separate offenses were committed in the course of the same series of acts pursuant to the same plan of action.

4. Constitutional Law § 28—

A defendant may not be lawfully convicted of an offense which is not included within the offense charged in the bill of indictment, regardless of the evidence introduced against him.

5. Criminal Law § 26—

The offenses of kidnapping and rape each have essential elements which are not component parts of the other, and therefore a prosecution under an indictment for kidnapping will not support a plea of former jeopardy in a subsequent prosecution for rape, even though rape may have been the motive for the kidnapping and even though defendants in the prior prosecution for kidnapping were convicted, respectively, of assault on a female and simple assault, the record in the kidnapping prosecution disclosing that the court instructed the jury that occurrences subsequent to the kidnapping were not germane to that charge and might be considered only as bearing upon the questions of force and felonious intent.

6. Same—

Where the offenses with which defendants were successively prosecuted are separate and distinct so that as a matter of law defendants could not have been lawfully convicted under the first prosecution of the offense charged in the second prosecution, the plea of former jeopardy in the second prosecution is correctly overruled as a matter of law, and there is no necessity to submit the issue of former jeopardy to the jury.

7. Criminal Law § 87—

Indictments charging defendants with rape based upon their successive attacks upon the prosecutrix, each in the company of the others, as a part of one entire plan of action, *held* properly consolidated for trial.

8. Criminal Law § 33—

Where evidence of the acts of some of the defendants prior to the time they were joined by another of the defendants is excluded by the court as to such other defendant, but later evidence discloses that such other defendant was acting in concert and joined his co-defendants in the commission of the offense charged, the court correctly instructs the jury that the evidence theretofore excluded as to such defendant might be considered against him upon the question of his guilty knowledge and intent.

9. Criminal Law § 50; Rape § 4—

It is competent for prosecutrix to testify that she did not voluntarily engage in sexual relations with any of defendants at any time during the night in question, the testimony being of a fact within the knowledge of the prosecutrix and not an expression of opinion invading the province of the jury, it being for the jury to determine whether her testimony as to consent was true or false.

10. Indictment and Warrant § 1—

The absence of a preliminary hearing is not ground for the quashal of an indictment, since a preliminary hearing is not a prerequisite to the finding of an indictment.

11. Constitutional Law § 31—

The denial of a defendant's motion that he be furnished, at public expense, with a transcript of a former prosecution of such defendant for

the purpose of preparing for trial on a third indictment not involved in the present prosecution, is not error.

12. Indictment and Warrant § 13—

Motion for a bill of particulars is addressed to the sound discretion of the trial court, and when the record discloses that defendants were apprised of the nature of the State's case and that the evidence would be the same as in a former prosecution of defendants, no abuse of discretion is shown in the denial of the motion, there being no substantial difference in the testimony at the two trials.

13. Jury § 6—

The fact that the jury, pursuant to direction of the court, was empaneled by the solicitor rather than the clerk is not ground for objection.

14. Criminal Law § 99—

On motion to nonsuit, the evidence of the State is to be considered in the light most favorable to it, and any contradictions in the testimony of the State's witnesses are to be disregarded.

15. Rape § 5—

Evidence tending to show that the four defendants had the 16 year old prosecutrix alone at night in an automobile driven by them successively and that each in turn had sexual intercourse with her by force and against her will, threatened to cut her throat with a knife and forced her to silence when they stopped for gasoline by holding a knife at her throat, with testimony of prosecutrix that she begged for her release and that each act of intercourse was against her will, etc., *held* sufficient to be submitted to the jury on the question of each defendant's guilt of rape.

16. Rape §§ 4, 5—

The fact that a girl, in company with other girls, went to a dance hall with no male escort, even though the place be one at which men of low morals might be reasonably expected to congregate, does not establish her consent to sexual intercourse with such men, although it is competent evidence to be considered by the jury on the question of consent.

17. Criminal Law § 97—

Where some of defendants jointly tried introduce evidence, the court correctly denies a defendant not introducing evidence the right to the closing argument to the jury.

18. Constitutional Law § 33—

In a prosecution for rape, it is not error for the solicitor to comment upon the relative size of one of defendants as compared with that of the girl, even though such defendant does not testify as a witness, he being present in the courtroom throughout the trial.

19. Criminal Law § 116—

The fact that the court requires the jury to continue their deliberations successively on two occasions after they had announced a "deadlock" is not ground for objection when the record discloses that the trial lasted some ten days and that the entire deliberations of the jury consumed slightly more than five hours, and further that the trial judge gave no intimation as to what the verdict should be but specifically instructed the

jury that none should compromise his convictions or do violence to his conscience in order to reach a verdict.

20. Criminal Law § 103—

Announcement of the solicitor amounting to a bill of particulars and including a statement that he would not rely on defendants' guilt as aiders and abettors does not alter the nature of the offense charged or the proof requisite to establish guilt of such offense, and therefore where the evidence introduced by the State conforms to the solicitor's announcement but nevertheless tends to show that each defendant was present and that each, successively, raped the prosecutrix in the course of one series of acts and pursuant to the same plan of action, the court properly charges the jury upon the law of aiding and abetting arising on the evidence.

21. Criminal Law § 9—

Persons who are present, aiding and abetting each other in the perpetration of an offense, are equally guilty with the actual perpetrator of the crime.

APPEAL by defendants from *Gambill, J.*, at the 16 August 1965 Criminal Session of GUILFORD, docketed as No. 657 at Fall Term 1966.

The defendants are brothers. Each was charged in five separate indictments with the following offenses: Kidnapping; rape of the girl alleged to have been kidnapped; and aiding and abetting in her rape by each of his two brothers and by Benny McKinney, their first cousin. McKinney was similarly charged but has not yet been brought to trial. All of the offenses are alleged to have occurred on the night of 5 December 1964 in Guilford County.

In due time separate counsel were appointed to represent John Overman and Harvey Overman. Gary Overman was represented at and prior to trial by his self-employed counsel, the same counsel being thereafter appointed by the trial court to represent him upon this appeal, this defendant being then found by the court to be indigent.

In due time Gary Overman entered a plea in abatement to the indictments against him, in which plea he alleged that Randolph County was the proper venue. The record states that this plea in abatement was heard and denied prior to the making of a general appearance by Gary Overman, but does not show what evidence, if any, was introduced at that hearing.

Also in due time, each defendant moved that the indictments against him be tried separate from those against his brothers, alleging that the consolidation for trial of the charges against him with those against his brothers would be prejudicial to him. These motions were denied.

At the 10 May 1965 Criminal Session, the indictments against

the three Overmans charging them with kidnapping the girl were tried together. The jury found Harvey and John Overman guilty of assault upon a female, and Gary Overman guilty of simple assault, he being less than 18 years of age. Thereupon sentences, within the limits prescribed by the statutes governing such offenses, were pronounced upon the respective defendants. From these judgments none of the defendants perfected an appeal.

The State moved to consolidate for trial the three indictments charging the three Overman brothers, respectively, with rape. The motion was allowed over the objection of the defendants. The cases, so consolidated, were calendared for trial at the 16 August 1965 Criminal Session.

In due time, each of the Overmans entered a plea of former jeopardy to the indictment charging him with rape. The basis of each such plea was that the defendant had been previously tried upon the indictment charging him with kidnapping the girl and, at such trial, had been convicted of an assault upon her, which assault was part of the same transaction out of which arose the charge of rape. The plea of each defendant was overruled, the court refusing to submit to the jury an issue tendered by such defendant as to such alleged former jeopardy.

Each defendant thereupon moved for a bill of particulars "as to the acts that the State relies on for a conviction of the crimes alleged in the various Bills of Indictment on the calendar." The record states that thereupon "the Solicitor for the State announces that he is calling for trial only cases Nos. 447, 481 and 487, charging the defendants with the crimes of rape, and that he is not relying on aiding and abetting in the crime of rape as to any of the three defendants, and that the evidence as to each will be the same as in the former trial of each charging kidnapping." The court denied each motion for a bill of particulars.

In the course of the trial, the court ordered that the transcript of the testimony in the trial for kidnapping be made part of the record in this case. There is no indication that such transcript was submitted to or considered by the jury in the trial of the rape case. This transcript shows that the judge who presided at the trial of the rape case also presided at the trial of the kidnapping case. The evidence introduced by the State at the two trials was substantially identical, the court, at the kidnapping trial, permitting the jury to consider the testimony as to what was done to the girl, following her alleged abduction, for the sole purpose of determining whether the abduction was or was not by force, instructing the jury at that trial:

"The State argues and contends that what happened after the kidnapping is not part of the kidnapping; and the Court charges you that if you find from the evidence and beyond a reasonable doubt that [the girl] was put in the car, as contended by the State, that what happened after that is not part of the kidnapping, but you will only consider that as bearing upon whether or not [the girl] got in the car voluntarily of her own will or whether or not she was forced in the car by the other parties, bearing upon the felonious intent. * * *

"The Court also charges you that if she went in the car voluntarily, if you find that she did, if she went in the car voluntarily, even though she was ravished or raped after she got in the car, that did not mean they would be guilty of kidnapping, that is not part of the kidnapping. * * * What went on after she got in relates to her getting in voluntarily or by force or upon the intent of the defendants, the intent with which she was placed in the car, whether it was wilfully and unlawfully and feloniously."

Prior to the trial of the kidnapping case, John Overman and Harvey Overman each moved to quash all indictments against him arising out of the alleged events of 5 December 1964, for the reason that he had not been given a preliminary hearing and thus had not been afforded an opportunity to be confronted by his accusers. Each motion was denied.

Harvey Overman, prior to the trial of the rape cases, moved that he be furnished by the court, at public expense, with a transcript of the evidence at the trial of the kidnapping cases "as a necessary step in the preparation of his trial in T.D. 1271 [still another indictment] for the alleged kidnapping of Douglas Kennedy," the girl's companion. No ruling on this motion is shown in this record. There is nothing to indicate that such transcript was so furnished to Harvey Overman.

Each of the Overmans thereupon pleaded "not guilty" to the indictment charging him with rape. Thereupon, a jury was selected and the judge ordered the jury to be empaneled. The solicitor then proceeded to empanel the jury as to each defendant, the wording of the empanelment being proper. Each defendant excepts, contending that the empaneling of the jury must be done by the clerk.

The trial then proceeded and continued for ten days, the State offering evidence consisting of the testimony of the girl, her mother, Douglas Kennedy, who was her companion immediately prior to the alleged abduction, the physician who attended her immediately after the alleged offenses, Benny McKinney, the first cousin and alleged accomplice of the defendants, and investigating police offi-

cers. This testimony, which was in great detail, was sufficient, if true, to show:

The girl, 16 years of age and weighing about 95 pounds, went with some other girls to a public dance hall in rural Guilford County on Saturday night, as she had done on many other occasions. There she met friends, including Douglas Kennedy, whom she frequently met there. After dancing a while, he and she went out to his automobile in the parking lot, which was well lighted. As they sat there talking, John and Harvey Overman came to the car. It was then about 10:30 p.m., and the night was dark and rainy. Neither she nor any of the Overmans had ever seen each other before. John and Harvey Overman asked Douglas Kennedy to drive them to another dance hall, a short distance down the highway, offering to pay him for doing so. He agreed to do so without charge and they got in the back seat of the Kennedy automobile. After they left the parking lot, John Overman put a knife to Kennedy's throat and Harvey put one to the girl's throat. She was frightened. They told Kennedy to drive as they instructed. He, pursuant to their orders, drove down the highway to a dirt road and turned onto it. John and Harvey Overman then climbed over into the front seat and John took over the driving of the car.

Thereafter, John stopped the Kennedy car at a lonely, unlighted place on the dirt road, which place was well within Guilford County. Immediately, a 1952 or 1953 light green Ford automobile, later identified as belonging to the mother of the defendants, drove up and stopped a few feet behind the Kennedy car. John and Harvey Overman thereupon pushed Douglas Kennedy over into the back seat of the Kennedy car, from which he jumped out and ran away, going to a house some distance away, from which he called the police.

After Kennedy fled from the scene, John and Harvey Overman took the girl by the arms, pulled her out of the Kennedy car and, over her protest, put her in the back seat of the Overman automobile, which was driven by Gary Overman with Benny McKinney as a passenger.

Gary Overman then drove off in the Overman car with the girl and John Overman in the back seat, and Harvey Overman and Benny McKinney in the front seat. While the automobile was in motion upon one or more unidentified roads, and at places not specifically identifiable by the girl, she being held down upon the rear seat, the four men, in succession, got into the back seat of the car and had sexual intercourse with the girl.

When John and Harvey pulled the girl out of the Kennedy car and put her in the Overman car, she tried to get away but John and

Harvey would not permit her to do so, each holding her by an arm. She begged them to let her go and not to do anything to her. As soon as they got in the Overman car, John Overman started ripping off her clothes and threatened to kill her, telling her she would not be harmed if she did as she was told.

Thereafter, the Overman car ran into and became stuck in the side ditch. Leaving John in the car with the girl, the other three men got out and Harvey went to get help to pull the car out of the ditch. While this was going on, Benny McKinney, who had been in a drunken stupor at the time the girl was put in the Overman automobile, asked Gary how she got in the car. Gary told him, "Marvin [John] and Harvey took a knife to the boy and forced the girl into the car."

John Overman, while the unknown person or persons were present pulling the car out of the ditch, lay upon the back seat in front of the girl, held a knife on her and told her that if she opened her mouth he would kill her. At another time, while Harvey was in the back seat of the car with the girl, one of the men said, "Why don't we just cut her throat?" While the attack by Harvey upon the girl was in progress, Benny McKinney, who was then in the front seat of the car, heard John tell Harvey, "If she didn't shut her damn mouth to slice her throat." In reply the girl said, "Oh, no, don't kill me."

Although the girl complied with their orders throughout each of the several acts of intercourse, she did not voluntarily engage in those relations. After they were completed, she was permitted to put some of her clothes back on and the car was driven to a service station, which was well lighted. When the attendant came to put gas in the car tank, she was sitting in the back seat with Harvey, who held a knife at her throat or her stomach and told her, "If you cry out, I'll kill you." She was afraid that he would kill her and did not say anything to the attendant.

After leaving the service station, which was in Randolph County, the men inquired of the girl as to where she lived. They then took her to her home and allowed her to get out of the car, whereupon they drove off. As they left, she ran into the house screaming. It was then approximately 2:30 a.m., four hours after she left the dance hall. She told her parents the license number of the light green Ford immediately and repeated this information to the police when they arrived. They identified the car as the Overman automobile and officers were sent to the vicinity of the Overman home to watch for it.

Approximately an hour later, the officers on watch saw the car go into the driveway of the Overman home. Driving as fast as pos-

sible in the police car up to and behind the Overman car, they found therein John and Harvey lying down in it, but not Gary. The light inside the Overman car did not come on when the door was opened, and the Overman car was not within the range of the headlights of the police car at all times as the latter vehicle raced into the driveway.

John Overman and Harvey Overman offered no evidence. Gary Overman testified in his own behalf, his defense being an alibi. He testified that he had been riding in the automobile with his brothers and Benny McKinney earlier in the evening, but had left them and returned to his mother's residence about 10:30, which was the time the above events began. He testified that when he got home he went to his bedroom and to sleep. Subsequently, he was awakened by the noise of "a bunch of cars stopped and started." He looked out of his bedroom window and saw two or three police cars outside and observed his mother's car being driven away. Without making any inquiry or attempting to arouse other occupants of the house, he simply lay back down and went to sleep, explaining, "I didn't figure it was my business." When he next awakened, the police were knocking on his bedroom door. They took him to jail.

Other witnesses for Gary Overman testified to his good character. No other witness corroborated his testimony as to his absence from the scene of these occurrences.

John Overman and Harvey Overman, having offered no evidence, moved that their counsel be permitted to have the closing argument to the jury. This motion was denied and the State made the opening and closing arguments. In the course of the opening argument, the assistant solicitor, over objection, referred to the size of Harvey Overman in comparison to the size of the girl.

At the time of the testimony of the girl and of Douglas Kennedy concerning the events at the parking lot of the dance hall, and on the ride from it to the place where she was put in the Overman car, the court instructed the jury that it was not to consider this evidence as against Gary Overman, no connection of those events with him having then been shown. At the close of all the evidence, the court instructed the jury that they would consider all of such evidence with reference to Gary Overman also for whatever the jury might find such evidence tended to show. To this Gary Overman excepted.

The trial lasted ten days. At the conclusion of a detailed charge, the jury retired to its room to commence its deliberations at 5:22 p.m. Approximately one and a half hours later, it returned to the courtroom and reported that it had been unable to reach a verdict. The court permitted the jurors to go home for the night, to which there was no objection. The jury resumed its deliberations the next

morning and, after a little over an hour, returned to the courtroom and announced it was "hopelessly deadlocked." The court, after telling the jury that if it could not reach a verdict the cases would have to be tried over again, said:

> "A verdict of the jury, Gentlemen of the jury, is a unanimous verdict of twelve people reasoning together, not the verdict of eleven, not the verdict of eight, but the verdict of twelve people, unanimous, reasoning together. Now I do not ask anyone to compromise your convictions or do violence to your conscience but the court will ask you to go back and see if you cannot reach a verdict in these cases."

One hour later the jury returned to the courtroom reporting that it was still "hopelessly deadlocked." The court then stated:

> "I don't want to punish you in any way or do anything that would irritate you but you have only been out now about four hours. This case has taken considerable time to try. I am going to let you go back and see if you can make up your mind."

At the jury's request, it was permitted to recess for lunch before returning to the jury room. Following this recess it resumed its deliberations. One hour and 15 minutes later it returned a verdict, as to each defendant, of "guilty of rape with a recommendation of life imprisonment in State's prison," the total time spent in the jury room being five hours and 12 minutes. Judgment was rendered as to each defendant in accordance with the verdict.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.
E. L. Alston, Jr., for Harvey Clayton Overman.
Percy L. Wall for John Marvin Overman.
Clyde T. Rollins for Gary David Overman.

LAKE, J. There is no merit in the exception by Gary Overman to the denial of his plea in abatement, the ground of which plea was that the offense, if it occurred, occurred in Randolph County and, therefore, Randolph County was the proper venue.

The record shows only: "This plea in abatement was filed, heard and ruled on prior to the making of any general appearance by Gary David Overman. The plea was denied. Defendant excepts." Since the plea relates also to the indictment charging kidnapping, it appears that it was heard and denied prior to the trial of that charge. The record being silent as to the nature of the hearing upon this plea and as to what evidence was offered and received,

the presumption is that the procedure in the court below was regular and free from error. *State v. Mullis,* 233 N.C. 542, 64 S.E. 2d 656.

The evidence of the State at the trial of this action shows clearly, and without contradiction, that the place at which the girl was forced from the car of her original companion into the car of the Overmans, which latter car was driven by Gary Overman, was on a dirt road well within the boundaries of Guilford County. It clearly indicates that the first rape of the girl began immediately after she was put into the Overman car and that the subsequent rapes occurred in somewhat rapid succession. It was "a long time" after the car had been pulled out of the ditch that the girl observed a recognizable point in Randolph County. It is further noted that this plea in abatement was filed by Gary Overman, whose defense at the trial was that he was not present when these events occurred. John Overman and Harvey Overman did not contest the venue.

G.S. 15-134 provides that in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county alleged in the indictment unless the defendant denies the same by plea in abatement. This statute does not state which party has the burden of proof if such plea is filed. At common law, the burden of proof was upon the State to prove that the offense occurred in the county named in the bill of indictment. *State v. Oliver,* 186 N.C. 329, 119 S.E. 370. With reference to this statute, Ashe, J., speaking for the Court in *State v. Mitchell,* 83 N.C. 674, said:

> "The mischief intended to be remedied by it was the difficulty encountered by the Court in effecting the conviction of persons who had violated the criminal law of the State where the offense was committed near the boundaries of counties which were undetermined or unknown. And it often happened that, where the boundaries were established and known, it was uncertain from the proof whether the offense was committed on the one or the other side of the line, and, in consequence of the uncertainty and the *doubt* arising from it, offenders went 'unwhipped of justice.' This was the evil intended to be remedied."

The statute should be construed to accomplish this purpose. We, therefore, hold that there is no error in overruling Gary Overman's plea in abatement, there being nothing in this record to show that he offered any evidence which would support a finding that the offense with which he is charged occurred in a county other than Guilford, as charged in the indictment.

Each of the defendants assigns as error the denial by the court of his plea of former jeopardy and the refusal of the court to submit

to the jury an issue with reference to such plea. There is no merit in these assignments of error.

The theory of the pleas of former jeopardy is: Each defendant was previously tried under the indictment charging him with kidnapping this girl on the same evening on which the alleged rapes occurred; upon that trial John and Harvey Overman were convicted of an assault upon a female, and Gary Overman was convicted of a simple assault, he being less than 18 years of age; assault upon a female and simple assault are offenses included within the offense of rape; consequently, the defendants have each been already put in jeopardy for an offense included in the offense with which they are now charged.

It is elementary that a continuous series of acts by a defendant, all occurring on the same date and as parts of one entire plan of action, may constitute two or more separate criminal offenses. See *State v. Bruce,* 268 N.C. 174, 184, 150 S.E. 2d 216. The fact that a defendant has been previously put in jeopardy upon an indictment charging one such offense does not, necessarily, bar a subsequent prosecution upon an indictment charging a different offense committed in the course of the same series of acts and pursuant to the same plan of action. *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424.

When one is placed in jeopardy under a valid indictment, he is then in jeopardy with reference to every offense of which he might lawfully be convicted under that indictment, and no other. He may not thereafter be put in jeopardy for any offense of which he could lawfully have been convicted under that indictment. *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838, 6 A.L.R. 3rd 888.

A defendant indicted for a criminal offense may be convicted, under that indictment, of the offense charged therein or of any lesser offense, all of the essential elements of which are included within the offense so charged in the indictment and all of which elements could be proved by proof of the facts alleged in the indictment. He may not, upon his trial under that indictment, be lawfully convicted of any other criminal offense, whatever the evidence introduced against him may be. *State v. Rorie,* 252 N.C. 579, 114 S.E. 2d 233; 27 Am. Jur., Indictment and Information, § 194; Wharton, Criminal Law and Procedure, § 1799.

The test of former jeopardy is not whether the two offenses were committed in the same series of acts, pursuant to the same plan of action. The test is whether the defendant could have been lawfully convicted, under the former charge, of any offense of which he might, but for the former proceeding, be now convicted under the present indictment. *State v. Birckhead, supra; State v. Barefoot, supra; State v. Leonard,* 236 N.C. 126, 72 S.E. 2d 1, cert.

den., 344 U.S. 916; *State v. Williams,* 229 N.C. 415, 50 S.E. 2d 4; *State v. Midgett,* 214 N.C. 107, 198 S.E. 613.

If each of two criminal offenses, as a matter of law, requires proof of some fact, proof of which fact is not required for conviction of the other offense, the two offenses are not the same and a former jeopardy with reference to the one does not bar a subsequent prosecution for and conviction for the other. *State v. Birckhead, supra; State v. Stevens,* 114 N.C. 873, 19 S.E. 861. Where, as in *State v. Bell,* 205 N.C. 225, 171 S.E. 50, the prosecution, under the second indictment, proceeds upon the theory that the offense charged therein was committed by means of another offense for which the defendant has previously been put in jeopardy, as where an indictment for murder charges that the murder was committed in the commission of another felony, for which the defendant has been previously tried and acquitted, the State has made the first alleged offense an element of the second and the defense of former jeopardy bars the subsequent prosecution. This result does not follow where the offense charged upon the former procceding is neither an element of nor the means by which the offense subsequently charged was committed. Obviously, a former conviction or acquittal of an offense does not bar a subsequent prosecution under an indictment charging a totally different offense of the same kind, even though the two are separated by a narrow interval of time or place.

The offense of kidnapping and the offense of rape are obviously not the same, each having essential elements which are not component parts of the other. Though rape may be the motive for a kidnapping, the kidnapping is not the means by which the crime of rape is committed so as to bring such a case within the rule of *State v. Bell, supra.* See *State v. Bruce, supra,* at page 184.

The argument that assault and assault on a female are essential elements of rape and since these defendants were convicted of assault and assault on a female, respectively, when tried under the indictment for kidnapping, they have been formerly in jeopardy with reference to the offenses now charged in the indictments for rape, is ingenious but without merit. In the first place, notwithstanding *State v. Marks,* 178 N.C. 730, 101 S.E. 24, a simple assault is probably not, and an assault on a female is certainly not, an essential element of the crime of kidnapping, since the victim of a kidnapping need not be a female and may be enticed away by fraud rather than forced by violence or threat to accompany the abductor. See *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118, 95 A.L.R. 2d 441. The defendants did not appeal from their convictions of assault at the trial for kidnapping. Secondly, the transcript of the trial of the kidnapping case, which is part of the record in this action, though not sub-

mitted to the jury herein, shows that the jury was explicitly instructed at that trial that it might not convict the defendant in that action of an assault except as an incident to the alleged kidnapping. The jury at the kidnapping trial was instructed that the evidence there admitted as to what occurred after this girl entered the Overman car was to be considered by them only for the purpose of determining whether her going with the defendants to and into that vehicle was voluntary. These defendants have not been tried upon a charge of assault after the girl's entry into the Overman car.

The pleas of former jeopardy were, therefore, properly overruled. As stated by Higgins, J., in *State v. Barefoot, supra:* "This result is apparent as a matter of law. When no issues of fact are involved as to the identity of the parties or of the offenses, the question of jeopardy is to be decided by the court." There was no error in the refusal to submit the issue of former jeopardy to the jury.

Although none of the defendants has asserted that his present prosecution under the indictment for rape violates his rights under the Constitution of the United States, it is to be noted that the Supreme Court of the United States in *Hoag v. New Jersey,* 356 U.S. 464, 78 S. Ct. 829, 2 L. ed. 2d 913, *rehear. den.,* 357 U.S. 933, said "We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrences. The question in any given case is whether such a course has led to fundamental unfairness." To the same effect, see *Ciucci v. Illinois,* 356 U.S. 571, 78 S. Ct. 839, 2 L. ed. 2d 983. We find no such unfairness in the State's election to separate for trial the charges of kidnapping and rape.

There was no error in the denial of the motion by each defendant for trial separate and apart from his two brothers on the charge of rape. See: *State v. White,* 256 N.C. 244, 123 S.E. 2d 483; *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670; *State v. Combs,* 200 N.C. 671, 158 S.E. 252. While the three indictments charge successive acts of rape, the trial proceeded on the theory, known to the defendants and the court in advance, as a result of the earlier trial on the kidnapping charges, at which the same judge presided, that these separate acts were substantially contemporaneous and that all three defendants were present when each of the offenses was committed. Gary Overman contends, as the basis of his motion for separate trial, that evidence admitted properly against his two brothers was not competent as to him. This contention is also without merit.

It was not error for the court to instruct the jury that it might consider as against Gary Overman evidence, previously admitted

only as against the other two defendants, concerning events at the parking lot of the dance hall and on the ride from there to the point at which the girl was placed in the Overman car. At the time this testimony was given, it had not been connected with Gary Overman, and the jury was properly instructed not to consider it as to him. Subsequently, the State introduced evidence to the effect that Gary Overman was driving the Overman car, with his brothers as passengers, immediately prior to the events in the parking lot, that he, driving the Overman vehicle, pulled up behind the Kennedy car immediately after his brothers, with the girl and Kennedy therein, stopped it on a dark and lonely country road some two miles from the original point of departure and that he, shortly thereafter, was able to explain to Benny McKinney how the girl came to be in the Overman car. This is enough connection with the events at the parking lot and during the journey from it in the Kennedy car to permit the jury to consider this evidence as bearing upon Gary Overman's guilty knowledge and intent in connection with the offense of rape with which he is charged.

Again, there is no merit in Gary Overman's exception to the ruling permitting the girl to testify that she did not voluntarily engage in sexual relations with any of the defendants at any time during the night in question. His contention that this was an expression of opinion by a witness which invades the province of the jury is obviously unsound. This was not an expression of opinion. It was a statement of fact by the only person in all the world who had actual knowledge of the fact in question. It was, of course, for the jury to determine whether her testimony as to that fact was true or false. The jury determined that it was true.

There was no error in the denial of the motion by John Overman and Harvey Overman to quash the indictment against them because of failure to afford them preliminary hearings. "A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction." *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589.

Likewise, there was no error in the present case by reason of the court's denial of Harvey Overman's motion that he be furnished, at public expense, with a transcript of the evidence at the trial of the kidnapping case. It is a sufficient answer to this assignment of error in this case to note that the record shows his motion was that he be furnished with such transcript "as a necessary step in the preparation of his trial in T.D. 1271, for the alleged kidnapping of Douglas Kennedy," not for use in his trial on the present charge of rape.

The defendants also assign as error the denial by the court of their motion for a bill of particulars. There is no merit in these assignments. "The function of a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial, and (2) to limit the course of the evidence to the particular scope of inquiry." *State v. Lea,* 203 N.C. 13, 164 S.E. 737. The motion for a bill of particulars is addressed to the discretion of the trial court. G.S. 15-143; *State v. Wadford,* 194 N.C. 336, 139 S.E. 608. Obviously, there was no abuse of discretion in the denial of these motions in view of the solicitor's statement in response thereto that "the evidence as to each will be the same as in the former trial of each charging kidnapping." A comparison of the two transcripts shows no substantial difference in the testimony at the two trials.

All of the defendants assign as error that, pursuant to the direction of the trial judge that the jury be empaneled, the solicitor, rather than the clerk, proceeded to do so. The language of the empaneling procedure was correct. The ceremony was performed in the presence of the trial judge and all of the defendants. This was not error. See *State v. Ferrell,* 205 N.C. 640, 172 S.E. 186. "In the absence of a statutory provision, all proceedings with relation to the formation of the trial jury are left to the discretion of the court." 50 C.J.S., Juries, § 286. The brief of John and Harvey Overman states, "When the jury was selected it was, by order of the Judge Presiding, empaneled by the Solicitor for the State."

All of the defendants assign as error the denial of their respective motions for judgment of nonsuit at the close of the State's evidence and again at the close of all the evidence. There is no merit in these assignments of error. It is elementary that upon such motion the evidence of the State is to be considered in the light most favorable to it and contradictions, if any, in the testimony of the State's witnesses are to be disregarded. *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580.

There was positive testimony by the girl and by Benny McKinney that Gary Overman was present from the time the girl was put in the Overman car until she was allowed to get out of it in front of her home. There was positive testimony by the girl of every element of the crime of rape by each of the three defendants personally. By rigorous cross examination of the girl by each defendant, they sought to show that she consented to these acts or, at least, that they were committed without force. In *State v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113, Stacy, C.J., speaking for the Court, said:

"'Rape is the carnal knowledge of a female forcibly and against her will.' * * * 'By force,' however, is not necessarily meant by actual physical force. * * * Fear, fright, or duress, may take the place of force. [Citation.] The case is replete with evidence that the prosecutrix submitted 'on account of fear' and after the defendant had threatened to kill her or to do her great bodily harm, if she resisted. Indeed, the circumstances themselves were terrifying. The prosecutrix and her companion had been held up and robbed in the middle of the night by two strange men whom they regarded as desperadoes."

In the present case, the testimony of the girl, the young man who was her companion at the dance hall, and Benny McKinney, the companion of the defendants, is clear and explicit to the effect that knife blades were held to the throat of the girl and her companion on the ride from the dance hall to the point where she was put by force into the Overman car, at which place her companion fled. A 95 pound, 16 year old girl was then left alone in an automobile with four strange men, armed with knives, on a lonely country road many miles from her home, in the middle of the night. The testimony of the girl is explicit that she begged the defendants to release her and not to do anything to her, that they told her she would not be hurt if she did as they ordered, and that while Harvey was in the back seat of the car with her, one of the other men said, "Why don't we just cut her throat?" Benny McKinney testified that while the attack upon the girl by Harvey was in progress, John told Harvey, "If she didn't shut her damn mouth to slice her throat." The girl testified that, when they subsequently stopped for gasoline at a filling station, Harvey held an open knife at her throat or stomach and told her he would kill her if she cried out.

If this is not sufficient evidence to carry the case to the jury on the question of consent and force, it would be difficult to imagine a case that would satisfy that requirement. It is apparent, from their cross examination, that the defendants sought to infer the girl's consent to the sexual relations with her by these men from the girl's testimony that she went with her girl companions, but with no male escort, to a dance hall on Saturday night, she having been there on other occasions to meet friends, including the young man who was her companion at the time of the abduction by John and Harvey Overman. The fact that a woman goes, without proper escort, to a place where men of low morals might reasonably be expected to congregate does not establish her consent to have sexual relations with them, although it is competent evidence to be considered by the jury on that question. It was so considered by the jury in this

case. The jury rejected the defendants' inferences therefrom. Contributory negligence by the victim is no bar to prosecution by the State for the crime of rape.

Though John and Harvey Overman offered no evidence, Gary Overman did testify and offered other witnesses in his defense. Under these circumstances, it was not error for the judge to deny John and Harvey Overman the closing argument to the jury. *State v. Smith*, 237 N.C. 1, 23, 74 S.E. 2d 291; *State v. Robinson*, 124 N.C. 801, 32 S.E. 494.

Harvey Overman assigns as error the fact that, though he did not take the stand as a witness, the assistant solicitor in the opening argument to the jury commented upon the size of Harvey Overman as compared with the size of the girl. There was no error in permitting the assistant solicitor to do so. Harvey Overman was present in the courtroom throughout the trial, was pointed to in the presence of the jury by the girl, and stood confronting the jury when it was empaneled. In Stansbury, North Carolina Evidence, § 119, it is said that the jury "may look upon the prisoner, although he is not in evidence, to estimate his age." There was nothing offensive or inflammatory in the remark of the solicitor to which this exception is directed.

All of the defendants assign as error the remarks of the court to the jury on the two occasions when the jury returned to the courtroom and reported that it was "hopelessly deadlocked," on each of which occasions the court sent the jury back for further deliberations, making the remarks quoted in the statement of facts. The defendants contend that this was a coercion of the jury and an intimation of the court's opinion that the jury should find the defendants guilty. We find in the language of the court no intimation of what verdict the judge thought would be proper. There was nothing to indicate how the jury was divided numerically or upon what question. So far as the record discloses, the reported "deadlock" may have been upon the question of whether to recommend life imprisonment rather than the death penalty.

The trial lasted for ten days. There is no reason to suppose that a second trial would not have consumed an equal amount of time. The jury first reported itself to be in disagreement after approximately two and one-half hours of deliberation. Its total deliberation consumed slightly more than five hours. This is not an undue time for deliberation upon the life or death of three men in a case of this length. Of course, the judge should leave the jury "free and untrammeled to find the facts," but the test of this is whether "[t]he language of the court addressed to the jury was * * * subversive

of that freedom of thought and of action so very essential to a calm, fair, and impartial consideration of the case." *State v. Windley,* 178 N.C. 670, 673, 100 S.E. 116. The language of the trial judge in this case did not overstep those bounds.

It is to be remembered that this was a capital case. It was originally the rule in this State that one could not again be brought to trial in a capital case after a jury has been discharged without rendering a verdict. *State v. Garrigues,* 2 N.C. 241. While this is no longer the law of this State, a mistrial in a capital case should not be allowed without careful consideration. *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243. There was no coercion of the jury involved or suggested in the request of the trial judge that it resume its deliberations or in his reminder to its members that they should reach an agreement if they could do so without a compromise of conviction and without doing violence to their consciences. See *State v. Green,* 246 N.C. 717, 100 S.E. 2d 52; Strong, N. C. Index, Criminal Law, § 116, supplement.

All of the defendants assign as error the following portion of the charge of the court to the jury:

> "If others are present aiding and abetting in sexual ravishing then they would all be principals and equally guilty. In other words, gentlemen of the jury, if you find from the evidence and beyond a reasonable doubt that one of the defendants raped [the girl named in the indictment] as charged in the Bill of Indictment, that is, if the State has satisfied you from the evidence and beyond a reasonable doubt of every element, that is carnally knowing, forcibly and against her will, then, if one or more of the other defendants aided and abetted in that rape, they would be equally guilty whether they raped her themselves or not — whether they actually raped her themselves."

The foregoing statement was followed by a detailed instruction as to what constituted "an aider and abettor," the entire charge upon the subject of aiding and abetting being included in the assignments of error by the several defendants.

All of the defendants in their briefs concede that the charge of the court upon the subject of aiding and abetting was a correct charge insofar as the statement of the law upon that subject is concerned. We have, nevertheless, examined it carefully and find no error in it. These assignments of error are directed to the proposition that it was improper for the judge to instruct the jury at all upon the matter of aiding and abetting, or to permit the jury to con-

sider the guilt of any defendant as a principal in the second degree. The defendants so contend because of the statement by the solicitor at the hearing upon the defendants' motion for a bill of particulars "as to the acts that the State relies on for a conviction of the crimes alleged in the various Bills of Indictment on the calendar." The record shows with reference to that hearing of those motions:

> "The Solicitor for the State announces that he is calling for trial only cases numbers 447, 481 and 487, charging the defendants with the crimes of rape, and that he is not relying on aiding and abetting in the crime of rape as to any of the three defendants, and that the evidence as to each will be the same as in the former trial of each charging kidnapping."

The defendants contend that this statement "eliminated the necessity for a bill of particulars on indictments charging aiding and abetting, and amounted to a bill of particulars as to the indictment being tried."

The function of a bill of particulars is to inform the defendant of the nature of the evidence which the State proposes to offer. "A bill of particulars is not a part of the indictment, nor a substitute therefor, nor an amendment thereto," *State v. Wadford,* 194 N.C. 336, 139 S.E. 608.

We have held that when, upon arraignment, the solicitor announces that he will not insist on a verdict of the more serious offense charged in the bill of indictment but will seek only a verdict of a lesser offense included therein, the announcement is equivalent to a verdict of not guilty of the more serious offense and prevents the State from thereafter prosecuting the prisoner for it. *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918. In the present case, however, the solicitor did not make such announcement. The defendants remained charged with the capital crime of rape. The announcement by the solicitor amounted to a bill of particulars but it did not change the offense charged, nor could it change the law of this State as to what proof is sufficient to establish the commission of that offense.

The evidence introduced by the State conformed to the solicitor's announcement. The defendant Gary Overman testified that he was not present when the alleged rape of the girl by the other men occurred. He testified that he had never seen this girl until after his arrest. The other defendants did not take the stand in their behalf, which was, of course, their right. There is no showing by any defendant of what he could have done in his defense, which he did not do, in reliance upon the foregoing statement by the solicitor.

It is, of course, well settled that one who is present, aiding and abetting, in a rape actually perpetrated by another, is equally guilty with the actual perpetrator of the crime. *State v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113; *State v. Hall,* 214 N.C. 639, 200 S.E. 375. Upon this ground even a woman may be convicted of rape, and a husband of the rape of his wife. See *State v. Dowell,* 106 N.C. 722, 11 S.E. 525; *State v. Jones,* 83 N.C. 605. There is no merit in this assignment of error.

We have carefully examined other assignments of error relating to the court's review of the evidence and its instructions as to possible verdicts which might be returned by the jury and find no merit in any of these. Still other assignments of error are formal or relate to matters within the discretion of the trial judge.

No error.

HUGH WILCOX v. GLOVER MOTORS, INC., AND DORAN KENT ANDERS

AND

JUANITA WILSON v. GLOVER MOTORS, INC., AND DORAN KENT ANDERS.

(Filed 1 March, 1967.)

1. Trial § 11—

While counsel are entitled to argue both the law and the facts to the jury and, to this end, in proper instances, may read a decision of the Supreme Court stating the applicable law and recounting some of the facts which the court had before it when it pronounced the rule in question, it is improper argument for counsel to read the facts in prior decisions and state that the fact situations in those cases were the same as those in the case at trial and that therefore the prior decisions impel a like conclusion.

2. Same—

It is not sufficient, upon objection to improper argument of counsel, for the court merely to stop the argument without instructing the jury not to consider it, either at the time or in the court's charge to the jury.

3. Automobiles § 54f—

Admission of ownership of the vehicle involved in the collision requires the submission to the jury of the question of liability under the doctrine of *respondeat superior*, but where all of the evidence discloses that the driver was a prospective purchaser from an automobile dealer and that he was driving the vehicle without any representative of the motor company with him, the court may give peremptory instructions that the jury answer the issue of agency in the negative if they found the facts to be as all of the evidence tended to show, otherwise to answer the issue in the affirmative. G.S. 20-71.1.

4. Appeal and Error § 54—

Where the court instructs the jury to answer a subsequent issue in the negative if it answers a prior issue in the negative, and error is found in the trial of the prior issue, a new trial must be awarded on the second issue also in order that there may be a proper determination of the second issue by the jury upon the applicable law in accordance with instructions of the court.

5. Automobiles § 52—

When a dealer permits a prospective purchaser to take a car and drive it for the purpose of trying it out to determine whether he wishes to buy it, no representative of the dealer accompanying the driver, the relationship between the dealer and the prospective purchaser is that of a bailor and bailee for the mutual benefit of the parties.

6. Same—

Liability of the owner of an automobile in knowingly permitting a person to drive the vehicle upon the highway with defective brakes, which proximately causes injury, attaches independently of agency.

7. Same; Automobiles § 21—

The requirement of G.S. 20-124 that a vehicle operated upon a public highway should be equipped with adequate brakes applies to both the owner and the driver of the vehicle, but the statute does not constitute either an insurer, and before either may be held liable for a collision resulting from defective brakes the plaintiff must introduce evidence that the owner or driver knew of such defect or was negligent in failing to discover it, and when plaintiff introduces no evidence of knowledge, express or implied, the issue of negligence in this regard need not be submitted to the jury.

APPEALS by plaintiffs from *Latham, S.J.*, at the 29 August 1966 Civil Session of BUNCOMBE.

These are suits for damages arising out of a three car collision upon an overpass bridge on U. S. Highway 25A south of Asheville. A station wagon in which the plaintiff Wilcox was riding as a passenger entered the bridge from the south. The plaintiff Wilson, driving an automobile owned by her, entered the bridge from the north. The defendant Anders, driving an automobile owned by the defendant Glover Motors, Inc., entered the bridge from the north, behind the Wilson car. In an attempt to pass the Wilson car, Anders collided first with the station wagon and then with the Wilson car. In the collision both plaintiffs suffered personal injuries and the Wilson automobile was damaged. The suits were consolidated for trial.

The pleadings are substantially identical in the two actions. The plaintiffs allege that Glover Motors, Inc., hereinafter called Glover, a dealer in new and used automobiles, permitted Anders to drive its vehicle, a used car, in an effort to sell it to him, though it knew, or

should have known, that the automobile had defective brakes. The plaintiffs allege that Anders was negligent in his operation of the vehicle in several respects, including failure to keep a lookout, excessive speed, improper passing, and operating the automobile without adequate brakes or failing to apply its brakes. Each complaint further alleges that Anders was operating the automobile as an agent of Glover and in furtherance of the business of Glover. The answer of Anders admits the allegation of agency, that of Glover denies it. Both defendants deny all allegations of negligence by either of them.

Evidence offered by the plaintiffs tended to show:

Miss Wilson drove her automobile upon the bridge from the north. From that direction the highway approaches the bridge on a curve and upgrade. As she approached the bridge, a traffic light at an intersection immediately south of the bridge was visible to her. It was red, several vehicles being stopped between her and the light. For this reason she slowed down. Suddenly, lights flashed into her rear view mirror and immediately thereafter the Glover car, driven by Anders, was at her left side. It collided with the station wagon, which was headed north, and with the Wilson car. The speed of the Wilson car upon the bridge was between 10 and 15 miles per hour. As the Anders car came up behind Miss Wilson, she heard it "drop into a lower gear."

The station wagon, headed north, stopped for the traffic light and, when it turned green, proceeded through the intersection and onto the bridge. When the station wagon entered the bridge, the Wilson car was on it, three or four car lengths from the station wagon. The Glover car, driven by Anders, was then overtaking the Wilson car and about seven car lengths behind it. It was dark and only the two sets of headlights were visible to Wilcox, who was in the front seat of the station wagon. He estimated the speed of the Glover car, driven by Anders, at 40 miles per hour. When about two car lengths behind the Wilson car, Anders pulled out to his left to pass. Wilcox was of the opinion, from the sound of the motor, that Anders then shifted to a lower gear. The collision was almost instantly thereafter.

Wilcox testified that Anders told the investigating patrolman that his brakes had failed and that he had noticed some difficulty with the brake pedal earlier. Both the patrolman, who was called as a witness for the plaintiffs, and Anders, who testified in his own behalf, denied that Anders made any statement to the patrolman indicating earlier trouble with his brakes, each testifying that the statement was merely that the brakes had failed at the time of the accident.

The investigating patrolman examined the brake pedal on the Glover vehicle, driven by Anders, and found there was no resistance. At that time, one of the wheels had collapsed and he observed a fluid on the wheel and on the brake cylinder and the ground around the wheel.

The speed limit was 35 miles per hour beginning at a point 1,000 feet north of the bridge, and 25 miles per hour beginning at a point 150 feet north of it. There were double yellow center lines beginning 200 feet north of the bridge and continuing upon it. Anders told the patrolman that he was driving about 35 miles per hour, that, as he approached the Wilson car, he applied his brakes and, when they failed, he went to his left to avoid the Wilson car.

The evidence offered by Glover was to the effect that Anders, a prospective purchaser of the automobile, came to Glover's place of business about closing time to look at the car. With the permission of Glover's manager, Anders took the car to keep it overnight and to try it out.

The testimony of Anders was to the effect that he went to Glover's, looked at the automobile, inquired as to its price and mechanical condition, and took it out to drive it during the evening and return it the next day. He drove about the area for some miles, stopping on numerous occasions for traffic lights and other reasons. He noticed nothing wrong with the brakes before reaching the scene of the collision. As he approached the bridge, he observed the cars in front of him stopping so he cut off the gas and attempted to apply the brakes. His speed was then 35 miles per hour. The brake pedal went completely to the floor. Anders tried pumping the pedal, without results. He was then on the bridge. He put the car into a lower gear to reduce its speed. He did not apply the "emergency" or "parking" brake. The brake lights of the Wilson car were on. In order to avoid colliding with it, he went to his left. The station wagon then came onto the bridge from the opposite end, and he collided with it before he could complete the passing of the Wilson car. Anders' speed at the time of the impact was between 10 and 20 miles per hour.

Mrs. Brank, Anders' passenger, testified that as they approached the bridge and could see the red traffic light on the other side of it and the cars beginning to stop for it, Anders took his foot off the accelerator and, all of a sudden, told her there were no brakes and for her to get down. She saw him frantically pushing down the brake pedal, and then working with the gears. He swerved just before reaching the Wilson car.

The court submitted the following issues to the jury in each case:

1. Was the plaintiff injured by the negligence of the defendant Doran Anders, as alleged in the complaint?

2. Was the defendant Doran Anders operating the 1963 Plymouth automobile owned by the defendant Glover Motors, Inc., at the times herein complained of as an agent of the defendant Glover Motors?

3. Was the plaintiff injured by the negligence of the defendant Glover Motors, as alleged in the complaint?

4. What amount, if anything, is the plaintiff entitled to recover?

The court instructed the jury that if it answered the first issue "No," it would not answer any of the other issues. The jury did answer the first issue "No," and did not answer any of the other issues. Judgment was entered upon the verdict in favor of the defendants. Both plaintiffs appealed.

Robinson & Randle; Parker, McGuire & Baley for plaintiff appellant Wilcox.

John C. Cheesborough and G. Edison Hill for plaintiff appellant Wilson.

Van Winkle, Walton, Buck and Wall by O. E. Starnes, Jr., for defendant appellees.

Lee and Allen by H. Kenneth Lee for defendant appellees.

LAKE, J. The principal contention of the defendants, with reference to the issue of negligence by Anders, was that Anders was faced with a sudden emergency due to the failure of the brakes on the Glover car which he was driving. The plaintiffs assign as error portions of the charge to the jury with reference to the doctrine of sudden emergency. We find in these instructions, when read in context, no error prejudicial to the plaintiffs.

In his argument to the jury upon this issue, one of the trial counsel for Anders (not his counsel in this Court) read to the jury excerpts from the published opinions of this Court in *Crowe v. Crowe*, 259 N.C. 55, 129 S.E. 2d 585; *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39; and *Hudson v. Drive It Yourself*, 236 N.C. 503, 73 S.E. 2d 4. In those cases, this Court, applying the doctrine of sudden emergency to the facts there recited, affirmed a judgment of nonsuit in the first case, granted the defendant a new trial in the second, and reversed the denial of a motion for nonsuit in the third.

Counsel introduced this portion of his argument with the statement, "The fact situation in these cases is the same as in Mr. Anders' case." He concluded this portion of his argument by say-

ing, "I say to you that the facts in this case are the same as the facts in the case I have just read [*Hudson v. Drive It Yourself, supra*], and that the defendant Anders is no more liable here than the defendants in the other cases."

The portions of the opinions in the *Crowe* and *Hudson* cases, *supra,* so read to the jury, contained summaries of the facts shown by the records in those cases. Counsel's reading from the opinion in the *Crowe* case, *supra,* closed with this quotation therefrom: "Plaintiff's evidence, considered in the light most favorable to him, and giving to him the benefit of every legitimate inference to be drawn therefrom, fails to show any negligence on defendant's part which was a proximate cause of his injuries." Counsel's reading from the opinion in the *Hudson* case, *supra,* that being a case of a sudden brake failure, closed with this quotation therefrom: "We reach the conclusion that the evidence offered was insufficient to show a negligent breach of duty on the part of the defendant, and that the motion for judgment of nonsuit should have been allowed."

During this portion of the argument, the plaintiffs objected on the ground that counsel for Anders was reading to the jury the facts in these other cases. The record shows no ruling by the trial judge upon this objection. Plaintiffs' briefs, however, state that upon their objection the judge stopped this argument, but did not instruct the jury to disregard it. There is no reference to this argument in the charge of the court to the jury. There is nothing in the charge bearing upon the matter, except the court's general statement that the jury was not to take the law from counsel but from the court and was to apply it to the facts as the jury found the facts to be from all the evidence.

This was not proper argument. It was highly prejudicial to the plaintiffs. The trial judge should have promptly sustained the objection, directed counsel to desist from so comparing the facts of the reported cases with the one on trial and instructed the jury to disregard this portion of counsel's argument, or he should have so instructed the jury in his charge so specifically as to leave no doubt in the minds of the jurors that such excerpts from the former decisions of this Court were not to be considered by them in determining whether or not these plaintiffs were injured by the negligence of Anders. *State v. Smallwood,* 78 N.C. 560; 88 C.J.S., Trial, § 200. It is not sufficient merely to stop such an argument without an appropriate direction to the jury.

In McIntosh, North Carolina Practice and Procedure, 2d ed., § 1492, with reference to the procedure for correcting and removing the effects of improper argument, it is said:

> "The Court may correct the impropriety by at once checking the argument and restricting it within proper bounds, or he may correct it in his charge to the jury, or if a favorable verdict is given he may set aside the verdict and grant a new trial. It is difficult to lay down the line, further than to say that it must ordinarily be left to the discretion of the judge who tries the case; and the Court will not review his discretion, unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury."

Since, in the present instance, the trial judge did not correct the impropriety by any of these methods, it is necessary for us to do so by granting a new trial.

G.S. 84-14 provides, "In jury trials the whole case as well of law as of fact may be argued to the jury." It is well settled that this statute permits counsel, in his argument to the jury, to state his view of the law applicable to the case on trial and to read, in support thereof, from the published reports of decisions of this Court. *Brown v. Vestal,* 231 N.C. 56, 55 S.E. 2d 797; *Howard v. Telegraph Co.,* 170 N.C. 495, 87 S.E. 313. It is often necessary for counsel to do so in order that the jury may understand the issue to which counsel's argument on the evidence is addressed.

In order to make meaningful a statement of a rule of law found in a reported decision, it is sometimes necessary to recount some of the facts which the court had before it when it pronounced the rule in question. For this purpose, counsel, in his argument in a subsequent case, may not only read the rule of law stated in the published opinion in the former case but may also state the facts before the court therein. *Cashwell v. Bottling Works,* 174 N.C. 324, 93 S.E. 901; *Harrington v. Wadesboro,* 153 N.C. 437, 69 S.E. 399. Counsel's freedom of argument should not be impaired without good reason, but where both the impropriety and the prejudicial effect are clear, the court should act.

It is not permissible argument for counsel to read, or otherwise state, the facts of another case, together with the decision therein, as premises leading to the conclusion that the jury should return a verdict favorable to his client in the case on trial. That is, counsel may not properly argue: The facts in the reported case were thus and so; in that case the decision was that there was no negligence (or was negligence); the facts in the present case are the same or stronger; therefore, the verdict in this case should be the same as the decision there. *Forbes v. Harrison,* 181 N.C. 461, 107 S.E. 447; *State v. Corpening,* 157 N.C. 621, 73 S.E. 214; 53 Am. Jur., Trial, § 493; 88 C.J.S., Trial, § 171. This is but an application of the rule

that, in his argument to the jury, counsel may not go outside the record and inject into his argument facts of his own knowledge, or other facts not included in the evidence. See *Hamilton v. Henry,* 239 N.C. 664, 80 S.E. 2d 485. The ultimate test is whether the reading from the reported case "would reasonably tend to prejudice either party upon the facts" of the case on trial. See: *Conn v. R. R.,* 201 N.C. 157, 159 S.E. 331, 77 A.L.R. 641; *Forbes v. Harrison, supra.* An examination of passages read to the jury by counsel in his argument in the present case compels the conclusion that the reading of them could contribute little, if anything, to the jury's understanding of the doctrine of sudden emergency in the law of negligence. These passages do not meet the test of permissibility. We do not imply any criticism of those decisions or any statement therein.

It is alleged in the complaint in each case now before us that Glover was the owner of the automobile operated by Anders. This is admitted by the answer of each defendant in each case. By reason of G.S. 20-71.1, these admissions in the pleadings are sufficient to take the case to the jury for its determination upon the issue of whether Anders, at the time of the collision, was driving this vehicle as the employee or agent of Glover and in the course of such employment. *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295; *Johnson v. Thompson,* 250 N.C. 665, 110 S.E. 2d 306; *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. Consequently, though there was no other evidence of agency, *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16, it was necessary for the court to submit to the jury, as it did, in each case, the issue, "Was the defendant Doran Anders operating the 1963 Plymouth automobile owned by the defendant Glover Motors, Inc., at the time herein complained of as an agent of the defendant Glover Motors?"

The court instructed the jury:

> "[I]f you find these to be the facts, that is that Anders had the car in order to try it out in anticipation of a purchase, that there was no agent of the defendant Glover Motor Company with him at the time of the accident, then the Court charges you as a matter of law that the relationship between Anders and Glover Motor Company was that of bailor and bailee, and not that of principal and agent, and it would be your duty to answer this issue NO; otherwise, you would answer this issue YES."

That instruction was proper, there being no evidence of agency other than that which was supplied by G.S. 20-71.1 and the above mentioned admissions in the pleadings. *Chappell v. Dean,* 258 N.C. 412, 128 S.E. 2d 830.

The jury, however, did not answer the issue as to the agency of Anders for Glover, having been instructed not to do so if it answered the issue as to Anders' negligence in the negative, as it did. Since the cases must go back for a new trial because of the improper argument of counsel upon the issue of whether the plaintiffs were injured by the negligence of Anders, and since it has not been determined whether Glover would be liable for such injury on the principle of *respondeat superior,* the cases must also go back for new trials as to the defendant Glover.

The third issue submitted to the jury was, "Was the plaintiff injured by the negligence of the defendant Glover Motors, as alleged in the complaint?" The court instructed the jury that it would answer this issue, if it came thereto, in the same way that it answered issue No. 2 relating to the agency of Anders for Glover. Thus, the court excluded from consideration by the jury the contention of the plaintiffs that Glover, itself, was negligent, independent of any negligence by Anders, in that Glover permitted Anders to drive its automobile when Glover knew, or in the exercise of reasonable care should have known, that the brakes on the automobile were defective. Although the jury did not come to and so did not answer this issue, it appears probable that upon the further trial of these actions the question will again arise as to whether the alleged independent negligence by Glover should be excluded from the jury's consideration upon the third issue. Consequently, we deem it advisable to examine the correctness of this ruling upon the evidence contained in the present record.

When a prospective purchaser of an automobile is permitted by the dealer to take the car and drive it for the purpose of trying it out to determine whether he wishes to buy it, no representative of the dealer accompanying him, the relationship between the dealer and the prospective purchaser is that of bailor and bailee. The bailment is one for the mutual benefit of the parties.

G.S. 20-124 provides that every motor vehicle "when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop such vehicle * * * and such brakes shall be maintained in good working order." The purpose of this statute is to protect from injury all persons using the highway, both occupants of the vehicle in question and others. With reference to this statute, Rodman, J., speaking for the Court, in *Stephens v. Oil Co., supra,* said:

> "Notwithstanding this mandatory language, the statute must be given a reasonable interpretation to promote its intended purpose. The Legislature did not intend to make operators of

motor vehicles insurers of the adequacy of their brakes. The operator must act with care and diligence to see that his brakes meet the standard prescribed by statute; but if because of some latent defect, unknown to the operator, and not reasonably discoverable upon proper inspection, he is not able to control the movement of his car, he is not negligent, and for that reason not liable for injuries directly resulting from such loss of control."

The duty imposed by this statute rests both upon the owner and upon the driver of the vehicle, though knowledge of a defect, or negligence in failing to discover it, on the part of the one would not necessarily be imputed to the other. A bailor who knows, or by a reasonable inspection of his vehicle should know, that its brakes are defective and unsafe, is negligent in permitting that vehicle to be taken from his premises and driven upon the highway by a bailee and may be held liable in damages to a third person injured by the operation of such vehicle, if such defect in its brakes is the proximate cause of such injury. *Hudson v. Drive It Yourself, Inc., supra.* See also *Austin v. Austin,* 252 N.C. 283, 113 S.E. 2d 553.

The bailor, even though a dealer in second hand automobiles and engaged in the repair of automobiles, is not an insurer of the brakes upon a vehicle held by him for sale and delivered by him to a prospective customer for a trial drive upon the highway. *Hudson v. Drive It Yourself, Inc., supra; Stephens v. Oil Co., supra.* The burden is upon the plaintiff to prove that the bailor, at the time he allowed the vehicle to leave his possession for such purpose, knew, or in the exercise of reasonable care in the inspection of the vehicle should have known, that the brakes were defective. In the record now before us there is no evidence of such negligence by Glover. The doctrine of *res ipsa loquitur* does not apply to a brake failure several hours and many miles after delivery of the car to the bailee. See *Hudson v. Drive It Yourself, Inc., supra.* In the absence of such evidence, it was not error to refuse to submit to the jury an issue as to negligence by Glover, separate and apart from negligence by Anders, its alleged agent. *Wells v. Clayton, supra,* at page 105. That is, there was no error in the instruction limiting the jury's consideration upon the third issue to the question of Glover's liability upon the basis of *respondeat superior.*

Wilcox v. Glover Motors, Inc., et al: New trial.

Wilson v. Glover Motors, Inc., et al: New trial.

STATE v. WAYNE EDWARD BUTLER.

(Filed 1 March, 1967.)

1. Criminal Law § 50—

Testimony of a witness that defendant shot the deceased persons is not rendered incompetent because the witness was in an adjoining room and could not see the shots actually fired, when the testimony of the witness further discloses that she heard the shots, heard one of the victims accuse defendant of having shot him, heard defendant state that he had shot him and was going to shoot the rest, and that defendant immediately came into the room where the witness was and shot her, etc., so that it is apparent from the record that the witness was testifying to facts within her knowledge, gathered from the use of her other senses, actual vision not being an absolute requirement under such condition.

2. Criminal Law § 71—

Where the court, on the *voir dire*, excludes testimony of a statement of defendant, there is no occasion for cross-examination by defendant in regard thereto.

3. Criminal Law § 43—

Where there is testimony that a photograph introduced in evidence was an accurate representation of the scene, the court properly admits such photograph for the purpose of illustrating the testimony of the witness.

4. Criminal Law § 71—

The ruling in *Miranda v. Arizona*, 384 U.S. 436, has no application to a trial had prior to the date of the rendition of that decision, and where there is no claim by the defendant that he was denied counsel, and the affirmative evidence is to the effect that defendant was informed of his constitutional rights and that he did not have to make a statement, testimony of defendant's statement is competent.

5. Same—

An exculpatory statement of defendant is not a confession, even though it be in contradiction of the testimony of defendant at the trial, and the rules governing the admissibility of confessions are not germane.

6. Criminal Law § 162—

Where the court immediately sustains objection to questions asked defendant by the solicitor, defendant has sustained no prejudice, the questions not being patently unfair or improper and the testimony sought to be elicited by them being merely incompetent for technical reasons.

7. Criminal Law § 116—

It is not error for the court, after the jury had failed for several hours to reach a verdict, to urge the jurors to agree upon a verdict when the record discloses that the court cautioned them that they should reconcile their differences of opinion only if they could do so without any one of them surrendering his conscientious convictions in the matter.

APPEAL by defendant from *Johnson, J.*, at March 14, 1966, Criminal Term of SCOTLAND Superior Court; argued at Fall Term, 1966, as No. 828.

The defendant was convicted of murder in the second degree in case No. 2538 in which Geraldine McDaniel Brown was killed on 18 November, 1965, and in case No. 2539 in which Junior Moore Gibson died. In #2538 he was given a prison sentence of not less than 25 nor more than 30 years, and in #2539 not less than 15 nor more than 20 years — the sentences to run consecutively.

The evidence for the State tended to show that the deceased, Geraldine Brown, and her four children lived in an eight-room house near Laurel Hill, and that the defendant Butler had been living there several months. Junior Moore (Boots) Gibson came there on 18 November, 1965, and he and Ed Butler went off to borrow some money for Butler. They were not successful and the defendant returned about midnight, mad at Geraldine because she hadn't told him something he thought he ought to know. He cursed her and then started shooting with a rifle. After about a dozen shots had been fired Geraldine was found dead on the floor and Boots was dead in a kitchen chair. The defendant also shot Diane, the daughter of the deceased woman, in the right hand and arm, and the defendant was shot in the throat.

The defendant testified that upon his return about midnight Geraldine was sitting at the kitchen table with the rifle; that she fussed at him about having been with another woman and threatened him; that as she started to get up he tried to take the rifle from her and was shot; that as he lay on the floor, paralyzed, he heard several shots and later saw the two dead persons, the gun lying beside Geraldine on the floor. He denied ever having or firing the gun. Defendant drove himself to the hospital.

Statements attributed to the defendant at the hospital were not admitted.

Upon the convictions the defendant appealed.

T. W. Bruton, Attorney General, Harrison Lewis, Deputy Attorney General, Eugene A. Smith, Trial Attorney for the State.

Kennieth S. Etheridge for defendant appellant.

PLESS, J. The only witness to the shooting was the daughter of the deceased woman, Mrs. Diane Godwin. Since a number of exceptions are taken to her testimony we have summarized or quoted it rather fully. After testifying that when the defendant and Boots returned from the unsuccessful trip to get some money, Butler was mad, she then testified: "Ed was cussing at mama and calling her names. He called her a bitch and everything else; he said she didn't have guts enough to tell him anything. That is all I remember him saying, just cussing at her and calling her names. At this time I

was in my bedroom which is right next to the kitchen where a light was on at the time and the door was closed partly. My sister, Teresa Elaine, who is five years old, was the only other person in the room with me.

"Q. What next did you hear between these three who were in the kitchen? A. When Ed finished cussing at mama, he started shooting around the house.

"Objection by the Defendant. Objection overruled.

"To the failure of the Court to sustain the objection of defendant to the answer of the above question, the defendant excepts. Exception No. 1.

"Q. What do you mean by around the house? Was it in the kitchen or where? A. I guess around the kitchen floor.

"Objection by the defendant. Objection sustained.

"Q. Where was he at the time he was shooting? Objection by the Defendant.

"(By Defense Counsel: Objection on the ground she said her door was closed and this is all purely speculation). (By the Court: She may state where he was, if she knows). A. In the kitchen somewhere.

"To the failure of the Court to sustain the objection of the defendant, the defendant excepts. Exception No. 2.

"I heard a rifle, gun, or whatever was shooting and I am not sure how many shots I heard; it was several shots. After the first shots, I didn't hear anybody say anything. I do not know how many shots exactly were fired. I heard glass crack and I heard Mama tell Ed to stop shooting in the house and stop breaking glass. Ed didn't say anything. Then after about five minutes, I heard several more shots, and I heard Boots say, 'Ed, you shot me.' Ed said 'yes, you s. o. b., I shot you; I am going to shoot the rest.' Then Eddie came through my bedroom door and shot at me. I had gotten out of bed and was going to try to slip out the back and get help, and that is when he came to my bedroom door and shot at me. He shot at me once and I was hit in the right arm and hand. He did not say anything to me before he shot me or after he shot me.

"After he shot me, Ed went in the room where Mama and Boots was, told Mama he was sorry he shot her, he didn't mean to. Mother didn't say anything. He asked the Lord to forgive him for his sins, and then there was another shot. Ed was still in the kitchen at the time there was another shot and Mother and Junior were still in there.

"(The following questions and answers were not put in the narrative form, because the defendant wished to call them to the attention of the Court on appeal).

"Q. Did you see her at the time he shot, if he shot at that time? A. I didn't see him shoot himself, but I heard the shot. Then he fell between the living room and the kitchen.

"Motion by the defendant to strike the Answer. Motion overruled.

"To the failure of the Court to sustain the motion to strike, the defendant excepts. Exception No. 3.

"Eddie fell between the living room and the kitchen. The living room is right next to the kitchen, and the top part of his body was in the living room. I did not go near him at that time and I did not hear him say anything further.

"After he shot me, I had fallen on my bed and fell over like he had killed me and just laid there for five or ten minutes until he left. He went out the front door, but I did not see him as he went out the door and after he went out the door. He cranked up Boots' automobile right then and left in it. He left the rifle lying on the kitchen floor."

While the record indicates that the defendant may have made an incriminating statement to Sheriff Lytch shortly after he went to the hospital, it was not offered in evidence apparently because the defendant had not been properly warned of his rights at that time.

The defendant testified in substance that when he and Boots returned about midnight that Geraldine was sitting at the kitchen table with the rifle, that when she started to get up he tried to take the rifle and got shot in the throat. "I sank down * * * and fell over. She (Geraldine) started crying. * * * I was lying on the kitchen floor, face down when I heard the rifle start firing and I heard glass breaking, and I heard Bootsy say, 'You shot me.' He did not say who shot him. When he said that, the door opened to my right, leading to Diane's bedroom. When you close the door, if you don't close it easily, when you open it, it makes a racket. When I walked in the kitchen the door had been closed. When the door opened, Diane called my name, like she was frightened; there was another shot; she screamed and the door slammed. Everything got quiet for two minutes. I was lying on the floor, felt like I was paralyzed and felt like I was going off to sleep. I could feel the floor dent. I could hear footsteps and felt the floor jar, like somebody walking. Two minutes later I heard two more shots; I guess I lay on the floor a couple more minutes; began to get where I could get up; got on my hands and knees and the first thing I saw was Geraldine lying between the table and cabinets, laying on her left side, her eyes still open. Her face was about directly in front of mine as I was lying face down. I looked around to see where Bootsy was. He was sitting

on a chair to my left, had his head thrown back. I got up and went to where Geraldine was and the rifle was laying beside her. I pushed the rifle to one side, laid down beside her, put my arms around her, and her eyes were still open. I said Geraldine, are you dead? She didn't answer and I knew she was dead. I got up and the blood was gushing out of my mouth, nose and throat. I thought I was dying; then I walked over to where Bootsy was. I lay the back of my hand on his chest and I couldn't feel his heart beat. I came out of the kitchen and Robert was sitting on the bed. He asked me, 'Ed, are you all right?' I said, 'No, son, I am shot.' And I walked out of the front door. I saw a car in the yard and it popped in my mind, maybe I can make it to the hospital. I got in the car and drove it to the hospital."

On cross-examination the defendant was asked about statements he allegedly made at the hospital. He said he didn't remember them, and no attempt was made to contradict him.

He was also asked about later statements while in the hospital at Raleigh, to which he replied that he had then told that the gun went off when he was taking it from Mrs. Brown. He denied having said then that Diane had shot him. The Sheriff was not permitted to testify about any statement made by the defendant except one he made about a week after the shooting, when he had been warned of his rights. The Sheriff said the defendant then said that Diane Brown did the shooting.

The State also offered the testimony of J. E. Ivey, a deputy sheriff, in corroboration of Diane Brown. He said that he was the first officer to arrive at the Brown home after the trouble was reported, that Diane met him at the door and "I walked in the living room, saw this pool of blood on the floor just inside the door leading from the kitchen into the living room. I said, 'What in the world happened, Diane?' She said, 'Come in the kitchen.' I saw her mother lying on the floor and the Gibson boy sitting in a chair. I asked Diane what had happened. She said Ed had shot her mother and Bootsy Gibson and had shot her (Diane) in the arm; and then had shot himself."

In the brief for the defendants several contentions of error are made which we will now consider in order:

First, the admission of Diane Godwin's evidence regarding the shooting because she was in the adjoining room and, therefore, could not see what happened.

If, upon an extremely technical, unrealistic and impractical interpretation it could be held that Diane's testimony that Butler did the shooting was not competent because she did not actually see him firing the rifle, it was cured when she testified that, following

the shooting, he "went in the room where Mama and Boots was, told Mama he was sorry he shot her * * * asked the Lord to forgive him for his sins, and then there was another shot." She had already testified that the defendant had told Boots he had shot him and that he was going to shoot the rest. In view of the statements attributed to the defendant by Diane, her evidence regarding the shooting would be competent from the use of her other senses; visual not being an absolute requirement under these conditions. Stansbury, N. C. Evidence, 2d Ed., § 96; *S. v. Bridges,* 266 N.C. 354, 146 S.E. 2d 107.

The defendant also complains that his attorney was not permitted to question him on *voir dire,* in the absence of the jury. The Court was then inquiring into the conditions of a statement the State was seeking to show the defendant made to Sheriff Lytch. It developed that the defendant had made no statement incriminating himself and the Judge refused to admit it. Under these conditions there was nothing to require or justify a friendly "cross-examination" of the defendant by his own attorney. Also the record does not show what could have been elicited to further favor the defendant.

Sheriff Lytch testified that the picture of Gibson's body correctly represented its condition. The fact that the deceased's shirt had been unbuttoned so that the wounds in his chest would appear in the picture did not affect its correctness. He testified that Exhibit 7 was an accurate picture of Geraldine Brown as she lay on the floor after being shot.

This evidence coupled with the Court's admonition that the pictures were to be considered for the sole purpose of illustrating the testimony of the witnesses makes the exception to their admission untenable. Stansbury, N. C. Evidence, 2d Ed. § 34; *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572.

The defendant also complains about questions asked of him by the Solicitor. These were to the effect that he, the defendant, had told the Sheriff while at the hospital that he had shot the deceased persons. The defendant replied that he had not, and further stated that he did not remember talking with the Sheriff at that time. The State made no effort to contradict him and he has therefore not been prejudiced.

In his brief the defendant makes frequent references to the recent rulings of the U. S. Supreme Court in *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, and *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d, 694. They cannot avail him. The ruling in *Miranda* was not to be applied retroactively, that is, to cases

tried before 13 June, 1966. Since the trial here was some three months before that date its requirements were not applicable.

Neither can *Escobedo* affect the result here. The U. S. Supreme Court summarized its ruling in that case as follows: "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright,* 372 U.S., at 342, 9 L. Ed. at 804, 93 A.L.R. 2d 733, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

There was no claim made by the defendant that he was denied counsel and the affirmative evidence was that he had been informed of his rights and that he did not have to tell anything at all. It was following that that the defendant further denied his guilt and said "Diane Brown was the one that killed them."

The defendant's rights have been fully protected. No statement admitting any guilt on his part has been attributed to him. In fact, it was only after the State had rested its case and the defendant had voluntarily testified, denying his guilt, and asserting that Geraldine Brown did the shooting, that the statement (that Diane Brown was the one who killed them) was introduced, on rebuttal, by the State.

This was not an admission or confession but was exculpatory, even though a contradiction of his testimony. There is a difference between a defendant's admission of his own guilt and his claim that another is guilty. "Exculpatory statements, denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed. This necessary limitation of the term 'confession' is generally conceded." III Wigmore on Evidence, 240.

Defendant also takes exceptions to *questions* asked by the Solicitor of the defendant, even though the answers denied admissions by the defendant. The presiding Judge cannot be expected to rule out questions before they are asked, and when, as here, he promptly sustained the objections, the defendant has shown no substantial disadvantage.

The defendant complains that after the jury had failed for several hours to render a verdict the Judge urged the jurors to agree

upon a verdict, but this is entirely proper when, as here, he asks that they "reconcile any differences of opinion existing among you if it possibly can be done without a one of you surrendering your conscientious convictions in this matter." The object of having a jury deliberate is so that each one may not only express his opinion, but that he listen to and consider those of his fellow jurors. As long as a juror is not forced into participating in a verdict that violates his conscience there is no good reason why he should not give heed to the opinions of his fellows. The fact that an overwhelming majority has different views from his own should not make him feel that he must join in a verdict that causes him conscientious unhappiness. But the fact that he is one of a very small minority should well cause him to consider that he and not his fellows can possibly be mistaken in his opinion. *S. v. McKissick,* 268 N.C. 411, 153 S.E. 2d 28.

We have considered the entire record and the numerous exceptions of the defendant and are of the opinion that he has had a fair trial, free of substantial error.

No error.

DAYCO CORPORATION v. I. L. CLAYTON, COMMISSIONER OF REVENUE.

(Filed 1 March, 1967.)

1. Taxation § 28b—

The State is under no constitutional compulsion to allow a loss incurred by a taxpayer in a prior year to be carried over and deducted from the net taxable income for succeeding years, and the right to deduct such loss carry-over is governed solely by the statute and must be determined in accordance with the statutory provisions permitting such loss carry-over.

2. Statutes § 5—

A statute must be construed, if possible, to accomplish the purpose of the statute as stated therein.

3. Taxation § 28b—

Dividends received by a foreign corporation from shares of stock owned by it in non-subsidiary corporations and capital gains received by it from the sale of shares of stock in such non-subsidiary corporations, even though such income is derived from out of state transactions and is not taxable here, must be deducted from the amount of loss carry-over claimed by the corporation against its income taxable by this State in succeeding years, since the income derived from dividends and capital gains is "income not taxable under this article" within the provisions of the statute. G.S. 105-147(9)(d).

DAYCO CORP. *v.* CLAYTON, COMR. OF REVENUE.

APPEAL by plaintiff from *Farthing, J.*, at the November 1966 Session of HAYWOOD.

The plaintiff, a Delaware corporation doing business in North Carolina, filed its corporate income tax returns with the Commissioner of Revenue for its fiscal years ending October 30, 1960, 1961, 1962, 1963 and 1964, respectively, and paid the income tax shown thereon due the State. The defendant assessed an additional income tax against the plaintiff, which the plaintiff paid under protest. It now sues to recover the amount of such payment, less a portion thereof conceded to have been properly assessed. It contends that the portion which it now seeks to recover was unlawfully assessed by reason of the defendant's misconstruction of the provisions of the Revenue Act in determining the deductions allowable to the plaintiff in subsequent years by reason of net economic losses sustained by it in the fiscal years of 1960 and 1961.

The matter was submitted to the superior court, without a jury, upon an agreed statement of facts. The court found the facts to be as so stipulated, these being:

"(1) The plaintiff is now a Delaware corporation, but was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business at 333 West First Street, Dayton, Ohio, authorized to transact business in North Carolina, with a factory in Haywood County, North Carolina. The plaintiff is engaged in the manufacture of rubber and plastic products, and conducts manufacturing operations in several states, including North Carolina.

"(2) The defendant is the duly appointed, qualified and acting Commissioner of Revenue of the State of North Carolina, with an office in Wake County, North Carolina.

"(3) The plaintiff reports income taxes to the State of North Carolina on a fiscal year basis which ends on October 31 based upon an allocation of income between the State of Ohio and the State of North Carolina and based upon an apportionment of income taking into account the averaged ratio of property holdings, payrolls and sales in Ohio and elsewhere and North Carolina respectively.

"(4) The income tax returns filed by the plaintiff reported net losses for the fiscal years of 1960 and 1961 and net gains for the fiscal years 1962, 1963 and 1964; in the returns filed by the plaintiff, the losses reported for 1960 and 1961 were carried forward as net economic loss deductions in total extinguishment of the 1962 and 1963 reported gains and in partial extinguish-

ment of the gain reported for 1964; that no taxes were paid in the years 1960 and 1961 by reason of the losses reported and none paid in 1962 nor 1963 by reason of the net economic losses carried forward per the plaintiff's return; that in 1964 the plaintiff reported that all but $1,240,801.83 of its total net income was wiped out by the net economic loss deduction remaining, of which sum 26.3711% was apportioned by the plaintiff to North Carolina, resulting in a tax calculated by the plaintiff to be $10,847.45, which was paid.

"(5) On April 13, 1965, the defendant assessed the plaintiff with an income tax deficiency in the amount of $64,522.73 plus interest of $1,007.73, a total of $65,530.46, representing taxes and interest alleged by the defendant to be due by the plaintiff.

"(6) On May 10, 1965, the plaintiff mailed a letter to the defendant objecting to the assessment and requested a hearing thereon; on November 18, 1965, an informal hearing was granted and held; on January 25, 1966, the plaintiff was notified of the defendant's decision upholding the assessment; on February 11, 1966, the plaintiff, pursuant to the assessment but under protest, paid the tax and interest in the total amount of $68,722.57 ($64,522.73 tax plus $4,199.84 interest); on March 10, 1966, the plaintiff, conceding its liability for part of the tax assessed, made demand or claim for refund in the amount of $55,484.27 plus interest; on March 15, 1966, the defendant denied the claim for refund; this action for the recovery of $55,484.27 plus interest was commenced in the Superior Court of Haywood County on June 2, 1966. Process was served on the defendant on June 7, 1966, and answer filed June 17, 1966.

"(7) The assessment herein described as computed by the defendant is twofold, namely, that income from certain royalties and income from the sale of certain tangible personal assets is apportionable to North Carolina, and second, that the available net economic loss carry-over deduction must be reduced by all taxable or non-taxable income, including the apportioned part of the income from dividends and income from the sale of stock.

"(8) The plaintiff conceded the first part of the assessment, *i. e.*, that royalties received by the plaintiff from patents or processes developed by the plaintiff in North Carolina are unitary and apportionable to North Carolina G.S. 105-134(3), and that income from the sale of certain tangible properties was allocable to North Carolina."

The superior court concluded as matters of law:

"1. Dividends received by a corporation whose principal place of business is located in a state other than North Carolina from non-subsidiary corporations constitute non-unitary income which is directly allocable to such other state under G.S. 105-134, but the apportionable part of such dividends are available to the Commissioner of Revenue in reducing net economic loss and net economic loss carry-over under G.S. 105-147(9)(d).

"2. Gains by a corporation whose principal place of business is located in a state other than North Carolina from the sale of a non-subsidiary corporation's stocks which constitute non-unitary income and is directly allocable to such other state under G.S. 105-134, but the apportionable part of such gains are available to the Commissioner of Revenue in reducing net economic loss and net economic loss carry-over under G.S. 105-147(9)(d).

"3. The assessment of additional taxes by the Commissioner of Revenue, part of which were conceded by the taxpayer and part of which, dealt with in Conclusions of Law Nos. 1 and 2, was paid under protest and is the basis for this action, was in all respects in accordance with law, G.S. 105-147(9)(d): *Dayton Rubber Co. v. Commissioner of Revenue,* 244 N.C. 170 (1956); *Aberfoyle Mfg. Co. v. Commissioner of Revenue,* 265 N.C. 165 (1965)."

Upon these conclusions the court adjudged that the plaintiff take nothing by this action and that the costs of the action be taxed against the plaintiff.

In their agreed statement, so filed with the superior court, the parties drew the issue between them as follows:

"It is agreed that, if dividends received from and gains from the sale of non-subsidiary corporate stocks owned by the plaintiff are non-taxable income, the portion of the assessment relating thereto is correct. It is agreed that, if dividends received from and gains from the sale of non-subsidiary corporate stocks owned by the plaintiff constituted income which is not apportionable to North Carolina in reduction of a net economic loss under G.S. 105-147(9)(d)., although such income is directly allocable to the state in which the principal place of business of a corporation is located, G.S. 105-134(2)a., the portion of the assessment relating thereto is incorrect."

The plaintiff contends that dividend income received by it from non-subsidiary corporate stocks and capital gains made by it from

the sale of such stocks constitute taxable income allocable to states other than North Carolina and, consequently, may not be considered "non-taxable income" to be deducted from its "net economic loss" in computing the deduction allowable in a subsequent year on account of such loss. The defendant contends that, in computing the deduction for such loss sustained in a prior year, the loss must be reduced by all such income, received in the year for which such deduction is claimed, even though allocable to another state in computing the corporation's tax liability apart from the question of "net economic loss" deductions. The defendant also contends that a "net economic loss" means the amount by which allowable deductions for the year of the loss exceeds the income for such year from all sources, including income not taxable under the North Carolina Revenue Act.

The defendant does not deny that all procedural requirements for the recovery by the plaintiff of any refund to which it may be entitled upon the merits of its contentions have been fulfilled. Thus, the only question for the superior court and upon appeal is whether the Commissioner of Revenue followed the method prescribed by law for the determination of the deduction allowable to the plaintiff on account of a "net economic loss" in a prior year.

Attorney General Bruton and Deputy Attorney General Abbott, for defendant appellee, Commissioner of Revenue.

Millar & Alley for plaintiff appellant.

Of Counsel: Kennedy Legler, Jr.

LAKE, J. The plaintiff does not contend that the assessment in question has the effect of the levy of a tax on income which is beyond the constitutional power of the State to tax. The sole question is the right of the plaintiff to deduct from that portion of its income, otherwise subject to tax by the State, a certain amount by reason of a "net economic loss" sustained by the plaintiff in an earlier year. The General Assembly was under no constitutional compulsion to allow any deduction whatever from income, otherwise taxable in this State, because of such loss in a prior year. *Manufacturing Co. v. Clayton, Acting Comr. of Revenue,* 265 N.C. 165, 143 S.E. 2d 113; *Rubber Co. v. Shaw, Comr. of Revenue,* 244 N.C. 170, 92 S.E. 2d 799. We are, therefore, concerned solely with the interpretation to be given G.S. 105-147(9)(d), this being the only provision in the Revenue Act authorizing a deduction from income otherwise taxable on account of a "net economic loss" in a prior year.

This portion of the Revenue Act provides that in computing "net income" a deduction shall be allowed for "losses in the nature

of net economic losses sustained in any or all of the five preceding income years arising from business transactions" (or other types of transactions not germane to the present inquiry). Subparagraph (d, 2) defines "net economic loss" as follows:

> "The net economic loss for any year shall mean the amount by which allowable deductions for the year other than personal exemptions, nonbusiness deductions and prior year losses shall exceed income from all sources in the year including any income not taxable *under this article.*" (Emphasis added.)

Subparagraphs (d, 3 and 4) prescribe the extent to which a deduction for such "net economic loss" in a prior year may be allowed in computing the tax due upon the income received in the subsequent year. These provisions are:

> "3. Any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable *under this article* received in the same year in which the deduction is claimed, except that in the case of taxpayers required to apportion to North Carolina their net apportionable income, as defined in this article, only such proportionate part of the net economic loss of a prior year shall be deductible from the income taxable *in this State* as would be determined by the use of the apportionment ratio computed under the provisions of G.S. 105-134 or of subsection (c) of G.S. 105-142, as the case may be, for the year of such loss. (Emphasis added.)
>
> "4. A net economic loss carried forward from any year shall first be applied to, or offset by, any income *taxable or nontaxable* of the next succeeding year before any portion of such loss may be carried forward to a succeeding year. If there is any income *taxable or nontaxable* in a succeeding year not otherwise offset only the balance of any carry-over loss may be carried forward to a subsequent year." (Emphasis added.)

Statutory provisions must be construed, if possible, so as to accomplish the purpose of the statute stated therein. *Blair v. Commissioners,* 187 N.C. 488, 122 S.E. 298; *Manly v. Abernathy,* 167 N.C. 220, 83 S.E. 343. In subparagraph (d, 1) the legislature has stated its purpose in permitting a deduction for a "net economic loss" sustained in a prior year as follows:

> "The purpose in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of re-

lief to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in determination of taxable income, and the deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to *the extent that such loss or losses shall result in the impairment of the net economic situation of the taxpayer* such as to result in a net economic loss as hereinafter defined." (Emphasis added.)

In the light of this stated purpose of the legislature, we construe the process provided by G.S. 105-147(9)(d) for determining the amount of the deduction allowable to a corporation on account of a "net economic loss" in a prior year to be:

First: The income of the corporation from all sources whatsoever for the year in which such loss is alleged to have occurred is computed. In this computation there must be included income exempt from taxation, income allocated to other states and, therefore, not taxable in North Carolina and income allocated to North Carolina. (G.S. 105-147(9), subparagraph d, 2.)

Second: The total "allowable deductions" for the year in which the loss is alleged to have occurred are computed. In this computation, the calculator looks to the Revenue Act of this State to determine what is an "allowable deduction." He excludes from the computation (1) personal exemptions, (2) non-business deductions, and (3) losses in earlier years (G.S. 105-147(9), subparagraph d, 2.)

Third: If the amount so computed in paragraph "Second" exceeds the amount so computed in paragraph "First," the excess is the amount of the taxpayer's total "net economic loss." (G.S. 105-147(9), subparagraph d, 2.)

Fourth: The total "net economic loss" is multiplied by the "apportionment ratio" computed for the corporation, pursuant to G.S. 105-134 (or G.S. 105-142(c), if applicable), for the year in which the "net economic loss" was sustained. The product, so obtained, is the amount to be "carried forward" for use in computing the corporation's income tax liabilities to North Carolina in the subsequent year or years. (G.S. 105-147(9), subparagraph d, 3.)

Fifth: Compute the total income "not taxable" under the North Carolina Revenue Act which the corporation receives in the next succeeding year after the year in which the "net economic loss" was sustained. (G.S. 105-147(9), subparagraphs d, 3 and 4.)

Sixth: Subtract from the amount "carried forward" (Step Fourth, above) the amount computed in Step Fifth, above. The remainder is the amount available for deduction in North Carolina in

the year next succeeding that in which the "net economic loss" was sustained on account of that loss.

Seventh: Subtract from what would otherwise be the corporation's "net taxable income" in North Carolina for the year next succeeding that in which the "net economic loss" was sustained the deduction computed in Step Sixth, above. The remainder, if any, is subject to tax in North Carolina at the rate of six per cent. (G.S. 105-134.)

Eighth: Any excess of the deduction computed in Step Sixth, above, over what would have been the corporation's "net taxable income" in North Carolina for the year next succeeding that in which the "net economic loss" was sustained had there been no such loss, then is "carried forward" for use in computing the corporation's income tax liabilities to North Carolina in the next year. (G.S. 105-147(9), subparagraph d, 4.)

Ninth: In such next year *(i. e.,* the second year following that in which the "net economic loss" was sustained), start with the amount "carried forward" to such year, as computed in Step Eighth, above. Repeat for such year Steps Fifth, Sixth, Seventh and Eighth, above. This process continues through the fifth year following that in which the "net economic loss" occurred, or until the amount "carried forward" from the year in which such loss occurred (Step Fourth) is exhausted. (G.S. 105-147(9), subparagraphs d, 4 and 5.)

Dividends received by a corporate taxpayer from shares of stock owned by it in non-subsidiary corporations are clearly "income" in the year received within the meaning of G.S. 105-147(9)(d). Likewise, a gain received by a corporate taxpayer from its sale of such shares of stock is "income" in the year received.

Under G.S. 105-134(2)(a) all such income so received by the plaintiff was allocable to states other than North Carolina. Thus, it is income upon which no tax is imposed by the Revenue Act. The Commissioner of Revenue contends that this is, therefore, income "not taxable under this article," within the meaning of G.S. 105-147(9), subparagraphs (d, 2 and 3) and "income nontaxable" under subparagraph (d, 4). If this be correct, such income must be included in the computations to be made under Steps Fifth and Ninth, above. The plaintiff contends that such income is not "income not taxable under this article," but is taxable income allocated to states other than North Carolina and, therefore, it is not to be included in the computations to be made under Steps Fifth and Ninth, above.

We hold that the construction placed by the Commissioner upon the terms "income not taxable under this article" and "income non-

taxable" as used in these provisions of the statute is correct. It is a strained and unnatural use of the term "taxable income" to extend it to income which the statute attributes, by the allocation process, to a state or country other than North Carolina. The construction placed upon these terms by the Commissioner is supported by the language of G.S. 105-134, which provides, "Every corporation engaged in doing business in this State shall pay annually an income tax equivalent to six per cent of its net *taxable* income." (Emphasis added.) Here, the term "taxable income" clearly means income on which the State of North Carolina, by the Revenue Act, levies a tax. All other income is "income not taxable under this article" and, therefore, is to be included in the computations to be made in Steps Fifth and Ninth, above.

If such dividends or gains are received by the corporation in the year in which it alleges it sustained a "net economic loss," it is clear that the statute contemplates that such dividends and gains must be included in the "income from all sources" to be computed under Step First, above. It is necessary that they be so included in order to achieve the declared purpose of the statute in allowing a deduction for "net economic loss." (G.S. 105-147(9), subparagraph (d, 1).)

G.S. 105-147(9), subparagraph (d, 4) provides that a "net economic loss" carried forward from any year shall first be applied to or offset by "any income taxable or nontaxable" of the next succeeding year before any portion of it may be carried forward to a second, third, fourth or fifth year. Clearly, dividends and gains from the sale of corporate stock received in the year "next succeeding" that in which the "net economic loss" was sustained are either "taxable" income or "nontaxable" income. In either event, all such income in the year next succeeding that in which the "net economic loss" was sustained is to be deducted from the part of such loss "carried forward" for use in the computation of the deduction permissible in the second, third, fourth or fifth year after that in which the "net economic loss" was sustained. Surely the legislature intended that such income received in the year next succeeding the year in which the "net economic loss" was sustained is to be subtracted from the original "carry forward" loss in computing the deduction allowable in the first year following such loss. (Steps Fifth and Sixth, above.) That is, such income is "income not taxable under this article."

The judgment of the superior court denying recovery by the plaintiff was, therefore, in accordance with the provisions of the statute.

Affirmed.

MARY GIBBS WILLIAMS v. JOSEPH R. BOULERICE, CECELIA W. BOULERICE, ROBERT E. HARE AND WILLIAM LEON HARE.

(Filed 1 March, 1967.)

1. Automobiles § 65—

Evidence that a driver, traveling east at a lawful speed, was confronted with a sudden emergency when a driver entered the street from an intersection so that she was forced to drive partially on the right shoulder to avoid collision with the other car, that she was then confronted with a fire hydrant on her right side of the road, and, to avoid it, cut to her left, lost control, traversed the street and went into the ditch on her left, while sufficient to present the question of negligence, does not disclose careless and reckless driving within the purview of G.S. 20-140.

2. Automobiles § 46—

Where the evidence is insufficient to present the question of a defendant's careless and reckless driving within the purview of G.S. 20-140, it is error for the court to submit the question of careless and reckless driving in violation of the statute in the court's instruction upon the issue of such driver's negligence.

3. Appeal and Error § 23—

Rules of Practice in the Supreme Court are mandatory, and an assignment of error to the admission of evidence which fails to disclose the evidence admitted over objection so that the question sought to be presented is disclosed within the assignment of error itself, is ineffectual.

4. Appeal and Error § 41—

It is a matter of common knowledge that an experienced driver is more competent than an inexperienced one, and the admission of testimony of a defendant at a former trial to the effect that he would not have the competence as a new driver as he would as an old driver, even if incompetent, cannot be prejudicial.

5. Trial § 51—

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound judicial discretion of the trial judge, and the refusal to grant the motion is not reviewable in the absence of manifest abuse of discretion.

APPEAL by plaintiff and defendants Boulerice from *Bundy, J.*, November 1966 Civil Session of PASQUOTANK.

Action *ex delicto* to recover damages for personal injuries sustained by plaintiff while riding as a passenger in an automobile allegedly negligently driven by her daughter Cecelia W. Boulerice, with the consent, knowledge and approval of her husband, Joseph R. Boulerice, who owned the automobile for the convenience and pleasure of his family as a family purpose automobile, which alleged negligent operation of the automobile by Cecelia W. Boulerice and the alleged negligent operation of another automobile owned by Robert E. Hare as a family purpose automobile and driven by his

son William Leon Hare with his father's consent, knowledge and approval and as his agent and employee within the scope of his agency, constituted joint and concurrent negligence on the part of the drivers of both automobiles and proximately caused her personal injuries.

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

"(1) Was the plaintiff injured by the negligence of the defendants Joseph R. Boulerice and Cecelia W. Boulerice, as alleged in the Complaint?

"ANSWER: Yes.

"(2) Was the plaintiff injured by the negligence of the defendants Robert E. Hare and William Leon Hare, as alleged in the Complaint?

"ANSWER: No.

"(3) What amount of damages, if any, is the plaintiff entitled to recover?

"ANSWER: $10,000.00."

From a judgment that plaintiff recover from the defendants Boulerice the sum of $9,500 (the judgment reciting that "under medical payment coverage there has heretofore been paid to the plaintiff on behalf of defendants Boulerice the sum of $500," which is credited on the recovery), defendants Boulerice appeal. No judgment appears in the record as to defendants Hare, though the record states under APPEAL ENTRIES OF PLAINTIFF: ". . . To the foregoing judgment as to the defendants Hare, the plaintiff excepts, and from the same appeals. . . . Notice of appeal given in open court."

Russell E. Twiford, attorney for plaintiff appellee as to defendants Boulerice, and attorney for plaintiff appellant as to defendants Hare.

John H. Hall, attorney for defendants Boulerice, appellants.

Leroy, Wells, Shaw & Hornthal, attorneys for defendants Hare, appellees.

PARKER, C.J. This is the second appeal in this case. The opinion in the first appeal is reported in 268 N.C. 62, 149 S.E. 2d 590. The first appeal was from a trial by Judge Mintz and a jury at the 20 September 1965 Session of Pasquotank, with this result: 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 them, 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. The Court in its opinion on the first appeal reversed the judgment of compulsory nonsuit in plaintiff's case against defendants Boulerice, and ordered a new trial in plaintiff's case against defendants Hare for error in the charge to the jury.

A summary of the essential allegations in the pleadings of all the parties and a summary of plaintiff's evidence in the case are set forth in the opinion on the first appeal, except there is no summary of the testimony of plaintiff's witness Noah Gurganus and there is no summary of the testimony of defendants Hare. In the instant case the briefs of all the parties state in substance the evidence in the second trial of this case was substantially the same as the evidence in the first trial, as set forth in the records on both appeals. Such being the case, we deem it unnecessary in deciding the appeal in the instant case to repeat the evidence in this opinion but refer to the evidence as set forth in the opinion of the first appeal.

This is a summary of the testimony of Noah Gurganus in the second trial, a witness for the plaintiff in both trials: On 17 July 1962 he was a member of the Elizabeth City police department. He investigated the accident about 2:50 p.m. on this date. He saw a 1959 Mercury on its left side in a ditch on the north side of Factory Street. He described in detail the ditch, the paved width of Factory Street, and the fireplug on the south side of Factory Street near the intersection and about 25 to 28 feet from the center of the intersection. When he got there plaintiff was standing on Factory Street and Mrs. Boulerice was still in the car, and her arms seemed to be pinned outside of the car against the ditch bank. Mrs. Boulerice stated she was headed east on Factory Street and when she came to the intersection of Factory and Fleetwood Streets a green and white Ford came out of Fleetwood Street at a rapid rate of speed and caused her to lose control of the car, and she went over to the right side of the street and back over to the left side and turned over in the ditch. Later in the day he talked to William Leon Hare. Hare stated that during that afternoon he had driven a green and white Ford through the intersection of Fleetwood and Factory Streets. He recalled passing a pink car like the Boulerice car before the accident, but did not recall where he passed it. Mrs. Boulerice did not

make any statement to him about her applying brakes prior to striking the ditch. He did not see any marks on the paved portion of Factory Street at all. We summarize Gurganus's testimony for the reason that plaintiff in her brief as appellee stresses the testimony of Gurganus under her discussion of careless and reckless driving of Cecelia W. Boulerice, and states this:

> "The plaintiff alleged and offered evidence, as hereinabove set forth, which was corroborated by the witness Gurganus, that the defendant Cecelia Boulerice operated said automobile in such a manner as to negligently and carelessly cause the injuries to the plaintiff and the defendants Boulerice offered no evidence in contradiction thereof."

This is a brief summary of the evidence of defendants Hare: William Leon Hare, who is a white man, testified in substance: On the day in question about 2:15 p.m. he drove his father's green and white Ford automobile into and through the T-intersection of Factory Street and Fleetwood Street in Elizabeth City when no other automobile was in it or approaching it. He did not pass the Boulerice car at the intersection. Before then he had seen the Boulerice car on several occasions. He did not see the Boulerice car until about an hour later when he returned home. He then saw it in the ditch on its side, and there was no one in the automobile.

Elliott Ward testified in substance: He is a mail carrier in Elizabeth City. In delivering mail on 17 July 1962, he noticed an automobile in a ditch, and two ladies were in the car and two men were giving assistance. He assisted in getting Mrs. Boulerice out of the car. She told him a colored man came across the road and caused her to run into the ditch. He did not ask her what caused her to go in the ditch: she volunteered the statement.

Mrs. Delores Hare, who is now the wife of Leon Hare and was his fiancee on 17 July 1962, testified in substance: On 17 July 1962 she was in the automobile driven by Leon Hare. When the automobile approached the intersection of Factory and Fleetwood Streets, they waited for a car to pass them. They were at a standstill when this car passed by. Mrs. Boulerice was not driving that automobile. After that automobile passed them, it continued on down Factory Street and did not go into a ditch. This was a little after 2 p.m. About an hour later they came back to the Hare house and saw an automobile in the ditch. No one was in it, but persons were standing nearby.

William Thomas Felton testified in substance: He did not see the accident and does not know how long the Boulerice car had been in the ditch when he saw it. The first time he saw Leon Hare

that day, he was standing in his yard. He came over to him after he had driven up into the driveway and asked him what had happened. That was after plaintiff and Mrs. Boulerice had been taken away from the automobile in the ditch.

Mrs. Cassie McLawhorn testified in substance: She was in the living room of her house, which faces Fleetwood Street. She heard "a slam," and saw the Boulerice car going over. She did not see any other car at this intersection. She saw Leon Hare leaving his house driving his father's car. It was a good while before she saw the car turning over in the ditch. The green and white Ford owned by Leon Hare's father was not parked beside his house at any time within ten minutes prior to the time she saw the car going over into the ditch. She does not know what actually happened before the Boulerice car went into the ditch.

Joseph Roughton testified in substance: He was sitting on his front porch. The first thing he knew about the accident, he saw this car going by and right along there by the fireplug it looked like it swung off to the left and went into the ditch. He did not see the Hare car anywhere around the intersection.

APPEAL BY DEFENDANTS BOULERICE.

A close study of plaintiff's evidence in the record in the instant case, which is admitted by all parties to be substantially similar to the evidence stated in the opinion on the first appeal, considered in the light most favorable to plaintiff and giving to her the benefit of every reasonable inference to be drawn therefrom, tends to show the following: About 2:15 p.m. on 17 July 1962 plaintiff was a passenger in the Boulerice car driven by Cecelia W. Boulerice, her daughter. This 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 per 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 towards Parsonage Street. The two automobiles came very close together when they passed, but did not strike or collide. Confronted with this sudden emergency, the driver of the Boulerice car pulled it to its right to avoid the Ford automobile hitting it. Then a fireplug was so close the Boulerice car cut back to the left and went across the street and turned over in a ditch about 6 feet deep and five to six feet across the top. Considering plaintiff's evidence as we are required to do in considering a motion for judgment of nonsuit, it is our opinion, and we so hold, that plaintiff has adduced no evidence at all tending to show that Cecelia W. Boulerice was guilty of careless and reckless driving in violation

of G.S. 20-140. *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904. There is no evidence offered by defendants Hare that plaintiff can call to her aid tending to show that Cecelia W. Boulerice was guilty of the careless and reckless driving of an automobile, in violation of G.S. 20-140.

The first issue submitted to the jury in the instant case is: "Was the plaintiff injured by the negligence of the defendants Joseph R. Boulerice and Cecelia W. Boulerice, as alleged in the Complaint?" And the second issue is: "Was the plaintiff injured by the negligence of the defendants Robert E. Hare and William Leon Hare, as alleged in the Complaint?" The court in its charge, *inter alia,* instructed the jury: "Now, when you come to consider this first issue, and likewise the second one, which we will come to in order, we have to know what negligence is complained of, or wherein does the plaintiff contend that the defendants Hare were negligent. She says that the Hares were negligent in that the car driven by the younger Hare was driven carelessly and recklessly, and there is a statute prohibiting the careless and reckless operation of a car. . . ." Immediately thereafter the court charged the jury as follows, which is assigned as error by the defendants Boulerice: "The violation of this statute is negligence *per se,* that is negligence of itself, and if the proximate cause of injury, why then it is negligence which would entitle you to answer the first issue YES, if you find negligence and proximate cause arising from careless and reckless driving, by the greater weight of the evidence." Immediately after the foregoing portion of the charge, the court went to the second issue having to do with the negligence of defendants Hare and charged at considerable length on that issue. Immediately thereafter the court instructed the jury as follows, which is assigned as error by the defendants Boulerice: "The plaintiff contends that Cecelia Boulerice drove the car of her husband on that occasion without due caution and circumspection, and at a speed or in a manner so as to endanger or be likely to endanger any person or persons on the highway." The court then again reverted in its charge to the first issue and charged the jury as follows, which the defendants Boulerice assign as error: "Now, concluding that portion of the charge, gentlemen, if the plaintiff has satisfied you from the evidence and by its greater weight that Joseph R. Boulerice and Cecelia W. Boulerice, she driving his car, were negligent in any one or more of the particulars alleged, which I have called your attention to, and that such negligence was a proximate cause of her injury, then it would be your duty to answer that issue YES. Otherwise, you would answer it No."

It was prejudicial error to defendants Boulerice for the court

to instruct the jury, *inter alia,* to the effect that if the jury found from the evidence and by its greater weight, the burden of proof being upon the plaintiff to so satisfy them, that Cecelia W. Boulerice drove her husband's automobile in a careless and reckless manner, in violation of G.S. 20-140, that that would be negligence, and that if such negligence was the proximate cause of her injuries then the jury should answer the first issue Yes, otherwise No, because there is no evidence in the record to show that Cecelia W. Boulerice drove the automobile carelessly and recklessly, in violation of G.S. 20-140. *White v. Cothran,* 260 N.C. 510, 133 S.E. 2d 132, and cases there cited; *Windley v. Brock,* 204 N.C. 357, 168 S.E. 204.

Plaintiff's uncontradicted evidence in the case shows that Cecelia W. Boulerice, who was driving her husband's automobile, was faced with a sudden emergency when she entered the intersection of Fleetwood and Factory Streets, the emergency being caused by a car being driven into the intersection from Fleetwood Street. Defendants Boulerice assign as error the correctness of the parts of the charge as to sudden emergency. This assignment of error raises serious questions as to the correctness of that part of the charge. However, since they are entitled to a new trial for prejudicial error in the charge as above set forth, we do not deem it necessary to discuss this assignment of error, as the law in this jurisdiction is well settled as to the doctrine of sudden emergency, and when the case is tried again the court will probably correctly charge on the doctrine of sudden emergency.

For error in the charge defendants Boulerice are entitled to a New trial.

APPEAL BY PLAINTIFF APPELLANT AS TO DEFENDANTS HARE.

Plaintiff has five assignments of error. All are overruled.

After the court had denied a motion by defendants Hare for judgment of compulsory nonsuit and the defendants excepted, the record shows the following:

"THE COURT then stated that it was going to allow certain portions of the testimony of Mrs. Cecelia Boulerice, one of the defendants, given at the prior trial when called as a witness by defendants Hare, to be read in evidence; to which both the plaintiff and defendants Boulerice noted their objection.

"PLAINTIFF'S EXCEPTION AND ASSIGNMENT OF ERROR NO. 1.

"MR. WELLS: As against the plaintiff and the defendants Boulerice, the defendants Hare offer into evidence the follow-

ing portions of the testimony of the defendant Cecelia Boulerice, given on the trial of this case in this court at the September 1965 Session.

"MR. TWIFORD: The plaintiff Williams objects as to the first part of the testimony.

"COURT: Overruled. You had better object as it comes up.

"PLAINTIFF'S EXCEPTION AND ASSIGNMENT OF ERROR NO. 2.

"MR. WELLS (reading from the former transcript):

"Q. Had you at that point developed into a driver with the same confidence as you have now in driving an automobile?

"Objection by Plaintiff Williams. Overruled.

"PLAINTIFF'S EXCEPTION AND ASSIGNMENT OF ERROR NO. 3.

"A. Well, you know I would not have the competency as a new driver as I would an old one."

The Rules of Practice in this Court are mandatory and will be enforced. *Pamlico Co. v. Davis,* 249 N.C. 648, 107 S.E. 2d 306; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment itself. *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271.

It is manifest that plaintiff's first two assignments of error disclose nothing prejudicial to plaintiff appellant, and according to the rules of this Court we have no disposition to embark upon "a voyage of discovery" through the pages of the record to ferret out what questions plaintiff appellant desires to present by these two assignments of error. It is a fact known generally by all men that a new driver of an automobile does not have the same competency as an experienced driver. It is our opinion, and we so hold, the admission of the testimony of Cecelia W. Boulerice given at a prior trial of this case when called as a witness by defendants Hare, "Well, you know I would not have the competency as a new driver as I would an old one," even if it were incompetent, which we do not concede, could not have prejudiced plaintiff and could not have influenced the verdict in the instant case as to the defendants Hare.

Plaintiff's fourth and fifth assignments of error are that the court erred in failing to set aside the verdict as being contrary to the law and weight of the evidence, and in the signing and entering of the judgment as to defendants Hare. These assignments of error are overruled. A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound judicial discretion of the trial judge, and the refusal to grant the motion is not

appealable in the absence of manifest abuse of discretion. 4 Strong's N. C. Index, Trial, § 51. There is nothing in the record to show that the trial judge abused his sound judicial discretion in denying plaintiff's motion. On plaintiff appellant's appeal as to defendants Hare, prejudicial error is not shown. Therefore, on plaintiff appellant's appeal as to defendants Hare we find

No error.

STATE v. EDDIE DOFICH WIGGS, ALIAS EDDIE DARSETT.

(Filed 1 March, 1967.)

1. Indictment and Warrant § 14; Criminal Law § 121—

By pleading not guilty to warrants in a court having jurisdiction of the offenses charged, defendant waives defects, if any, incident to the authority of the person who issued the warrants, both in regard to a motion to quash and in regard to a motion in arrest of judgment.

2. Criminal Law § 100—

Where no motion for compulsory nonsuit is made in regard to a charge contained in a warrant and no prayer for special instruction, the question of the sufficiency of the evidence to support conviction under the warrant cannot be raised for the first time after verdict.

3. Larceny § 7—

Where the State offers no evidence tending to identify the owner of the property defendant is accused of stealing, nonsuit should be allowed.

4. Disorderly Conduct—

Where a warrant charging disorderly conduct does not contain any allegations, specific or general, to the effect that the prosecution was for the violation of a municipal ordinance, but the municipal ordinance is introduced in evidence and the trial proceeds as though defendant had been charged with the violation of the ordinance, nonsuit for variance must be allowed. G.S. 160-272.

5. Arrest and Bail § 6—

A warrant charging that defendant did unlawfully resist a named police officer while the officer was making a lawful arrest at a designated place, by fighting the officer with his hands and kicking him, is sufficient, and defendant's motion in arrest of judgment is properly denied.

6. Assault and Battery §§ 11, 17—

A warrant charging assault by threatening to hit the arresting officer with a "gallon glass jar" is insufficient to charge an assault with a deadly weapon, and a verdict of guilty as charged supports judgment for a simple assault only.

7. Assault and Battery § 11—

In a prosecution for assault with a deadly weapon the indictment or warrant must name a weapon constituting a deadly weapon *ex vi termini*,

or describe the weapon and the circumstances of its use so as to show its character as a deadly weapon.

APPEAL by defendant from *Bailey, J.*, Schedule A, August 1965 Criminal Session of WAKE, docketed and argued as No. 493 at Fall Term 1966.

The four warrants on which these prosecutions are based were issued out of the City Court of Raleigh; and defendant, after trial and conviction on said warrants in said court, appealed from the judgments there pronounced to the superior court for trial(s) *de novo*.

Three of said warrants were issued June 5, 1965, by "D. E. Wiggs, Desk Officer," to wit, warrants for "Disorderly Conduct" and "Resisting Arrest," issued on affidavit of B. B. Coats, a Raleigh Police Officer, and a warrant for "Larceny" issued on affidavit of James E. Hayes. The fourth warrant, charging "Assault with a Deadly Weapon," was issued June 6, 1965, by "E. M. Meekins, Desk Officer," on affidavit of B. B. Coats.

When the cases were called for trial in superior court, defendant, through counsel, moved that each of the warrants be quashed. Nothing in the record indicates defendant's counsel stated any ground for any of these motions. Each motion was overruled and defendant excepted. Thereupon, defendant pleaded not guilty to each charge. The four cases were consolidated for trial.

Evidence was offered by the State and by defendant.

There was evidence which, when considered in the light most favorable to the State, tended to show the following: About five o'clock on the afternoon of Saturday, June 5, 1965, while in Cottingham's Grocery Store, defendant stole a can of tomato paste of the value of fifteen cents. Hayes, the store manager, having observed defendant remove the can from a grocery cart and put it in his pocket, called the police station. Officer Coats, answering the call, was met outside the store by Hayes. Hayes observed defendant pass the cashier without paying for the can of tomato paste and so advised the officer. When defendant and his girl friend left the store, Coats saw defendant's bulging pocket (in which, according to defendant's testimony, there was a can of tomato paste) and approached defendant with a request that he be permitted to see what defendant had in his pocket. Thereupon, near an intersection of streets and in the presence of many people, defendant became boisterous, used profane language in a very loud manner and called the officer "a blue-suited S.O.B." Thereupon, Coats advised defendant he was under arrest for disorderly conduct. Defendant struggled violently "for two to five minutes" there in the street, at one time

getting Coats down on one knee. Finally defendant broke away and ran. The three warrants issued June 5, 1965, were then obtained. A search for defendant that afternoon and night was unsuccessful. The next day, Sunday, June 6th, Coats and other officers went to a house where defendant was staying. Upon their arrival, defendant went upstairs and out on the roof. Coats notified defendant of the warrants and called on him to submit to arrest and arrange bond. Defendant's response, in vile, boisterous and profane terms, was that the officers would have to come get him if they wanted him. Coats went out on the roof after defendant. As Coats approached, defendant swung at him with a glass jug several times. Coats, who was able to avoid being struck, reached defendant and scuffled with him. In the course of their struggle, Coats hit defendant and caused him to slide off the roof. Defendant fell to the ground and officers there placed him under arrest.

In each case, defendant was found guilty as charged. Judgments were pronounced as follows: (1) On the verdict of guilty of (misdemeanor) larceny as charged, judgment imposing a prison sentence of two years was pronounced. (2) On the verdict of guilty of disorderly conduct as charged, judgment imposing a prison sentence of thirty days was pronounced, this sentence to begin at the expiration of the sentence in the larceny case. (3) On the verdict of guilty of resisting arrest as charged, judgment imposing a prison sentence of two years was pronounced, this sentence to begin at the expiration of the sentence imposed in the disorderly conduct case. (4) On the verdict of guilty of assault with a deadly weapon, judgment imposing a prison sentence of two years was pronounced, this sentence to begin at the expiration of the sentence imposed in the resisting arrest case.

According to the record: "After the entry of a verdict by the jury and the pronouncement of judgment by the court, the defendant, through counsel, made a motion in arrest of judgment, a motion to set the verdict aside as against the weight of the evidence, and a motion for a new trial based on errors committed during the course of the trial. All motions were denied." Defendant excepted and appealed.

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

Carl C. Churchill, Jr., for defendant appellant.

BOBBITT, J. Defendant assigns as error the denial of the motions he made in superior court to quash the warrants.

In his brief, defendant contends his said motions should have

been granted for the reason it does not appear that the persons who issued the warrants had been designated "desk officers" by the Chief of Police of Raleigh pursuant to authority of G.S. 160-20.1 and Chapter 1093, Session Laws of 1963. The contention is without merit. Having pleaded not guilty to said warrants in the City Court of Raleigh, a court having jurisdiction of all offenses charged in said warrants, defendant waived defects, if any, incident to the authority of the person who issued the warrant. "Decisions of this Court are uniform in holding that a motion to quash the warrant or bill of indictment, if made after plea of not guilty is entered, is addressed to the discretion of the trial court. The exercise of such discretion is not reviewable on appeal." *S. v. St. Clair,* 246 N.C. 183, 186, 97 S.E. 2d 840, 842, and cases cited. See also *S. v. Furmage,* 250 N.C. 616, 620, 109 S.E. 2d 563, 566. Too, in respect of defendant's motions in arrest of judgment, such pleas waived defects, if any, incident to the authority of the person(s) who issued the warrants. *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642.

No question as to the validity of either of said statutes was raised in the superior court. Nor is their validity challenged on this appeal. Hence, we do not on this appeal consider questions relating to their validity.

"Under the rules regulating practice and procedure in criminal actions, the objection that the evidence is not sufficient to carry the case to the jury or to sustain a verdict against the accused must be raised during the trial by a motion for a compulsory nonsuit under the statute now embodied in G.S. 15-173, or by a prayer for instruction to the jury. (Citations) It cannot be raised for the first time after verdict. (Citations)." *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311, and cases cited; 1 Strong, N. C. Index, Criminal Law § 100. No motion for compulsory nonsuit having been made in respect of the prosecution for "Resisting Arrest" and "Assault with a Deadly Weapon," whether the evidence was sufficient to support the convictions on the warrants containing these charges is not presented. The facts in connection with defendant's motions for nonsuit in respect of the prosecutions for "Larceny" and "Disorderly Conduct" are stated below. Separate consideration of each case is necessary to decision on this appeal.

WARRANT FOR LARCENY.

This warrant charges that defendant "did willfully, unlawfully, and feloniously steal, take and carry away one can of tomato paste, value $ .15 cents, from Cottinghams Groc. Store, 421 S. Bloodworth St. of the value of $ .15 cents of the goods, chattels and moneys of one J. L. Cottinghams then and there being found and did then and

there receive and conceal the said property with intent to appropriate the same to his own use knowing the same to have been stolen," etc. This warrant sufficiently charges the criminal offense of misdemeanor larceny and is not vulnerable to attack by motion in arrest of judgment.

At the conclusion of the State's evidence, and again at the conclusion of all the evidence, defendant moved for judgment as in case of nonsuit on the ground there was a fatal variance between the warrant and the proof. The evidence on which the State relies relates to a can of tomato paste taken from Cottingham's Grocery Store of which Mr. Hayes was manager. We find nothing in the evidence tending to identify this store or the merchandise therein as the property of J. L. Cottingham. Hence, nonsuit on the ground asserted should have been allowed. *S. v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558; *S. v. Brown,* 263 N.C. 786, 140 S.E. 2d 413. Hence, in respect of the prosecution on this warrant, the verdict and judgment are vacated; and the court's ruling in respect of nonsuit is reversed.

WARRANT FOR DISORDERLY CONDUCT.

This warrant charges that defendant "did wilfully, maliciously and unlawfully engage in the act of disorderly conduct by cursing and swearing in a loud and boisterous manner in a public place in the city and did also then and there use vulgar and indecent language in the presence of divers persons on 400 Blk. S. Bloodworth," etc.

The State, just before resting its case, offered Section 15-17 of the Raleigh City Code, which the court admitted in evidence over defendant's objection. At the conclusion of the State's evidence, and again at the conclusion of all the evidence, defendant moved for judgment as in case of nonsuit on the ground he was not charged with a violation of any city ordinance. The motions were overruled and defendant excepted. The trial proceeded and the judge instructed the jury as if defendant had been charged with a violation of Section 15-17 of the Raleigh City Code.

Criminal prosecution for violation of a municipal ordinance cannot be maintained if the warrant or indictment on which it is based does not set out the ordinance or plead it in a manner permitted by the 1917 statute now codified as G.S. 160-272. *S. v. Burton,* 243 N.C. 277, 90 S.E. 2d 390. Decisions prior to said 1917 statute include the following: *Greensboro v. Shields,* 78 N.C. 417; *Hendersonville v. McMinn,* 82 N.C. 532; *S. v. Edens,* 85 N.C. 522; *S. v. Lunsford,* 150 N.C. 862, 64 S.E. 765. Here, the "Disorderly Conduct" warrant on which defendant was tried contains no allegation, spe-

cific or general, to the effect the prosecution was for violation of an ordinance of the City of Raleigh.

Conceding, without deciding, that defendant's conduct was such as to warrant his arrest and prosecution for violation of a Raleigh ordinance, the motion for judgment as in case of nonsuit should have been allowed on the ground defendant had not been charged with the violation of such ordinance. Hence, in respect of the prosecution on this warrant, the verdict and judgment are vacated; and the court's ruling in respect of nonsuit is reversed.

WARRANT FOR RESISTING ARREST.

This warrant charges that defendant "did unlawfully and wilfully resist officer B. B. Coats, a Raleigh Police, while he was making a lawful arrest at 421 S. Bloodworth St. by fighting him with his hands and kicking him," etc.

G.S. 14-223 provides: "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor." The only question is whether the warrant is vulnerable to defendant's motion in arrest of judgment.

In *S. v. Fenner,* 263 N.C. 694, 700, 140 S.E. 2d 349, 353, Moore, J., for the Court, summarizes the holdings in prior decisions as follows: "A warrant charging a violation of G.S. 14-223 must, in addition to formal parts, the name of accused, the date of the offense and the county or locality in which it was alleged to have been committed, (a) identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute, (b) indicate the official duty he was discharging or attempting to discharge, and (c) state in a general way the manner in which accused resisted or delayed or obstructed such officer. *State v. Harvey,* 242 N.C. 111, 86 S.E. 2d 793; *State v. Eason,* 242 N.C. 59, 86 S.E. 2d 774; *State v. Jenkins,* 238 N.C. 396, 77 S.E. 2d 796." In *Fenner,* and also in *S. v. Taft,* 256 N.C. 441, 124 S.E. 2d 169, referred to in *Fenner,* the warrants were held sufficient. In *S. v. Maness,* 264 N.C. 358, 141 S.E. 2d 470, the count on which judgment was arrested, which purported to charge a violation of G.S. 14-223, did not state in a general way the manner in which accused resisted or delayed or obstructed such officer. In *S. v. Smith,* 262 N.C. 472, 137 S.E. 2d 819, and in *S. v. White,* 266 N.C. 361, 145 S.E. 2d 872, it was considered the indictment in *Smith* and the warrant in *White* did not sufficiently set forth the official duty the officer was discharging or attempting to discharge. The warrant under

consideration is not subject to the defects on which *Smith, Maness* and *White* are based. Rather, it is in substantial accord with the warrants upheld in *Taft* and in *Fenner*. The conclusion reached is that defendant's motion in arrest of judgment was properly denied; and that the verdict and the judgment, except as to the time the sentence will begin, should be and are upheld.

WARRANT FOR ASSAULT WITH A DEADLY WEAPON.

This warrant charged that defendant "did willfully, maliciously and unlawfully assault the person of one B. B. Coats with a deadly weapon, to wit, a gallon glass jar by threatening to hit him with the said jar," etc.

Considering the sufficiency of an indictment for the statutory crime of felonious assault as defined in G.S. 14-32, this Court held "a certain knife" was a sufficient description of the weapon. *S. v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132. Decision was based on the general rule that an indictment following substantially the language of the statute as to the essential elements of the offense meets legal requirements.

The warrant under consideration does not purport to charge a *statutory* crime. It purports to charge an aggravated assault, that is, an assault with a deadly weapon.

The requisites of an indictment or warrant charging the criminal offense of assault with a deadly weapon are set forth in 6 C.J.S., Assault and Battery § 110g(2), as follows: "In an indictment for an assault with a deadly or dangerous weapon, the dangerous or deadly character of the weapon must be averred, either in the language of the statute, or by a statement of facts from which the court can see that it necessarily was such. It is only necessary, however, to describe and charge the weapon to be deadly or dangerous where it is a weapon the ordinary name of which does not, *ex vi termini,* import its deadly or dangerous character; if it is a weapon the ordinary name of which imports its deadly or dangerous character, *ex vi termini,* it is sufficient to describe it by its name, without alleging that it was a deadly or dangerous weapon."

In *S. v. Porter,* 101 N.C. 713, 7 S.E. 902, it was held that, to sustain an indictment as sufficiently charging an assault with a deadly weapon, it must appear *from the indictment* that the weapon, *ex vi termini,* is a deadly weapon, or that the description of the weapon and the circumstances of its use are sufficient to show its character as a deadly weapon. Smith, C.J., for the Court, said: "The present indictment manifestly falls short of this requirement, for while called a deadly weapon it is designated simply as a stick,

with no description of its size, weight or other qualities or properties from which it can be seen to be a deadly or dangerous implement, calculated in its use to put in peril life or inflict great physical injury upon the assailed." True, there are borderline cases, such as *S. v. Phillips,* 104 N.C. 786, 10 S.E. 463, in which an indictment charging as assault "upon one W. R. Butler, with a *certain deadly weapon,* to wit, *with a club,*" etc., was held sufficient. Even so, the authority of *S. v. Porter, supra,* was recognized; and, based on cited definitions, Avery, J., for the Court, concluded that the word "club" meant "not only a large, but a heavy stick," suitable for use as an offensive weapon.

We are constrained to hold that a warrant charging an assault upon a named person with "a gallon glass jar by threatening to hit him with the said jar" does not sufficiently charge an assault with a deadly weapon to support a verdict and judgment for that offense. It contains no allegations as to the manner of defendant's use of the "gallon glass jar" other than the general allegation that defendant was *threatening* to hit the person alleged to have been assaulted with said jar.

Obviously, the warrant was sufficient to charge an unlawful assault. Although the court below instructed the jury as to circumstances under which they might return a verdict of guilty of simple assault, they returned a verdict of guilty *as charged.*

Under the circumstances, the verdict of guilty as charged must be considered a verdict of guilty of simple assault. Hence, the judgment is vacated; and the cause is remanded for pronouncement of a new judgment based on a conviction of simple assault.

Having considered all assignments of error brought forward in defendant's brief, the conclusions reached are as follows: With reference to the prosecutions for "Larceny" and "Disorderly Conduct," the verdicts and judgments are vacated; and in respect thereto the court below will enter judgments dismissing these prosecutions. With reference to the prosecution for "Resisting Arrest," the verdict and the judgment, except as to the time the sentence will begin, are not disturbed; and the case is remanded to the end that the court below shall enter a judgment specifying the time for the beginning of the sentence. With reference to the prosecution for "Assault with a Deadly Weapon," the verdict will stand as a verdict of guilty of simple assault; but the judgment pronounced thereon is vacated. The court below will pronounce a new judgment for a term not exceeding thirty days and provide therein when the sentence, if any, will begin.

Error and remanded.

WILLIAM T. MICHAEL v. GUILFORD COUNTY; CURTIS R. KENNEDY AND LINDSAY W. COX.

(Filed 1 March, 1967.)

Administrative Law § 2; Injunctions § 3; Counties § 2.1— Where adequate remedy by administrative procedure is provided, plaintiff must exhaust such remedy before resorting to injunction.

A landowner may not maintain an action to enjoin a county from enforcing its zoning regulations limiting the use of the land to residential and farming purposes upon the contention that the land lay near an airport and that subsequent to the enactment of the zoning regulations the use of larger and noiser aircraft over the land, with greater frequency and lower altitudes, rendered the land worthless for the permitted uses, when it appears that the county board of adjustment had authority to permit special exceptions to the zoning regulations in hardship cases, G.S. 153-266.17, with right of review by *certiorari* to the Superior Court, and that the landowner had not invoked such administrative remedy.

APPEAL by plaintiff from *Hasty, Special Judge,* October 10, 1966 Non-Jury Session of GUILFORD, Greensboro Division, docketed and argued as No. 698 at Fall Term 1966.

Civil action for injunctive relief, instituted June 28, 1966, heard below on defendants' demurrer to complaint.

Plaintiff alleged in substance, except where quoted, the matters set forth in the following numbered (our numbering) paragraphs:

1. Plaintiff and individual defendants are residents of Guilford County, "a body corporate and politic." Defendants Kennedy and Cox are Inspections Director and Planning Director, respectively, of Guilford County.

2. Plaintiff is the owner of a described tract of land in said county containing 4.5 acres, more or less, located "approximately 7,000 feet from the northern end of Runway No. 5-23 of the airport operated by the Greensboro-High Point Airport Authority."

3. A two-story frame dwelling and a one-story cinder block building are located on said property. "For approximately one year prior to June 8, 1966," plaintiff and his family resided in said dwelling; and plaintiff, by his own efforts and at substantial expense, had renovated said cinder block building for use as a woodworking shop.

4. The Airport Authority has maintained Runway No. 5-23 for many years for the purpose of accommodating aircraft during takeoff and landing; and, "(u)ntil some time in 1965," such aircraft passed directly over said property without unreasonable and oppressive interference with the use thereof. In recent months, however, "the Airport Authority *has announced its intention* to extend the runway 2000 feet northeasterly and the approach 2700 feet

from the end thereof, to accommodate larger jet aircraft." (Our italics.) Now, "larger and noisier aircraft are using the runway; the frequency of such flights has vastly increased; the aircraft have begun to fly over the property at lower altitudes and interference with the use and enjoyment of surrounding real estate in general and with plaintiff's property in particular has been much increased."

5. "Aircraft using Runway 5-23 now pass directly over plaintiff's real property at altitudes substantially less than 150 feet, at all hours of the day and night. The landing lights of such aircraft brightly illuminate the property during the evening and morning hours; the noise and wind generated by their engines cause plaintiff's buildings to vibrate, windows to rattle and crack and the mortar joints and plaster to separate. Such flights have placed plaintiff and his family in fear of bodily harm, have repeatedly startled and awakened them from sleep, and have caused them great inconvenience and embarrassment by disruption of conversation and television reception." On account of these conditions, on June 7, 1966, plaintiff and his family were forced to move their residence from said premises. The cinder block building can be used for no practical purpose. Most of the land "is now lying fallow." The flights of aircraft have "rendered the property useless for development as residential property and impractical for development as a farm (the only uses permitted under Zoning Regulations), and thus substantially (have) impaired the value of the real estate."

6. Under zoning regulations adopted in 1964 by the Board of Commissioners of Guilford County, a portion of plaintiff's property fronting on State Road No. 2137 is in the highest classification of the Guilford County Zoning Ordinance, that is, it is restricted to use for a one-family residence. The portion so restricted includes the dwelling, the yard used therewith, and a small portion of the cinder block building. The remaining portion, including the greater part of the cinder block building, is zoned for agricultural purposes. The cinder block building cannot be used as a residence and no *bona fide* agricultural use thereof is practicable.

7. In February 1966, plaintiff's application to the Guilford County Inspections Department for an electrical permit so that the cinder block building could be used as a woodworking shop was denied because that use was prohibited by said zoning restrictions. Advised to do so by defendant Kennedy, plaintiff filed an application that his property be rezoned to permit its use for industrial purposes. At the hearing before the Guilford County Planning Board, defendant Cox opposed plaintiff's said application on the ground the Planning Department did not "know the long-range needs of the airport, in regard to the road leading to the property,"

and the Planning Board denied plaintiff's application. Plaintiff appealed to the Board of County Commissioners. "In the interim, all individuals owning property fronting on public road 2137, and adjacent to that of plaintiff, and all property owners who could conceivably be affected by the requested zoning change, joined in plaintiff's petition to have the property rezoned. The Guilford County Board of Commissioners nevertheless denied the request for rezoning on June 6, 1966."

8. "Because of the close proximity of aircraft on takeoff and landing, plaintiff's property is wholly unsuitable for development restricted to the uses permitted by zoning." Under present conditions, "the zoning of plaintiff's property for single-family residence and agricultural uses is an unreasonable, capricious, confiscatory and arbitrary action of the zoning authority in that it renders development of plaintiff's property a practical impossibility"; and "(t)he Zoning Ordinance is therefore invalid with respect to plaintiff's property."

9. Plaintiff's property has already been damaged by defendants' arbitrary and capricious actions, and will be further depreciated in value, in violation of plaintiff's constitutional rights, if Guilford County continues to enforce the zoning regulations as to plaintiff's property; and that plaintiff has no adequate remedy at law.

Plaintiff prays "(a) permanent injunction restraining defendants and all personnel under their control from enforcing the Zoning Ordinance as to plaintiff's property herein described."

Defendants filed a joint demurrer, asserting therein the complaint did not state facts sufficient to constitute a cause of action.

The court entered an order sustaining said demurrer. Plaintiff excepted and appealed.

Jack W. Floyd for plaintiff appellant.
Ralph A. Walker for defendant appellee.

BOBBITT, J. According to plaintiff's allegations: The zoning regulations of which he complains were adopted by the Board of Commissioners of Guilford County in 1964. Runway No. 5-23, for many years, has been maintained by the Greensboro-High Point Airport Authority to accommodate aircraft during takeoff and landing. Plaintiff's property is located approximately 7,000 feet from the northern end of said runway. Prior to 1965, aircraft passing directly over plaintiff's property did not unreasonably interfere with the use thereof. The depreciation in the value of plaintiff's property resulting from the frequency and lower altitudes of larger

and noisier aircraft passing directly overhead has occurred since the adoption of said zoning regulations.

Plaintiff does not allege any facts relating to the legal status of the Greensboro-High Point Airport Authority. His brief directs our attention to *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803 (1946), in which three special acts of the General Assembly relating to the Greensboro-High Point Airport Authority, Public-Local Laws of 1941, Chapter 98, and Session Laws of 1943, Chapter 601, and Session Laws of 1945, Chapter 206, are cited and discussed. The 1941 Act creates the Greensboro-High Point Airport Authority, consisting of five members, as "a body corporate and politic," with authority to acquire property for the construction of airports and to make rules and regulations for the maintenance and operation thereof. It provides for the appointment of one member by the City Council of Greensboro; one by the City Council of High Point; and three by the Board of Commissioners of Guilford County. It confers authority "(t)o sue and be sued in the name of said Airport Authority." The 1943 Act provides, *inter alia,* that "(p)rivate property needed by said airport authority for any airport, landing field or facilities of same may be acquired by gift or devise, or may be acquired by private purchase or by the exercise of the power of eminent domain . . ." In *Airport Authority v. Johnson, supra,* it was held the 1945 Act "gives complete and express recognition of the plaintiff Authority as the agency of Greensboro and High Point, as well as of Guilford County; and the authority is given each municipality to deal with it, and upon a plebiscite to lend credit and to issue bonds and raise money for its support." According to *these* statutes, said Airport Authority is a separate and distinct corporate entity, with power to sue and be sued in its corporate name and to acquire property in its corporate name by the exercise of the right of eminent domain.

Whether plaintiff can maintain an inverse condemnation action against said Airport Authority for compensation on account of its appropriation of a flight easement over all or a portion of plaintiff's property is not presented. In this connection, see *Charlotte v. Spratt,* 263 N.C. 656, 140 S.E. 2d 341. The present action is to enjoin enforcement of particular provisions of a zoning ordinance with reference to plaintiff's property.

The complaint refers to the "Guilford County Zoning Ordinance" and to certain zoning regulations affecting plaintiff's property. Neither the ordinance in its entirety nor any specific portion thereof is set forth in the complaint or attached thereto as an exhibit.

Since the complaint contains no reference to a special enabling act relating to Guilford County, we must assume the zoning ordinance was adopted pursuant to the statutory authority conferred by G.S. Chapter 153, Article 20B, § 153-266.10 *et seq.* G.S. 153-266.10 empowers the board of commissioners of any county to regulate and restrict, *inter alia,* "(t)he location and use of buildings, structures, and land for trade, industry, residence or other purposes, except farming." It provides further: "No such regulations shall affect *bona fide* farms, but any use of such property for non-farm purposes shall be subject to such regulations. Such regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained." G.S. 153-266.17 requires the appointment of a board of adjustment and contains the following provisions, *inter alia,* relating thereto. "Such board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article." Again: "The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance. The ordinance may also authorize the board to interpret the zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in the administration of the ordinance. The board shall hear and decide all such matters referred to it or upon which it is required to pass under any such ordinance." Again: "Every decision of such board shall be subject to review by the superior court by proceedings in the nature of *certiorari.*"

To what extent, if any, the zoning ordinance purports to define the status, function and powers of an "Inspections Director" or of a "Planning Director" is not disclosed. The function of a "Planning Board" is to make recommendations to the Board of County Commissioners. G.S. 153-266.15. Obviously, an "Inspections Director" is an administrative officer from whose decision plaintiff was authorized by G.S. 153-266.17 to appeal to the board of adjustment. Plaintiff does not allege he has in any manner applied to the board of adjustment for relief.

Plaintiff does not attack the validity of the zoning ordinance. See *S. v. Owen,* 242 N.C. 525, 88 S.E. 2d 832. Nor does he assert any particular provision thereof is unconstitutional or otherwise void. See *Clinard v. Winston-Salem,* 217 N.C. 119, 6 S.E. 2d 867; *Schloss*

v. Jamison, 258 N.C. 271, 128 S.E. 2d 590, *s. c.,* 262 N.C. 108, 136 S.E. 2d 691. He alleges a portion of his property is now zoned for residential use and the remainder for agricultural use, and that it is impracticable under the circumstances to use his property for these purposes. Too, he alleges the cinder block building, which is partly in a residential zone and partly in an agricultural zone, is not suitable for either permitted use.

"The mere fact that a zoning ordinance seriously depreciates the value of complainant's property is not enough, standing alone, to establish its invalidity." *Helms v. Charlotte,* 255 N.C. 647, 651, 122 S.E. 2d 817, 820; *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600. Also, see *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706.

The only alleged material change in plaintiff's property since the challenged zoning regulations were adopted is that larger and noisier aircraft fly over his property with greater frequency and at lower altitudes. Plaintiff alleges in substance that "surrounding real estate in general" is similarly affected. The complaint contains no other allegation as to changes in the character of the neighborhood or area in which plaintiff's property is located. (We assume, for present purposes, that such flights are lawful; otherwise, there would be a cause of action against the offending parties.) The crucial question is whether the special conditions created by such flights entitle plaintiff to relief from enforcement of all or any of the attacked zoning regulations with reference to all or any part of his property.

The cited statutory provisions confer authority on the board of adjustment. As indicated, the complaint does not allege the provisions of the zoning ordinance. Hence, we do not know what additional powers and procedures, if any, relating to proceedings before the board of adjustment, are set forth in the zoning ordinance. See *Austin v. Brunnemer,* 266 N.C. 697, 147 S.E. 2d 182, where an ordinance adopted by the Board of Commissioners of Gaston County pursuant to the authority conferred by G.S. 153-266.10 *et seq.,* was considered.

We are of the opinion, and so decide, that, upon the facts alleged, plaintiff may not institute and maintain an action in the superior court *to enjoin* Guilford County from enforcement of zoning regulations on the ground that, as applied to plaintiff's property, they are unreasonable and arbitrary. Our statutes provide an adequate remedy, namely, by a proceeding before the board of adjustment, either on appeal from an adverse administrative decision or on original petition for relief on account of special adverse conditions. Upon the hearing before the board of adjustment, the facts

in connection with plaintiff's property, the character of the neighborhood, the effect of the increased use of the air space over plaintiff's property upon the present permissible uses thereof, etc., can be determined. Thereafter, the decision will be "subject to review by the superior court by proceedings in the nature of *certiorari.*" G.S. 153-266.17. The indicated procedure was followed in *Austin v. Brunnemer, supra.* See also *Durham County v. Addison, supra,* and decisions cited therein. This procedure has been followed in similar circumstances under zoning ordinances adopted by municipalities, pursuant to authority conferred by general statute, G.S. Chapter 160, Article 14, § 160-172 *et seq.,* or pursuant to special act, or both. *Craver v. Board of Adjustment,* 267 N.C. 40, 147 S.E. 2d 599; *Chambers v. Board of Adjustment,* 250 N.C. 194, 108 S.E. 2d 211; *In re Pine Hills Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1.

"Generally, there is no ground for equitable relief against zoning where there has been no invasion of property rights, or where there is an adequate remedy at law, as by *certiorari* or *mandamus,* or by pursuit of a statutory remedy." McQuillin Mun. Corp. (3rd Ed.), Vol. 8A, § 25.290, p. 328.

We are advertent to the fact that in *Helms v. Charlotte, supra,* on which plaintiff relies, similar relief was sought by action in the superior court. Suffice to say, the defendant, answering the complaint, raised no question as to procedure and the procedural question now determined was not referred to in the Court's opinion.

On this appeal, decision is based solely on the ground the complaint does not allege facts sufficient to show the procedure prescribed by statute does not constitute an adequate remedy at law.

For the reasons stated, the order sustaining defendants' demurrer is affirmed.

Affirmed.

STATE v. RAYMOND CALDWELL, ALIAS RAYMOND McHONE.

(Filed 1 March, 1967.)

1. Criminal Law § 23—

A plea of guilty, knowingly and voluntarily entered in a court having jurisdiction, to an indictment and information validly charging criminal offenses, are formal confessions of guilt obviating the necessity of proof by the State.

2. Criminal Law §§ 131, 139—

Appeal from sentence entered upon a plea of guilty, knowingly and vol-

untarily made, presents only the record proper for review, and while defendant may contest on appeal the sufficiency and validity of the indictment and information, he waives all other defenses and may not object that the court in determining sentence admitted testimony of a statement made by defendant without having been advised of his constitutional right to remain silent.

3. Criminal Law § 23—

The record in this case *is held* to show affirmatively that defendant, who was represented by counsel, understood the charge against him, the nature and effect of his plea of guilty and the maximum sentence which might be lawfully imposed upon such plea, and that he entered the plea voluntarily without threat or inducement.

4. Criminal Law § 131; Constitutional Law § 36—

The imposition of sentences which do not exceed the maximum fixed by the applicable statutes cannot be considered cruel and unusual punishment in the constitutional sense.

5. Assault and Battery § 11—

An indictment sufficiently charging defendant with assault with a deadly weapon, to wit, a pistol, with intent to kill and inflicting serious injury not resulting in death, G.S. 14-32, includes the offense of assault with a deadly weapon.

6. Concealed Weapons § 2—

An information charging that defendant, on a specified date, unlawfully and wilfully carried a concealed weapon, to wit, a pistol, about his person, the defendant not being at the time on his own premises, is an accurate and sufficient charge of violating G.S. 14-269.

7. Criminal Law § 16—

The Superior Court of Buncombe County has original jurisdiction over misdemeanors. G.S. 7-64.

APPEAL by defendant from *Martin, S.J.*, December 1966 Session of BUNCOMBE.

Criminal prosecution on an indictment charging defendant on 12 October 1966 with feloniously assaulting Hazel Bradley with a deadly weapon, to wit, a pistol, with intent to kill, and inflicting upon her serious injury not resulting in death, a violation of G.S. 14-32; and upon a written information signed by the solicitor charging defendant on 12 October 1966 with unlawfully and willfully carrying a concealed weapon, to wit, a pistol, about his person, he the said defendant not being at the time on his premises, a violation of G.S. 14-269.

A warrant charging defendant with feloniously assaulting Hazel Bradley on 12 October 1966 with a deadly weapon, to wit, a pistol, sworn to by a member of the Asheville police department before a deputy clerk of the police court of Asheville, was made returnable to the police court of the city of Asheville. In that court defend-

ant waived a preliminary hearing, and the action was transferred to the Superior Court of Buncombe County. The written information above referred to was initiated in the Superior Court. Immediately after the written information set forth in the record appears this:

> "Now comes Raymond Caldwell, and he, the said Raymond Caldwell, having been advised of his constitutional rights desires to be tried upon the Bill of Information filed instead of Bill of Indictment returned by the Buncombe County Grand Jury.
>
> s/ Raymond Caldwell
> Defendant
> s/ Floyd D. Brock
> Attorney"

In the Superior Court the defendant was represented by his court-appointed lawyer, Floyd D. Brock, and the indictment and information were read to him in the presence of his attorney, Floyd D. Brock. In respect to the indictment, defendant entered a plea of guilty of an assault with a deadly weapon upon Hazel Bradley, a misdemeanor, and a lesser degree of the felonious assault charged in the indictment, G.S. 15-170, and he pleaded guilty to the charge in the information. Whereupon, the presiding judge gave to defendant a paper containing questions, and asked him if he could read and write. Defendant replied, "Yes." Then the court asked him to fill out answers to the questions therein contained, which questions and answers were to the effect that he could understand the questions; that at the time he was not under the influence of any alcohol, drugs, narcotics, or other pills; that he understood what he was charged with in this case; that he understood that upon his pleas of guilty to the indictment and the information that he could receive a sentence of imprisonment for as much as four years; that neither the solicitor, nor his lawyer, nor any policeman or law officer, nor anyone else had made any promise to him that would influence him to plead guilty in this case; that neither the solicitor, nor his lawyer, nor any policeman or law officer, nor anyone else had made any threat to him to influence him to plead guilty in this case; that he had had time to confer with his lawyer; that he had authorized and instructed his lawyer to enter pleas of guilty; that he now entered pleas of guilty; and that these questions have been read and explained to him, and he has signed his name on the top line. The record states in substance that the paper containing the questions and defendant's answers was sworn to by defendant.

From a judgment of imprisonment for two years on defendant's

plea of guilty of assault with a deadly weapon, and from a judgment of imprisonment for two years upon the information of carrying a concealed weapon, said sentences to run consecutively, defendant appeals to the Supreme Court. The court-appointed trial attorney, Floyd D. Brock, was directed by the court to perfect his appeal to the Supreme Court.

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

Floyd D. Brock for defendant appellant.

PARKER, C.J. Defendant's plea of guilty of assault with a deadly weapon upon Hazel Bradley, which is a lesser degree of the felonious assault charged in the indictment, and his plea of guilty to the charge in the information of carrying a concealed weapon, to wit, a pistol, are formal confessions of guilt by him before the Buncombe County Superior Court in which he was arraigned on these charges to which he pleaded guilty. *S. v. Crandall,* 225 N.C. 148, 33 S.E. 2d 861; *S. v. Robinson,* 224 N.C. 412, 30 S.E. 2d 320.

Defendant assigns as error that the court failed of its own motion to set aside his plea of guilty to a charge of carrying a concealed weapon when the State failed to produce evidence to support said charge. This assignment of error is overruled for the following reasons: (1) The record shows that defendant's plea of guilty to the information charging him with carrying a concealed weapon, to wit, a pistol, not being on his premises, was knowingly, intelligently, and voluntarily entered into, and this made it unnecessary for the State to offer evidence to prove the offense charged in the information. *S. v. Dye,* 268 N.C. 362, 150 S.E. 2d 507; 21 Am. Jur. 2d, Criminal Law, § 495; 22 C.J.S., Criminal Law, § 424(4); (2) the State's evidence, considered in the light most favorable to it, shows that defendant was carrying concealed about his person and off his premises a deadly weapon, to wit, a pistol; and (3) the facts charged in the information, of which the defendant admitted himself to be guilty, constitute an offense punishable under G.S. 14-269. *S. v. Perry,* 265 N.C. 517, 144 S.E. 2d 591; *S. v. Hodge* and *S. v. White,* 267 N.C. 238, 147 S.E. 2d 881.

The court heard the testimony of Hazel Bradley, her younger sister Jackie Bradley, Mrs. Etta Courtney, and R. D. Poore, a detective sergeant with the Asheville police department, all of whom were witnesses for the State. Hazel Bradley's testimony was to this effect in brief summary: She is 16 years old. She had seen defendant one time before for a period of about 30 minutes prior to the time he shot her with a pistol. She was standing in front of her

house "joking and going on" with Cecil Darnell. Her younger sister and Cathy Davis were present. Defendant pulled a gun out of his back pocket and said, "I'll put a stop to all the fussing," and shot her on the left side underneath the left collar bone. The bullet knocked her down. She was hemorrhaging from her mouth. Darnell lifted her head up and said, "Try not to swallow the blood." Defendant bent over and looked at her and said, "Cecil, she's dying." She received treatment at the hospital for 14 days.

Jackie Bradley, Hazel's younger sister, testified in brief summary: Darnell took hold of Hazel and bent her arm and kissed her. Hazel said, "Cecil, I hate you." Defendant pulled out the pistol and said, "Wait a minute, I'll stop the G. D. argument," and shot her.

R. D. Poore, a detective sergeant with the Asheville police department, testified on direct examination in brief summary: He investigated the shooting of Hazel Bradley. He spotted defendant on the railroad track at the back of Farmer's Federation, and about that time a freight train was leaving for Big Gap, Virginia, and defendant swung aboard the train. Defendant later told him the route he took after he got off the train. He swam the river to his house. Defendant told what had happened. He said they were sitting there talking and that Cecil Darnell and Hazel were joking and arguing back and forth, and, in a joking way, he pulled his gun out of his pocket and told them that he would stop the argument, and that the gun "went off." He said he did not mean to shoot the gun at all. He stated that he threw the pistol on a coal car when he swung on the train. Defendant did not object to this testimony, or other testimony of Poore, when it was offered. At the end of his testimony on direct examination appear the words, "EXCEPTION #4." On cross-examination of Poore by defendant, he testified, "His wife said it was her gun." Defendant, who elicited this testimony on cross-examination, has no exception to it in the record.

Mrs. Etta Courtney testified in substance: She was in the house of Hazel's mother. Jackie Bradley came running in the house and said, "Lord, have mercy, Mama, they's a man shot Hazel." Defendant and Darnell came into the living room, and defendant said, "Call the police on me, I shot this girl down in the yard, and I think she is dead." She called the police station and asked them to send an ambulance. She had never seen defendant before.

Defendant assigns as error that the court erred in allowing Poore to testify as to what the defendant said to him at the time of his arrest in the absence of evidence by the State that the defendant had been advised of his constitutional rights to remain silent and to refrain from making incriminating statements against

himself. Defendant also assigns as error that the trial court erred in allowing Poore to testify as to what defendant's wife said concerning the pistol. These assignments of error are overruled.

In *S. v. Newell,* 268 N.C. 300, 150 S.E. 2d 405, the Court said: "Defendant having pleaded guilty, his appeal presents for review only whether error appears on the face of the record proper." To the same effect, *S. v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800, and cases there cited. The indictment and information here are parts of the record proper. By such pleas of guilty, defendant is not precluded from claiming that the facts alleged in the indictment or information do not constitute a crime under the laws of the State. *S. v. Perry,* 265 N.C. 517, 144 S.E. 2d 591; *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642; 21 Am. Jur. 2d, Criminal Law, § 495, p. 484; 22 C.J.S., Criminal Law, § 424(2).

In *Brisson v. Warden of Connecticut State Prison,* 25 Conn. Sup. 202, 200 A. 2d 250, defendant pleaded guilty to two counts of indecent assault and two counts of showing an obscene movie, and was sentenced to a term of not less than two and not more than seven years in the State's prison. Later he filed a petition alleging that he was illegally imprisoned in the State's prison for reasons set out in his "Statement of the Case and Petition for the Writ of *Habeas Corpus.*" In the petition for the writ of *habeas corpus* he alleged, *inter alia,* that he did not have counsel at the bind-over proceedings in the Circuit Court. The Court in its opinion in the *habeas corpus* proceeding said:

> "The plea of guilty waives any defect which is not jurisdictional. It is a confession of guilt in the manner and form as charged in the indictment. An accused by pleading guilty waives all defenses other than that the indictment charges no offense. He also waives the right to trial and the incidents thereof and the constitutional guarantees with respect to the conduct of criminal prosecutions. . . . See 4 Wharton, Criminal Law and Procedure, § 1901; 5 *id.* § 2012; 2 Underhill, Criminal Evidence (5th Ed.) § 398; 14 Am. Jur., Criminal Law, § 272; 22 C.J.S. Criminal Law, § 424; see also *Grasso v. Frattolillo,* 111 Conn. 209, 212, 149 A. 838; *Weir v. United States,* 92 F. 2d 634, 114 A.L.R. 481 (7th Cir.), cert. denied, 302 U.S. 761, 58 S. Ct. 368, 82 L. Ed. 590, rehearing denied 302 U.S. 781."

See also *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *S. v. Doughtie, supra.*

Defendant has not shown that there has been any violation of his fundamental constitutional rights or that he was denied the substance of a fair trial in a situation where he was not in a position

to protect himself because of ignorance, duress, or other reasons for which he should not be held responsible. The record shows affirmatively that defendant, who was represented by counsel, understood the charges against him, the nature and effect of his pleas of guilty, and the maximum sentences which might lawfully be imposed upon him if he entered such pleas, and that he entered the pleas of guilty to the offenses charged voluntarily, without threats or inducements or promises, and with a full understanding of the effect and possible consequences of such pleas of guilty. Certainly, the testimony defendant elicited from Poore by cross-examination that defendant's wife said the gun was hers did not incriminate him, and did him no harm. Even if defendant had not been warned by Poore or anyone of his constitutional rights, it seems manifest under the particular facts of this case and his pleas of guilty as above set forth that he intentionally, understandingly, and voluntarily relinquished or abandoned such rights. *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 146 A.L.R. 357.

Defendant assigns as error that the sentences imposed by the court were excessive. This assignment of error is overruled. The punishment imposed on his plea of guilty in the assault with a deadly weapon case does not exceed the limits fixed by G.S. 14-33. *S. v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633. The punishment imposed on his plea of guilty as charged in the information does not exceed the limits fixed by G.S. 14-269. 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. Bruce,* 268 N.C. 174, 150 S.E. 2d 216, and five cases of ours to the same effect there cited.

The indictment accurately includes in its allegations the offense of an assault with a deadly weapon, to wit, a pistol, an offense punishable under the laws of this State, and the information contains accurate and sufficient allegations to constitute the carrying of a concealed weapon, to wit, a pistol, about the person and off his own premises, an offense punishable by the laws of this State.

The information was initiated in the Superior Court of Buncombe County, and because of that the Superior Court of Buncombe County had jurisdiction over the offense charged in the information, a misdemeanor, by virtue of the provisions of G.S. 7-64.

The proceeding and judgment of the court below are, therefore, free from error.

Affirmed.

L. R. EVERETT, R. H. EVERETT, R. F. EVERETT, D. G. MATTHEWS, JR., AND D. G. MATTHEWS, SR., T/A SLADE, RHODES COMPANY, PLAINTIFFS, V. LENA GAINER, BOSTON GAINER, OLLIE GAINER AND JOE HENRY GAINER, ORIGINAL DEFENDANTS; KATIE LEE GAINER, BEATRICE H. GAINER AND LENORA GAINER, ADDITIONAL DEFENDANTS.

(Filed 1 March, 1967.)

1. Fraudulent Conveyances § 1—

A voluntary conveyance executed by a grantor who fails to retain property sufficient to pay his then existing debts may be set aside by a prior creditor, regardless of the intent of the grantee.

2. Same—

If a deed is executed by a grantor who fails to retain assets to pay his then existing debts and the consideration for the deed is grossly inadequate, the transfer is fraudulent as to a prior creditor of the grantor without a showing of actual fraud on the part of the grantee, and the fact that the grantees are sons of the grantor is pertinent to be considered with other facts and circumstances on the question of implied knowledge.

3. Same; Deeds § 8—

The recital of consideration in a deed is contractual and the actual consideration may be shown by parol evidence, but a recital of "other good and valuable consideration" in addition to the cash consideration recited therein adds nothing to the recital of the cash consideration in the absence of evidence by the grantor as to the nature and character of the other consideration, and the burden is on the parties resisting a creditor's action to set aside the deed as fraudulent to prove the nature and value, if any, of such other consideration.

4. Same—

Evidence of the lack or amount of internal revenue stamps on a deed is some evidence of the amount of consideration actually paid for the conveyance.

5. Fraudulent Conveyances § 8—

Evidence tending to show that the grantor executed a deed to her sons for "$100 and other valuable consideration," that the deed had no revenue stamps affixed thereto, that at the time of the execution of the deed the grantor failed to retain assets sufficient to pay her then existing debts, and that the property had a value of some $5000, *is held* sufficient to overrule nonsuit in an action by a prior creditor to set aside the deed as fraudulent.

APPEAL by plaintiffs from *Hubbard, J.*, November 1966 Session of MARTIN.

Civil action to set aside deed as being a fraudulent conveyance.

Plaintiffs offered evidence substantially as follows:

Defendant Lena Gainer and her son, Leo, ran a joint account with plaintiffs for a number of years prior to 1964. Leo Gainer

operated a farm for his mother and purchased farm supplies from plaintiffs, but payments were always made by checks signed by defendant Lena Gainer. Leo died in October 1963. Around March 1964 Lena Gainer was indebted to plaintiffs in the amount of $5,295.72. Subsequently, the estate of Leo Gainer paid a portion of this amount, leaving a balance due of $3,899.13. At the May 1966 Session of Martin Superior Court plaintiffs obtained a judgment against Lena Gainer for the amount of $3,899.13. Execution was issued thereon and returned unsatisfied.

Plaintiffs introduced in evidence a warranty deed from Lena Gainer, dated 2 March 1964, which conveyed a certain tract of land in Martin County, containing 20 acres more or less, to her three sons, Boston Gainer, Ollie Gainer, and Joe Henry Gainer, defendants in this action. The recital of consideration in the deed was "$100 and other valuable consideration." The deed shows no internal revenue stamps. Evidence was offered that said land as of 2 March 1964 had a fair market value of $5,000 to $5,500. It was stipulated by the parties that Lena Gainer owned no other property at the time of the conveyance.

One of the plaintiffs testified that on several occasions in 1963 he talked with Lena Gainer concerning payment of the account.

At the close of plaintiffs' evidence the court, upon motion of defendants, entered judgment of nonsuit. Plaintiffs appealed.

Edgar J. Gurganus for plaintiffs.
R. L. Coburn for defendants.

BRANCH, J. The sole question presented for decision is: Did the court below err in entering judgment of nonsuit at the close of plaintiffs' evidence?

In the case of *Aman v. Walker,* 165 N.C. 224, 81 S.E. 162, Justice Allen states the principles relating to fraudulent conveyances, two of the pertinent principles being as follows:

> "(2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally."
>
> "(5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part

of the *grantor,* participated in by the *grantee,* or of which he has notice, it is void."

This case was approved by the Court in *Garland v. Arrowood,* 177 N.C. 371, 99 S.E. 100, the Court stating:

"The jury have found that there was no actual intent to defraud or, in other words, *no mala mens,* but if the defendant, the donor of the gift, failed to retain property fully sufficient and available for the satisfaction of his then creditors, the gift was void in law, without regard to the intent with which it was made."

It was stipulated that defendant had "no other property" when the conveyance was made to her children. It would therefore logically follow that she failed to retain sufficient property to satisfy creditors. However, if the deed from Lena Gainer to her sons had been delivered for a fair price or for value, the sale would not be necessarily void as to creditors, even though she did not retain sufficient property to satisfy creditors. But if the grantor transferred all of her remaining property to her sons for a grossly inadequate consideration, the transfer is fraudulent as to a creditor of the grantor, and a creditor may set aside the conveyance without showing actual fraud. *Everett v. Mortgage Co.,* 214 N.C. 778, 1 S.E. 2d 109. The only evidence before us as to consideration is a recital in the deed of "$100 and other valuable consideration," and such inferences as may arise from the fact that no revenue stamps are affixed to the deed. "The consideration named in a deed is presumed to be correct. . . . Not being contractual it may be inquired into by parol evidence and shown to have been otherwise than as recited in the deed." *Gadsden v. Johnson,* 261 N.C. 743, 136 S.E. 2d 74.

In the case of *Sills v. Morgan,* 217 N.C. 662, 9 S.E. 2d 518, the evidence showed that plaintiff had recovered a judgment against the defendant husband on or about the same date the husband conveyed real property to his wife by deed which recited a consideration of $10. The defendant husband was indebted to plaintiff in the amount of $500 and had not retained sufficient property to satisfy his then existing debts. The court held that the question of whether the deed was executed for a valuable consideration should be submitted to the jury.

In the case of *McCanless v. Flinchum,* 89 N.C. 373, this Court recognized that the relationship between grantor and grantee, along with other facts and circumstances, is pertinent in cases involving fraudulent conveyances, and stated:

"When a father is unable to pay his debts and sells his land or other property to his son for less than its reasonable value, and this appears, the presumption is that the sale is fraudulent as to creditors; but this presumption may be disproved, and whether the sale is fraudulent or not is a question for the jury. In such a case the relationship between the parties is evidence, and generally strong evidence, of a fraudulent motive and intent. And when the law raises such a presumption, the jury, under instructions from the court, must find the fraudulent intent, unless the presumption is rebutted by proof satisfactory to them. . . . There is no reason why a father, unable to pay his debts, may not sell his property to his son, and the only difference between such a sale and one to a stranger is, that the close relationship between the father and son, if the *bona fides* of the sale shall be questioned, is a circumstance of suspicion, and evidence tending to show a fraudulent intent.

"A voluntary deed of land or other property made to a son by a father unable to pay his debts, is void *per se* as to creditors. . . ."

The Court again considered this principle of law in *Bank v. Lewis,* 201 N.C. 148, 159 S.E. 312, where the husband executed a deed to his wife for the express consideration of one dollar and love. The trial court submitted, *inter alia,* this issue: "Did the defendant, John T. Lewis, execute the deed of 25 October 1926, to his wife, Madge M. Lewis, with the purpose and intent to cheat and defraud and to hinder or delay his creditors in the collection of their debts?" In connection with this issue the court charged:

"Now, the deed in question, the court charges you, is a voluntary deed made by a husband to his wife for the express consideration of one dollar and love. . . . (Now, the deed as I say is a voluntary deed, made upon a good consideration, but not a valuable consideration, and if Lewis retained property enough at the time of the conveyance and delivery of that deed to pay all of his then existing debts, taking into consideration that he was one of the four signers of this guaranty and the condition of the Tri-State Fruit Company at that time, I say if you find that he did have sufficient to pay all of his then existing debts under those circumstances, then it would be your duty to answer the third issue 'No.')"

The plaintiffs excepted to the portion of the charge quoted in parentheses above. In passing on this assignment of error, this Court stated: "We see no merit in the above exception and assignment of

error, treating the deed as a voluntary conveyance between husband and wife, although the evidence of Madge M. Lewis (the wife) was competent to show a valuable consideration. Plaintiffs have no cause to complain of this charge." In this connection the Court quoted with approval the following:

> "In *Faust v. Faust,* 144 N.C., at p. 387, is the following: '"It was formerly held, although there was much conflict of opinion, that the clause stating the consideration in a deed or other instrument under seal must be held conclusive on the parties like other parts of the instruments and was not open to contradiction or explanation, but the more modern decisions settle the rule that although the consideration expressed in a sealed instrument is *prima facie* the sum paid, or to be paid, it may still be shown by the parties that the real consideration is different from that expressed in the written instrument. Accordingly, it is held, by an uncounted multitude of authorities, that the true consideration of a deed of conveyance may always be inquired into and shown by parol evidence." . . .'"

In the case before us it is apparent that if the sole consideration is $100, this is a grossly inadequate consideration, which would constitute the conveyance voluntary. Does the addition of the words "and other valuable consideration" make the conveyance valid as to then existing creditors? We think not. Our research does not reveal a North Carolina case in point; however, in the case of *California Mining Company v. Manley,* 81 P. 50, the Court, while considering a fraudulent-conveyance case, stated: "The recital of the money consideration of $1 explains itself, but the further recital as to 'other good and valuable considerations' means nothing, and would be given no weight in the absence of evidence explaining the nature and character of that consideration." There was no evidence to contradict the recital in the deed and the burden to explain the nature and character of the consideration is on defendants.

"Where an insolvent husband has conveyed land to his wife, and the preexisting creditor brings an action to impeach the deed for fraud, the *onus* is upon her to show that a consideration actually passed in the shape of money paid, something of value delivered, or the discharge of a debt due from the husband to her." *Peeler v. Peeler,* 109 N.C. 628, 14 S.E. 59; *Eddleman v. Lentz,* 158 N.C. 65, 72 S.E. 1011; *Bank v. Lewis, supra.*

To support their contention that the conveyance was voluntary appellants would show the absence of internal revenue stamps. Whether the revenue stamps affixed to an instrument are evidence of consideration has not been passed on in this jurisdiction.

26 U.S.C.A. § 4361 is as follows:

"There shall be imposed a tax on each deed, instrument or writing (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereof at the time of sale, exceeds $100 and does not exceed $500, in the amount of 55 cents; and at the rate of 55 cents for each additional $500 or fractional part thereof."

26 U.S.C.A. § 4383 provides:

"The tax imposed by this chapter shall be paid by any person who makes, signs, issues, or sells any of the documents and instruments subject to the taxes imposed by this chapter, or for whose use or benefit the same are made, signed, issued, or sold. The United States or any agency or instrumentality thereof shall not be liable for the tax with respect to an instrument to which it is a party, and affixing of stamps thereby shall not be deemed payment for the tax, which may be collected by assessment from any other party liable therefor."

Ramming Real Estate Co. v. United States, 122 F. 2d 892, was an eminent domain proceeding in which the Court allowed a witness to state the value of land based upon examination of recorded deeds where witness considered the recitals in the deed and the amount of the revenue stamps affixed. In passing upon this question the Court stated: "(W)e think the amount of revenue stamps attached to the deeds may be said to have been a reliable source of information as to the amount of the consideration paid for the property described therein."

In the case of *In re McGeehin's Will,* 235 N.Y.S. 477, 134 Misc. Rep. 334, the Court held that where there is no direct evidence respecting consideration received by grantor for the conveyance, but the deed bore U. S. internal revenue stamps of $1.50, presumption is created that grantor received approximately $5,000.

Thus, we hold that the amount of internal revenue stamps, or the absence of internal revenue stamps, is some evidence of the amount of consideration actually paid for the conveyance. In the instant case the recital in the deed of $100 and other valuable consideration considered with the absence of internal revenue stamps is evidence that the consideration was not more than $100.

Appellees cite as their sole authority the case of *Murphy v. Hovis,* 265 N.C. 448, 144 S.E. 2d 260. *Murphy* was decided on the principle stated in *Aman v. Walker, supra,* that: "If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by grantee and of which intent he had no notice, it is valid." Factually, *Murphy v. Hovis* is different from the case at hand, in that in the *Murphy* case grantees assumed a deed of trust in the amount of $5,000. Furthermore, in the instant case it is in evidence that grantor told one of the plaintiffs in December 1963 that "Ollie had been named administrator of Leo's estate and that Ollie Gainer and Boston Gainer were looking after her (Lena Gainer) business from then on." The conveyance under attack was not made until 2 March 1964, and was made to Ollie Gainer, Boston Gainer and Joe Henry Gainer, sons of the grantor, all of whom were residents of Martin County. Thus, the inference of notice, even of intimate knowledge of the financial condition of their mother, and of her inability to make a fair and equitable transfer to them, seems unavoidable.

"We may add that a purchaser from a fraudulent vendor must have acquired the land for value and without notice. If *feme* defendant did not pay value or purchased with full knowledge of the evil intent and fraudulent purpose of the vendor in making the conveyance to her, her title fails as to his creditors." *Bank v. Pack,* 178 N.C. 388, 100 S.E. 615.

If there appears more than a scintilla of evidence in support of plaintiffs' claim, the matter becomes a question for the jury. *James v. R. R.,* 236 N.C. 290, 72 S.E. 2d 682.

Considering the relationship of parent and child existing between grantor and grantees, the stipulation that at the time of the conveyance grantor owned no other property, the recital of consideration in the deed, the absence of internal revenue stamps, the uncontradicted evidence that Lena Gainer was indebted to plaintiffs at the time of the conveyance, and the plaintiffs' evidence as to the value of the property, we hold that there was sufficient evidence to carry the case to the jury.

Reversed.

STATE HIGHWAY COMMISSION v. WAYNE W. HEMPHILL AND WIFE, SYLVIA HEMPHILL; T. O. PANGLE, TRUSTEE; P. L. KING AND WIFE, MINNIE BELLE KING; FRANK KASEY.

(Filed 1 March, 1967.)

1. Appeal and Error § 46—

While the exercise of a discretionary power is not reviewable in the absence of a showing of abuse of discretion, the refusal to entertain a motion on the ground that the court is without discretionary power to do so is reviewable.

2. Pleadings § 24—

The Superior Court has inherent and statutory power to allow an amendment of a pleading or the filing of a pleading at any time, unless prohibited by some statutory act or unless vested rights are interfered with.

3. Constitutional Law § 6—

While the General Assembly has no power to deprive the judicial department of jurisdiction rightfully pertaining to it as a coordinate department of the State government, the General Assembly has the power to regulate procedure in all courts below the Supreme Court. Constitution of North Carolina, Article IV, § 12.

4. Statutes § 5—

A statute must be construed to effectuate the legislative intent.

5. Same—

Where acts of the legislature apply to the same subject, the statutes are to be reconciled if this can be done by any fair and reasonable intendment, but to the extent that they are necessarily repugnant the latter statute prevails.

6. Same—

A special or specific statute will be construed as an exception to a prior general statute to the extent of conflict.

7. Same—

Where the language of the legislature is plain and free from ambiguity, the definite and sensible meaning of the statute must be given effect.

8. Eminent Domain § 7—

G.S. 136-107 limiting the time for the filing of answer in condemnation proceedings instituted by the Highway Commission must be construed as an exception to the general power of the court to extend the time for the filing of pleadings, G.S. 1-152, so that the court has no discretionary power to allow the filing of an answer after the time limited in the condemnation statute.

9. Same—

A petition under G.S. 136-105 to withdraw the amount deposited by the Highway Commission as compensation cannot be construed as an answer filed by a landowner in the condemnation proceedings, even though the petition states that the value placed on the land by the Commission is

inadequate, since neither statute nor custom requires that the order served on the Director recite the allegations in the petition, and therefore such petition is not notice to the Highway Commission.

10. Pleadings § 6—

A petition filed by defendant in the cause cannot be construed as an answer when under the applicable procedure the petition is not served on plaintiff, either by statutory requirement or custom, since the objectives of pleadings are to develop and present the issues and to give the adverse party notice of the grounds of contest.

APPEAL by defendants from *Martin, S.J.,* 10 August 1966 Civil Session of BUNCOMBE.

The State Highway Commission, pursuant to the provisions of G.S. 136-19 and G.S. 136-103 *et seq.,* and pursuant to a resolution of said Commission duly passed, instituted proceedings to condemn and take for public use an estate or interest in land owned by defendants. Plaintiff Commission filed a complaint and Declaration of Taking and Notice of Deposit on 28 September 1964 and made a deposit of $300 with the Superior Court of Buncombe County. Defendant Sylvia Hemphill was served with summons on 8 October 1964, and defendant Wayne Hemphill was served on 10 October 1964.

On 8 June 1965, defendants, through their attorney, Harold K. Bennett, filed a petition pursuant to G.S. 136-105 to withdraw the amount deposited by the Highway Commission. The petition, *inter alia,* alleged:

> "4. That these defendants, petitioners, have not filed an answer in the above entitled action.
>
> "5. Your petitioners, defendants, aver and say that the estimate as to the value placed on said lands so appropriated and condemned in the amount of $300.00 is inadequate and does not represent just compensation. . . . and that your petitioners will within the time allowed by law, file appropriate answer showing the actual value of the lands condemned and appropriated and severance damages sustained to their remaining lands caused by said taking."

On 28 September 1965 Copeland, S.J., entered an order allowing defendants an extension of time through 27 December 1965 in which to file answer. By letter dated 14 October 1965 Mr. Bennett forwarded to defendants copy of order of Riddle, J., dated 6 October 1965, allowing him to withdraw as counsel. By letter dated 29 November 1965 the offices of Mr. Harold K. Bennett forwarded the file in the case to defendant Wayne Hemphill, and in the forwarding letter again advised that he immediately employ counsel to rep-

resent him, as time for filing answer would expire on 27 December 1965.

Answer was filed by defendants on 8 June 1966. On 13 June 1966 plaintiff filed motion to strike answer. Martin, J., entered an order striking defendants' answer. Defendants appeal from this order.

Attorney General Bruton, Deputy Attorney General Lewis, Trial Attorney J. Bruce Morton, and Associate Counsel Lamar Gudger for plaintiff Highway Commission.

Joseph C. Reynolds and Dennis J. Winner for defendants Wayne W. Hemphill and wife, Sylvia Hemphill.

BRANCH, J. The appellants and the appellee in their respective briefs submit that the questions for decision are:

1. Did the trial court err in stating that it had no discretion in allowing the defendants to answer in that the eighteen months allowed by N. C. Gen. Stats., Sec. 136-107, had expired?

2. The defendants filed a petition on June 8, 1965, which, among other things, stated that the amount deposited by the plaintiff did not represent just compensation. Is this sufficient to be taken as an answer within the meaning of N. C. Gen. Stats., Sec. 136-106 and Sec. 136-107?

Considering the first question, we are cognizant of the general rule that "(a) judgment or order rendered by a judge of the Superior Court in the exercise of a discretionary power is not subject to review by appeal to the Supreme Court in any event, unless there has been an abuse of discretion on his part." *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377. But if the exercise of a discretionary power of the Superior Court is refused upon the ground that it has no power to grant a motion addressed to its discretion, the ruling of the court is reviewable. *Gilchrist v. Kitchen,* 86 N.C. 20; *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919. It has also been long settled in this jurisdiction that the right to amend pleadings in a case and allow answers or other pleadings to be filed at any time is an inherent and statutory power of the superior courts which they may exercise at their discretion, *unless prohibited by some statutory enactment* or unless vested rights are interfered with. *Gilchrist v. Kitchen, supra; Harmon v. Harmon,* 245 N.C. 83, 95 S.E. 2d 355; G.S. 1-152.

G.S. 136-107 is as follows:

"Any person named in and served with a complaint and declaration of taking shall have twelve (12) months from the

date of service thereof to file answer. Failure to answer within said time shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner. For good cause shown and upon notice to the Highway Commission the judge may within the initial twelve months' period extend the time for filing answer for a period not to exceed an additional six (6) months."

This statute became effective July 1, 1960, except as to any actions pending. Article IV, Sec. 12, of the Constitution of the State of North Carolina provides, in pertinent part:

"The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; . . . and regulate by law, when necessary, *the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court,* so far as the same may be done without conflict with other provisions of this constitution." (Emphasis ours)

This section gave to the General Assembly power to regulate the proceedings in all the courts *"below the Supreme Court." Horton v. Green,* 104 N.C. 400, 10 S.E. 470. Thus the legislature was acting within its constitutional power to regulate proceedings in the Superior Court.

Many years ago the legislature enacted G.S. 1-152 (formerly C.S. 536), which provided:

"Time for pleading enlarged. — The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time."

Appellants rely on the broad authority given by this statute to judges of superior court along with the inherent powers of the court to sustain their position. In considering the two pertinent statutes, we apply the well-recognized rules of statutory construction that the intent of the legislature controls the interpretation of a statute,

Lockwood v. McCaskill, 261 N.C. 754, 136 S.E. 2d 67, and that when there are two acts of the legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment, but, to the extent that they are necessarily repugnant, the *latter shall prevail. Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187; *Martin v. Sanatorium,* 200 N.C. 221, 156 S.E. 849.

G.S. 136-107 is a specific statute regulating procedure only in condemnation proceedings under Article 136 of the General Statutes. "The special or specific statute circumscribes the effect of the prior general or broad act from which it differs, and operates to engraft thereon an exception to the extent of the conflict." 50 Am. Jur., Statutes, § 563, p. 564.

There is no necessity for construction of the statute as such since it plainly expresses the legislative purpose and meaning on its face. " 'When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly.' " *Long v. Smitherman,* 251 N.C. 682, 111 S.E. 2d 834.

G.S. 136-107 expresses a definite, sensible and mandatory meaning concerning procedure in condemnation proceedings under Chapter 136 of the General Statutes, so as to prohibit the exercise of the statutory or inherent power by the superior court to allow extension of time to answer after time allowed by said statute has expired.

Thus we hold that the trial court did not err by stating it had no discretion in allowing the defendants to answer in that the eighteen months allowed by N. C. General Statutes, Section 136-107, had expired.

As to the second question presented for decision, appellants contend that their petition, brought under G.S. 136-105 for disbursement of deposit, should be taken as an answer because it stated "That the amount deposited by the plaintiff did not represent just compensation." Appellants state in this petition that they have not filed answer and "that they will within the time allowed by law file appropriate answer." G.S. 136-105, the statute under which appellants filed their petition, provides in part: "No notice to the Highway Commission of the hearing upon the application for disbursement of deposit shall be necessary, but a copy of the order disbursing the deposit shall be served upon the Director of the Highway Commission." Neither the statute nor custom in practice requires the order served on the Director to recite allegations in the petition. Therefore, the adverse party, the appellee, is completely

without notice that appellants have stated in the petition "that the amount deposited did not represent just compensation." "Pleadings are designed to develop and present the precise points in dispute between parties. . . . In a more restricted and in the commonly accepted sense, the object of pleadings is to notify the opposite party of the facts which the pleader expects to prove so that he may not be misled in the preparation of his case." 41 Am. Jur., Pleading, § 3, p. 289.

This Court looks with favor upon the early joining of issues and prompt disposal of litigation. This can only be done when all parties are given prompt notice of the contentions and claims of their adversaries in the mode sanctioned by law. Our code has required that an answer be filed so as to admit or contain a general or specific denial of each material allegation of the complaint controverted by defendant. *Spain v. Brown,* 236 N.C. 355, 72 S.E. 2d 918.

"An answer is 'filed' when it is delivered for that purpose to the proper officer and received by him. Upon admission that answer has been filed it will be presumed that a copy thereof for the use of plaintiff had likewise been filed and mailed to him or his attorney of record, as required by G.S. 1-125." Strong: N. C. Index, Vol. 3, Pleading, § 6, p. 610.

In the instant case the petition filed by appellants gives no notice to appellee of their contentions or defenses so that it might marshal its evidence and apply the law so as to insure a fair and prompt disposal of the litigation.

Our Court, speaking through Merrimon, J., in the case of *McLaurin v. Cronly,* 90 N.C. 50, stated:

> "An important part of every code of laws is that settling and defining the methods of legal procedure. In this rest the life, vigor and efficiency of the law. It is, therefore, unwise to underrate its importance. It is of the highest moment to observe and uphold it with consideration and care. It is dangerous to allow and tolerate careless practice under procedure law. Such practice never fails to impair the due administration of justice, and sometimes results in defeating the ends of the law."

The equities of the case do not favor the appellants. In addition to the eighteen months which were available to them in which to file proper answer, they had the benefit of conscientious counsel who notified them of his intention to withdraw from the case by letter dated October 14, 1965, and furnished them with a copy of crder allowing him to withdraw from the case by letter dated October 29, 1965, in which he requested appellants to please pick up

their file in this case. By letter dated November 29, 1965, the law offices of Harold K. Bennett again urged appellants to employ counsel, reminded them that the time for filing answer expired on 27 December 1965. Thus the appellants had ample time to file answer and were strongly warned of the necessity for the employment of counsel and filing of pleadings.

The paper writing filed by appellants was not in name, intent or effect an answer.

We hold that the petition filed by appellants on 8 June 1965 is not sufficient to be taken as an answer within the meaning of G.S. 136-106 and 136-107.

The order entered by the trial court is

Affirmed.

RAYMOND CECIL, ADMINISTRATOR OF THE ESTATE OF LARRY STEPHEN CECIL, v. HIGH POINT, THOMASVILLE AND DENTON RAILROAD.

(Filed 1 March, 1967.)

1. Railroads § 5—

G.S. 136-20, giving the Highway Commission exclusive jurisdiction to require gates, alarm signals or other approved safety devices to be installed at railroad crossings does not include signs and notices of the existence of a crossing, and does not relieve a railroad company of the duty to give users of the highway adequate notice and warning of the existence of a grade crossing, even though it be one at which the Highway Commission has not required the erection of gates, gongs or signaling devices.

2. Same—

In an action to recover for wrongful death of a motorist killed in a railroad grade crossing accident, plaintiff may properly allege, after averring that the crossing was obstructed so that a train or its lights were not visible to a driver along a highway until he was within 75 feet of the crossing, that the railroad company maintained only one small crossing sign which was insufficient to give notice to a motorist of his approach to the crossing, and that the railroad company was negligent in failing to erect and maintain warning devices or signs commensurate with the dangerous nature of the crossing, and order striking such allegations is reversed.

ON *Certiorari* to review an Order of *Crissman, J.*, dated 15 June, 1966, entered at the Special Civil Session of GUILFORD County Superior Court, docketed and argued at Fall Term, 1966 as No. 685.

This case was here in 1965, and is now before us upon plaintiff's

exception to Judge Crissman's Order striking paragraphs 5 and 7 of the amended complaint.

The plaintiff alleges that his intestate, while driving his car at a grade crossing, was struck by defendant's train, causing his death.

He describes the highway approaching the crossing as down grade, bordered on both sides by banks, dense woods and undergrowth, so that a train or its lights are not visible to a driver until he is approximately 75 feet from the crossing.

The stricken paragraphs are as follows:

"5. At no time herein complained of was there any warning device of any nature or description whatsoever at said crossing designed to warn northbound motorists of the approach of a train. And, furthermore, there was no warning device of any nature or description designed to apprise northbound traffic of even the presence of defendant's tracks, with the exception of one small, round, yellow crossing sign located on the right or east shoulder of the road, approximately 338 feet south of the crossing, which sign gave no notice of the approach of any train and inadequate notice of even the presence of defendant's tracks.

"7. Defendant Railroad was advised of and knew, or in the exercise of reasonable care should have known of the conditions at and the nature of the subject grade crossing, and more particularly the total absence of any warning device of any nature or description designed to warn northbound motorists of the approach of a train or even the presence of the tracks, with the exception of the said one small crossing sign. Notwithstanding said conditions, defendant failed to erect any warning devices at said crossing to give the traveling public, and more particularly plaintiff's intestate, such advance notice of the approach of its trains to the crossing or of the presence of its tracks as would permit the motorist, and more particularly plaintiff's intestate, to bring his vehicle to a safe and timely halt before reaching the tracks. Plaintiff's intestate's death was due to, caused and occasioned by and followed as a direct and proximate result of the negligent and unlawful failure of defendant Railroad to erect and maintain warning devices, such as cross-arm signs, bells, flashing signals, sirens or watchmen, commensurate with the aforesaid nature of and conditions at said grade crossing."

Plaintiff appeals.

Schoch, Schoch & Schoch for plaintiff appellant.
Lovelace, Hardin & Bain for defendant appellee.
Craige, Brawley, Lucas & Horton, Maupin, Taylor & Ellis,

Simms & Simms, Poisson & Barnhill, Joyner & Howison, Amici Curiæ.

PLESS, J. In the previous decision in this case, 266 N.C. 728, 147 S.E. 2d 223, we dismissed the appeal of the plaintiff. In that action the lower court struck out a portion of the complaint in which it was alleged that the Railroad had been notified and warned that there were insufficient warning devices for said crossing and that it had negligently failed to erect any warning devices commensurate with the ultra hazardous character of the crossing. In dismissing the appeal we noted that plaintiff, if so advised, could move to amend his complaint so as to allege additional facts.

The amendment elaborates upon the former allegations and adds details — which we must construe literally. Upon the present question we cannot consider omissions or incomplete descriptions.

The plaintiff's position is succinctly stated in his brief: He "respectfully requests that the court reverse its interpretation of G.S. Sec. 136-20 as set forth in *Southern Railway v. Akers Motor Lines*, 242 N.C. 676 (1955) (hereinafter referred to as *'Akers'*). Appellant concedes that should the court fail to reverse the position taken in *Akers*, the judgment should be affirmed."

G.S. 136-20 is a lengthy statute entitled: "Elimination or Safeguarding of Grade Crossings and Inadequate Underpasses or Overpasses." Section B contains a provision that when the State Highway Commission shall determine that a crossing is dangerous to public safety that it may "in its discretion order said railroad company to install and maintain gates, alarm signals or other approved safety devices if and when in the opinion of the said Commission * * * the public safety and convenience will be secured thereby." Another section: (F) "The jurisdiction over and control of said grade crossings and safety devices upon the State Highway system herein given the Commission shall be exclusive."

The plaintiff does not allege that the Commission has ordered any kind of signal nor safety device at the crossing in question and, of course, does not allege any failure of the railroad company to comply with the orders of the Commission. The gravamen of the amended complaint is that, even in the absence of an order by the Commission, the Railroad was negligent in not installing signals and other devices because of the dangerous nature of the crossing. The court interpreted this statute in the *Akers* case, *supra*.

In that case the Railroad sued the Akers Motors Lines to recover for damages to its train when struck by a tractor-trailer owned by the defendant at a grade crossing. The alleged negligence of the defendant was in failing to keep a proper lookout, failure to

see the train approaching, etc. Akers denied its negligence and set up a cross-action in which it alleged that the Railroad was negligent in failing to maintain gates, gongs, or other safety devices at the crossing which the Railroad should have known to be dangerous. The jury upheld the defendant's cross-action and awarded damages against the Railroad and the plaintiff appealed.

In reversing the judgment against the Railroad, the Court said: "The defendants relied upon the failure to maintain gates or gongs or other like signaling devices at the crossing as evidence of its negligence. The court instructed the jury as to defendants' contentions in respect thereto and undertook to state the applicable law. This must be held for reversible error committed on the first issue as to the negligence of the defendants for the reason the court overlooked and failed to make reference to the provisions of G.S. 136-20. By the enactment of this section of the Code the Legislature has taken from the railroads authority to erect gates or gongs or other like signaling devices at railroad crossings at will and has vested exclusive discretionary authority in the State Highway and Public Works Commission to determine when and under what conditions such signaling devices are to be erected and maintained by railroad companies."

It will be noted that the statute refers only to gates, alarm signals or other approved safety devices in Section B. In Section F it refers only to "grade crossings and safety devices".

The *Akers* decision refers to "gates or gongs or other like signaling devices at the crossing", and says that, "The Legislature has taken from the railroads authority to erect gates or gongs or other like signaling devices."

In *State Highway Commission v. Clinchfield Railroad Company,* 260 N.C. 274, 132 S.E. 2d 595, the Highway Commission ordered the railroad to widen a crossing at its expense, the Superior Court upheld the Commission's order, and upon consideration by this Court of Clinchfield's appeal it was held that G.S. 136-20 was not applicable, the Court saying: "Careful consideration impels the conclusion G.S. 136-20 applies only to a factual situation for which provision is made, namely, the construction of an underpass or overpass or the installation and maintenance of gates, alarm signals or other safety devices."

Unless we are to interpret the phrase "safety devices" and "signalling devices" as including signs and notices of the existence of the crossing, G.S. 136-20 is not applicable here. We find nothing in either of the cases referred to above to justify that interpretation, and it is obvious that if the Legislature so intended it could easily

have added phrases such as "notices and signs" that would have avoided any question.

In *Cox v. Gallamore,* 267 N.C. 537, 148 S.E. 2d 616, Justice Lake, speaking for the Court, said: "G.S. 136-20, which empowers the State Highway Commission, under certain circumstances, to require a railroad company to install gates, alarm signals or other safety devices at a crossing, does not relieve the railroad from its common law duty to give users of a highway adequate warning of the existence of a grade crossing at which the Commission has not required such devices to be installed. *Highway Commission v. R. R.,* 260 N.C. 274, 132 S.E. 2d 595."

It is, therefore, apparent that in none of the cases above referred to has G.S. 136-20 been construed to place sole responsibility upon the Highway Commission to require notices and signs of the existence of a railroad crossing, nor to relieve the railroads of the duty referred to above.

In *Cox v. Gallamore, supra,* we approve the following language from 44 Am. Jur. Railroads, § 528: "* * * but the (railroad) company may, by its omission of some duties, subject itself to a liability for injury to one ignorant of a crossing, where it would not be liable if he knew thereof. One of these is the duty to give appropriate warning to persons using the highway of the presence of railroad crossings. The manner in which this duty shall be discharged varies according to the circumstances and surroundings, and ordinarily it is a question for the jury whether the duty in a particular case has been sufficiently performed. This is usually done by means of sign boards at or near the crossing indicating the presence of the crossing, and these are frequently required by statute."

"A traveler on a highway is not required to use ordinary care to learn whether or not a crossing is unusually dangerous, and the duty to employ all his senses to ascertain whether it is safe to cross a railroad does not exist until the traveler has knowledge or by the exercise of reasonable care should have had knowledge of the existence of the crossing." 75 C.J.S., Railroads § 768.

With that knowledge, he must remember that it is always train time at a railroad crossing — and the train has the right-of-way. Motorists must recognize that the tracks constitute a deadly warning that a train may be coming and that they must protect themselves by diligently using their senses for self-preservation.

The plaintiff's allegation that the only device warning of the presence of a railroad track was a "small, round, yellow crossing sign * * * 338 feet south of the crossing" and that the tracks are not visible to traffic * * * until the driver is approximately 75

feet from the tracks, brings him within the *Cox* case insofar as the pleadings are concerned. We are dealing only with them — not the merits. If additional signs, or one different from the one described, or knowledge of the crossing by the deceased should later appear a different result would conceivably arise.

The provisions of the two paragraphs under consideration in which the absence of adequate notice of the existence of the crossing is alleged is proper, and G.S. 136-20 has no bearing upon that feature of the questioned pleadings.

The other features of the pleadings alleging that there was no warning device of any nature to warn motorists of the approach of a train, and complaining of the "unlawful failure of the defendant railroad to erect and maintain warning devices such as crossarms, signs, bells, flashing signals, sirens or watchmen commensurate with the aforesaid nature and conditions at said grade crossing" are permissible at the present stage of the proceedings, since we are considering only the two paragraphs of the complaint under attack. Later developments may require answers to questions that have not yet been properly presented.

It is not necessary that the *Akers* case be reversed or modified at this time in view of this decision, and we express no opinion with reference thereto. The ruling of the lower court in striking the questioned pleadings is

Reversed.

JUAN F. TORRES (LOUISA M. TORRES), v. MICHAEL ZEB SMITH, A MINOR, BY HIS GUARDIAN AD LITEM, EARL J. FOWLER, AND ELIZABETH A. LOWRY.

(Filed 1 March, 1967.)

1. Automobiles § 54a—

A person authorized by the owner to drive a vehicle does not have authority to permit another to drive the vehicle in the absence of express or implied authority by the owner.

2. Automobiles § 54f— Evidence held to require peremptory instruction to answer issue of agency in the negative.

The evidence tended to show that the owner of a vehicle authorized her son to drive it to a filling station for further repairs, that the son transported a filling station employee from the filling station to the son's place of work and permitted the employee to drive the vehicle back to the filling station, and that the accident in suit occurred while the employee was thus driving the vehicle. There was no evidence that the owner

authorized the son to permit any other person to drive the vehicle. *Held:* While under G.S. 20-71.1 the issue of agency is properly submitted to the jury, the uncontradicted evidence requires the court to peremptorily instruct the jury to answer the issue of agency in the negative if they found the facts to be as all of the evidence tended to show, and a peremptory instruction to answer the issue in the negative if the jury should find that the employee was, at the time of the collision, on a mission of his own or on a mission for the service station, is insufficient, since such instruction relates to the liability of the principal for an agent's driving and does not present the owner's contention of want of agency.

APPEAL by defendant Elizabeth A. Lowry from *Martin, S.J.*, November, 1966 Civil "A" Session, BUNCOMBE Superior Court.

Each of the plaintiffs instituted a civil action against Michael Zeb Smith, driver, and Elizabeth A. Lowry, owner of a 1955 Ford which collided with a 1963 Dodge owned by the plaintiff, Juan F. Torres. Both Mr. and Mrs. Torres were injured. The accident occurred on Tunnel Road in Asheville.

The evidence disclosed that prior to the accident, Tunnel Road Atlantic Service Station had installed a new clutch and had returned the vehicle to Mrs. Lowry. The clutch did not function properly. Mrs. Lowry instructed her minor son William Lowry, a licensed driver, to return the vehicle to the Atlantic Station for further work on the clutch. William Lowry and his sister, Mrs. Owenby, worked at Holiday Inn, one-half mile from the service station. In obedience to his mother's instructions, the son, with his sister in the vehicle, proceeded to the Atlantic Station and called for Mr. Jones, who was not then at the station. Michael Zeb Smith, age 16, was a part-time employee of the station. He told Lowry that he helped Jones install the clutch and knew how to repair it. Lowry and his sister were due at the Inn for work. Arrangements appear to have been made for Smith and his friend, James Bailey, to go with Lowry and his sister to the Holiday Inn, leave them and take the Ford back for the repairs. Smith had a permit but did not have an operator's license. Bailey was a licensed driver. On the way back to the station the accident occurred. Smith was driving.

The record is silent as to whether the appellant's son turned the vehicle over to Bailey, a licensed driver, or Smith, who had only a permit to drive. However, Smith drove the vehicle from the Holiday Inn and as he attempted to enter Tunnel Road he had a collision with the Torres automobile. Both the owner and his wife sustained injuries.

The appellant filed an answer stating she had never seen nor known Michael Zeb Smith, the co-defendant. She denied she had authorized him to operate her vehicle or that she had authorized any-

one to give him such authority. She so testified, as did her son and daughter. Smith testified he did not know Mrs. Lowry.

The Court submitted the following issues:

"1. Was the plaintiff injured and damaged by the negligence of Michael Zeb Smith, as alleged in the complaint? ANSWER: YES

2. What amount, if any, is the plaintiff entitled to recover for damages to his automobile? ANSWER: $800.00

3. What damages, if any, is the plaintiff entitled to recover for personal injuries? ANSWER: $10,000.00

4. Was Michael Zeb Smith the agent, servant and employee of Elizabeth A. Lowry and about her business and within the course and scope of his employment for her at the time of the collision, as alleged in the complaint? ANSWER: YES."

Issues one, three and four were submitted in the companion case instituted against the same parties by Mrs. Juan F. Torres. The cases were consolidated and tried together. In the second case, the jury answered the issues in favor of Mrs. Torres and awarded her $2,000 for personal injuries.

From judgments entered in favor of the plaintiffs in accordance with the jury's findings, Mrs. Lowry excepted and appealed.

Meekins and Roberts by Landon Roberts for defendant appellant.

Loftin & Loftin by E. L. Loftin for plaintiff appellee.

HIGGINS, J. The appellant, Mrs Lowry, challenges the verdicts and judgments against her upon these grounds: (1) all the evidence is to the effect that co-defendant Smith was operating the Ford automobile without the knowledge, consent or permission and against the wishes of the appellant; (2) and if a showing that she was the owner makes out a *prima facie* case under G.S. 20-71.1, nevertheless all the evidence being to the contrary, the trial judge should have entered judgment of nonsuit or should have given the jury a peremptory instruction to answer the issues "No"; (3) if the Court's charge amounts to a peremptory instruction, the same is so restricted as to dilute, minimize and destroy its full benefit.

The critical issues in the cases are not unlike those involved in *Whiteside v. McCarson*, 250 N.C. 673, 110 S.E. 2d 295. The record fails to disclose evidentiary facts sufficient to make out a case of liability against the owner of the vehicle under the doctrine *respondeat superior*. But for G.S. 20-71.1, compulsory nonsuit for lack of evidence would be required. Upon a showing of ownership, the

artificial force of the *prima facie* rule under the above Section seems to permit a finding of agency. *Electric Corporation v. Aero Company,* 263 N.C. 437, 139 S.E. 2d 682. The plaintiffs' evidence does not negate agency. Hence, the statute is sufficient to repel the motion for nonsuit. *Dellinger v. Bridges,* 259 N.C. 90, 130 S.E. 2d 19; *Insurance Company v. Motors,* 240 N.C. 183, 81 S.E. 2d 416.

The evidence disclosed that the appellant did not know defendant Smith. She did not consent for him to drive her vehicle. She did not authorize her minor son or anyone else to consent for her. "Ordinarily one permittee does not have authority to select another permittee without specific authorization * * *", *Bailey v. Insurance Company,* 265 N.C. 675, 144 S.E. 2d 898; 5 A.L.R. 2d 566; 160 A.L.R. 1195, *et seq.* The evidence is to the effect the owner gave directions to her son to take the vehicle to the Atlantic Station for the repairs she had discussed with owner Jones. The son obeyed the instructions, took the vehicle to the garage for the repairs; Mr. Jones was not present and Smith said that Jones was in town and that he, Smith, had helped put in the clutch and knew how to repair it.

Smith stated he had only a permit and not an operator's license but that Bailey, his friend, had a driver's license and would help him return the Ford to the garage. Thereafter, the owner's son, with his sister, co-defendant Smith and Smith's friend Bailey in the vehicle, drove to the Holiday Inn. Thereafter, Smith took over and was on his way back to the garage when the accident occurred. Smith was operating the vehicle without authority of the owner who had not authorized her son or anyone else to turn her vehicle over to Smith, an unlicensed driver.

The evidence entitled the appellant to the peremptory instruction which this Court said should have been given in the *Whiteside* case, "to answer the agency issue, 'No,' if they find the facts to be as the evidence in behalf of the defendant-owner tends to show."

The Court actually charged:

> "The presumption which is raised by this statute is subject to being rebutted and set aside by other evidence in the case, and with respect to that, members of the jury, I will instruct you that if you believe the evidence in this case produced by the defendants, and find the facts to be as that evidence tends to show, that is that the defendant Smith was at the time of the collision on a mission of his own, or for the Clifford Jones Atlantic Service Station, then it would be your duty to answer that fourth issue No, and in the other case the third issue No."

The Court instructed the jury that if the defendant Smith was at the time of the collision on a mission of his own or for Clifford Jones Atlantic Service Station, then it would be the jury's duty to answer the fourth issue No (in Mr. Torres' case) and the third issue No (in Mrs. Torres' case). The vice in the instruction is the limitation which requires a "No" answer only upon the basis of a finding that Smith was on a mission of his own or on a mission for the Atlantic Service Station. The appellant's contention all along had been that she did not know Smith, she did not authorize him or delegate the authority to anyone to authorize him to operate her vehicle for himself, for the Atlantic Service Station, or for any other purpose. Any use he made of her vehicle was without her knowledge, consent or authority. From the charge as given, the jury may well have concluded that the agency of Smith to drive the Ford was established. Hence the appellant could be relieved of responsibility for his negligence only by a finding he was on a mission of his own or for Jones Atlantic Service Station. Such is the rule of liability for an agent. Here appellant denies the agency, and all the evidence except this statute supports her contention.

The Court should have charged the jury to answer the issue "No" if they found the facts to be as the evidence in behalf of the defendant owner tended to show, *Whiteside v. McCarson, supra.* The peremptory instruction actually given denied the appellant the full benefit of her testimony. This error entitles appellant to a

New trial.

STATE v. LOUIS ANTHONY LOGNER, DEFENDANT.

(Filed 1 March, 1967.)

1. Criminal Law § 71—

The intoxication of a defendant at the time of making incriminating statements does not render the statements incompetent when the trial court finds, upon supporting evidence, that at the time defendant was not intoxicated to such an extent as to render his statements involuntary.

2. Criminal Law § 107—

Ordinarily, the trial court is required to instruct the jury as to all essential elements of the offense charged and place the burden upon the State to prove each of such elements, and whether a deficiency in this respect is sufficient ground for a new trial must be determined in relation to the circumstances of each case.

3. Same—

The court's instructions to the jury made the question of guilt dependent upon whether defendant made incriminating statements attributed to him and whether he made such statements freely and voluntarily, but no where did the court charge the elements of the offenses or that the burden was on the State to satisfy the jury from the evidence beyond a reasonable doubt that defendant committed the acts constituting the offenses charged. *Held:* The failure of the court to define the offenses and properly place the burden of proof is prejudicial error.

4. Criminal Law § 71—

It is error for the trial court to charge the jury that the court had found that the incriminating statements attributed to defendant were freely and voluntarily made.

APPEAL by defendant from *Burgwyn, E.J.*, April 18, 1966, Regular Criminal Session of DURHAM, docketed and argued as No. 747 at Fall Term 1966.

Criminal prosecution on a two-count bill of indictment charging defendant (1) with feloniously breaking and entering a building (dwelling) occupied by one George G. Johnson, and (2) with the larceny of personal property of said George G. Johnson, to wit, a safe and contents, of the value of $250.00.

Evidence was offered by the State and by defendant.

The State offered the testimony of George G. Johnson tending to show that someone had cut the window screen and, through the window, had entered his dwelling at 2412 Indian Trail, Durham, N. C., and had taken and carried away from said dwelling his "small iron safe, about 2½ feet high, and about twenty-one (21) inches deep," the value of the safe and its contents being "around Two Hundred and some dollars"; and that, shortly after his return on Monday, November 9, 1964, from a week-end trip, he discovered his dwelling had been broken into and entered and the safe stolen.

Defendant was placed under arrest about 11:30 a.m. on November 18, 1964, by Detectives R. G. Morris and J. S. Hatley of the Durham Police Department, for operating a car while under the influence of intoxicating liquor.

The State proffered the testimony of Morris and Hatley as to incriminating statements of defendant after his arrest and while in their custody. Upon objection by defendant, the court conducted a hearing in the absence of the jury to determine the admissibility of the proffered testimony. The evidence at such hearing consisted of testimony as to the manner and extent defendant was advised as to his constitutional rights and as to the extent of defendant's intoxication at the time he was so advised and at the time he made the incriminating statements attributed to him. At the conclusion of such hear-

ing, the presiding judge, in the absence of the jury, made findings of fact to the effect defendant had been properly advised as to his constitutional rights and that defendant was not intoxicated to such extent as to render his incriminating statements involuntary.

Defendant's objections having been overruled, Morris and Hatley testified as to statements made by defendant with reference to the Johnson and other "safe jobs." According to their testimony: Defendant stated he had broken into and entered the Johnson dwelling; that he had taken and carried away the safe and its contents; and that, with the assistance of one or more other persons, he had "carried the safe to a wooded area off 70 East and busted it open." They testified that defendant, about 2:30 or 3:00 p.m. on November 18th, accompanied and directed them to the place where the abandoned safe was found.

Evidence offered by defendant tended to show that, at the time of his arrest and thereafter on November 18th, he was intoxicated to such extent he was not aware of being advised by the detectives as to his constitutional rights; that he did not consciously and voluntarily make any statement with reference to the Johnson case; that he did not know where Johnson lived and had not seen the safe referred to as the Johnson safe until it was exhibited at a former trial; and that if he made any of the incriminating statements attributed to him by said detectives, such statements were not in fact true.

The jury returned a verdict of "guilty as charged," and the court pronounced judgment imposing a prison sentence of not less than five nor more than seven years. Defendant excepted to said judgment and appealed.

Attorney General Bruton and Staff Attorney Vanore for the State.
Wade H. Penny, Jr., for defendant appellant.

BOBBITT, J. Defendant assigns as error the admission, over his objections, of the officers' testimony as to incriminating statements made by defendant.

According to the State's evidence, defendant, after his arrest on November 18, 1964, and while in the custody of Detectives Morris and Hatley, made incriminating statements relating both to the safe of McCracken Oil Company of Oxford, N.C., and to the safe of George Johnson. Defendant was tried at July 28, 1965 Special Criminal Session of Durham upon an indictment charging safe-cracking and safe robbery in connection with the McCracken Oil Company safe. He was found guilty as charged and Judge Bickett, who presided at the trial, pronounced judgment imposing a prison

sentence. Upon defendant's appeal, this Court found "no error." *S. v. Logner,* 266 N.C. 238, 145 S.E. 2d 867.

The record on appeal in said prior prosecution, as appears from the preliminary statement and opinion of Sharp, J., shows that, in said trial before Judge Bickett, the testimony of Morris and Hatley was substantially the same as their testimony in the present case as to the conditions and circumstances under which defendant made the statements attributed to him; that defendant objected to their testimony on substantially the same grounds asserted herein; and that Judge Bickett, based on findings of fact made by him, overruled defendant's objections and admitted the testimony in evidence. This Court held the evidence presented at the *voir dire* hearing was sufficient to support Judge Bickett's findings and rulings. It has come to our attention that, in a *habeas corpus* proceeding in the United States District Court for the Middle District of North Carolina, District Judge Gordon, after conducting a plenary hearing, reached the opposite conclusion and ordered the discharge of defendant unless the State retried him within six months. *Logner v. State of North Carolina,* 260 F. Supp. 970. While we regret this conflict, we adhere to the views expressed by Sharp, J., in *S. v. Logner, supra,* and for the reasons there stated we approve Judge Burgwyn's findings and rulings.

However, for reasons stated below, we are constrained to hold defendant is entitled to a new trial.

Defendant contends, based on sufficient exceptions and assignments of error, that the court did not declare and explain the law as to the elements of the criminal offenses charged in the bill of indictment. The judge instructed the jury in substance as follows: After reading the material portions of each count in the bill of indictment, proper instructions were given as to the presumption of innocence and as to the State's burden to establish guilt beyond a reasonable doubt. The court gave instructions as to the applicable law in determining the weight, if any, to be given the testimony relating to statements attributed to defendant. The court then reviewed the conflicting contentions as to whether defendant made the statements attributed to him by Morris and Hatley and as to the weight to be given the testimony relating to defendant's intoxication. According to the record, the court failed to define or otherwise explain the essential elements of the crimes charged in the bill of indictment or to state the facts the State was required to establish beyond a reasonable doubt to warrant verdicts of guilty.

The State must prove beyond a reasonable doubt every essential element of the crime charged, and it is incumbent upon the trial judge to so instruct the jury. *S. v. Cooper,* 256 N.C. 372, 124 S.E.

2d 91, and cases cited. An instruction as to the essential elements of the crime is a necessary part of such charge. Whether a deficiency in this respect is sufficient ground for a new trial must be determined in relation to the circumstances of each case. *S. v. Fulford,* 124 N.C. 798, 32 S.E. 377. In the present case, we are of the opinion, and so hold, that the failure of the court to give instructions as to the essential elements of the crimes charged and as to the facts the State was required to establish beyond a reasonable doubt to warrant verdicts of guilty constitutes prejudicial error.

The court's final instruction, to which defendant excepted, sufficiently indicates the error. The court's final instruction was as follows:

"If you are satisfied beyond a reasonable doubt that he made those statements as testified to by the officer, and that he did so freely and voluntarily, and that his mind was clear enough at least for him to know what he was talking about, you would find him guilty as charged in the bill on both counts. If you have a reasonable doubt about his having made any statements as testified to by the officers, you would find him not guilty or if you are satisfied beyond a reasonable doubt that he made the statements, and however, are not satisfied beyond a reasonable doubt that he knew and had enough mental acumen left in his mind to speak the truth about the matter and to know what he was talking about, you would find him not guilty."

In the quoted instruction, guilt is made to depend upon whether defendant made the statements attributed to him by Morris and Hatley and, if so, whether he made them (1) freely and voluntarily and (2) with knowledge of their truth or falsity, rather than upon whether defendant committed the crimes charged in the bill of indictment. We find no instruction charging in substance that, before the jury could return a verdict of guilty on the first count, the State must satisfy the jury from the evidence beyond a reasonable doubt that defendant broke into and entered the dwelling of George Johnson in early November 1964 with intent to commit the felony of larceny therein, or that, before the jury could return a verdict of guilty on the second count, the State must satisfy the jury beyond a reasonable doubt that defendant unlawfully took and carried away George Johnson's safe from said dwelling with the felonious intent of appropriating it to his own use and of depriving its true owner permanently of the use thereof.

While a new trial is awarded on the grounds stated above, it appears that the judge included in his instructions to the jury a statement that "the court has ruled that the confession or statement, if one was made by the defendant as testified to by the officers, was

freely and voluntarily made on his part without compulsion or duress and without reward, or hope of reward." Defendant's exception and assignment of error with reference to this excerpt from the charge are not brought forward in his brief. However, it seems appropriate to call attention to certain recent decisions of this Court. "If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury." *S. v. Walker,* 266 N.C. 269, 145 S.E. 2d 833. It is error for the judge to instruct the jury that he has ruled or determined that the statements, if any, attributed to defendant, were made by defendant freely and voluntarily. *S. v. Barber,* 268 N.C. 509, 151 S.E. 2d 51.

For prejudicial error in the charge, defendant is awarded a new trial.

New trial.

STATE v. CHARLES SUMNER, JR.

(Filed 1 March, 1967.)

1. Criminal Law § 118—

While a verdict is not complete until accepted by the court, if the jury returns a verdict that is permissible under the charge and complete in itself, even though it contains surplusage, the court must accept it.

2. Same; Assault and Battery § 17—

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, a verdict of guilty of "assault with intent to harm but not to kill" is a complete and sensible verdict, and supports judgment for a simple assault, the words "without intent to kill but with intent to harm" being treated as surplusage.

3. Same; Criminal Law § 116—

Where the jury in a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, returns a verdict of guilty of "assault with intent to harm but not to kill", it is error for the court to again charge on the permissible verdicts and require the jury to redeliberate, and judgment entered upon the jury's later verdict of assault with a deadly weapon must be vacated and the cause remanded for judgment on the verdict first tendered by the jury.

APPEAL by defendant from *Gwyn, J.,* June 13, 1966 Criminal Session, ROCKINGHAM Superior Court.

In this criminal prosecution the defendant was charged with a felonious assault on Howard Wayne Eagle with a deadly weapon, to-wit: a knife, with the felonious intent to kill and murder the said Howard Wayne Eagle inflicting serious injury, not resulting in death.

Charles Sumner, Jr., and Howard Wayne Eagle were inmates of "The Prison Camp of Rockingham County." The State's evidence tended to show the defendant stabbed Eagle in the back with a knife, inflicting an injury about one inch long and sufficiently deep, "when his heart beat the blood would 'oogle' out." The fight developed over a contention that Eagle had "turned State's evidence." The defendant testified, ". . . I noticed that he had a knife in his left hand. . . . I grabbed Howard Wayne Eagle's arm and twisted it behind his back and shoved him away from me. I did not see the knife any more."

The court charged the jury that it might return one of these possible verdicts: (1) guilty of an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death; (2) guilty of an assault with a deadly weapon; (3) guilty of a simple assault; (4) not guilty. The jury returned this verdict: "Guilty of an assault with intent to harm but not to kill." The court repeated the instructions as to four possible verdicts and ordered the jury to retire. The jury returned this verdict: "Guilty of assault without intent to kill but with intent to harm."

"Court: You make no mention of a weapon."

"Foreman: Yes, sir."

"Court: I am going to ask the possible verdicts in this case be typed up in issue form and submitted to the jury."

The jury was recalled.

"Court: Members of the jury I have had the possible verdicts in this case typed up and prepared in issue form and I am going to ask you to take this into the jury room with you and please check the one which correctly reffects your verdict."

After further deliberation the jury returned this verdict: "We find the defendant guilty of assault with a deadly weapon without intent to kill but with intent to injure." The court ordered the verdict recorded as last returned and imposed a prison sentence of two years to begin at the expiration of other sentences the prisoner was serving. The defendant excepted and appealed.

T. W. Bruton, Attorney General, Millard R. Rich, Jr., Assistant Attorney General for the State.

Benjamin R. Wrenn, Court-appointed Attorney for Charles Sumner, Jr., appellant.

HIGGINS, J. The defendant contends the court committed error in refusing to accept the jury's verdict as first returned: "Guilty of assault with intent to harm but not to kill." He contends the verdict as first returned, when properly interpreted is a conviction of a simple assault, nothing more, and that "without intent to kill but with intent to harm" could add nothing to the charge and hence could add nothing to the verdict. The expression should be treated as surplusage.

When the surplus words which add nothing to the meaning are removed, the verdict is clear, free from ambiguity and uncertainty, and meets the test of a proper verdict. It should have been accepted by the court. *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651. Twice the jury specifically excluded the intent to kill, and on neither occasion did it include the use of a weapon. The third attempt included the deadly weapon only after the court called the oversight to their attention.

The question then became one whether the court had the power to reject the verdict and to re-submit the case to the jury. "When and only when, an incomplete, imperfect, insensible, or repugnant verdict, or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict." *State v. Perry,* 225 N.C. 174, 33 S.E. 2d 869; citing *State v. Noland,* 204 N.C. 329, 168 S.E. 412; *State v. Bazemore,* 193 N.C. 336, 137 S.E. 172; *State v. McKay,* 150 N.C. 813, 63 S.E. 1059; *State v. Arrington,* 7 N.C. 571. To the foregoing may be added, *State v. Lewis,* 256 N.C. 430, 124 S.E. 2d 115, and *State v. Wilson,* 218 N.C. 556, 11 S.E. 2d 567.

When the second attempt at a verdict was announced, Judge Gwyn remarked, "You make no mention of a weapon." The foreman: "Yes, sir." Thereafter, Judge Gwyn refused to accept the second attempt and went to great pains to assure the jury that his having mentioned a weapon should have no bearing whatever on reaching a verdict which he directed them to return after further deliberation. However, when a proper verdict is once returned into court it is beyond the power of the judge to recommit the issue to the jury. While the general rule is that a verdict is not complete until it is accepted by the court, *Bundy v. Sutton,* 207 N.C. 422, 177 S.E. 420; *State v. Snipes,* 185 N.C. 743, 117 S.E. 500, nevertheless the rule seems to be that if a proper verdict is returned, one that is permissible under the charge and complete in itself, even though it contains surplusage, the court should have accepted it and directed its entry into the records as the verdict of the jury. This rule was first stated by Taylor, C.J., in *State v. Arrington,* 7 N.C. 571: "I

think this course of proceeding is fit to be imitated here, whenever a prisoner, either in terms or effect, is acquitted by the Jury, and that in all such cases the verdict should be recorded. . . . The verdict first returned ought to have been recorded; and it ought to be done now, *valeat quantum valere potest,*" [A liberal translation, "It should have that effect now."] *State v. Arrington* has been cited with approval by this Court 20 times and has been cited in other jurisdictions. In effect the verdict first returned in the instant case was equivalent to a verdict of not guilty as to the charge of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. It was likewise equivalent to a verdict of not guilty of assault with a deadly weapon. The verdict excluded the intent to kill. It failed to include the use of any weapon. We conclude that nothing is left but a verdict of guilty of a simple assault.

In disposing of this case we use the language of this Court in *Perry:* "The judgment entered is vacated and the cause is remanded to the end that the court below may (1) strike the verdict entered, (2) record the one first tendered by the jury, and (3) pronounce judgment on the verdict thus recorded."

Error and remanded.

F. T. FLEMING, SR., v. EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN.

(Filed 1 March, 1967.)

1. Insurance § 64—

Provisions of a liability policy to the effect that insurer would not be liable for injury or damage inflicted by insured until after insured's liability had been determined by judgment or by written agreement of the insured, insurer and the claimant, are valid and preclude recovery against insurer in the absence of such judgment or agreement or a waiver thereof.

2. Same—

Evidence merely that some person in liability insurer's claim department answered claimant's telephone call and promised that insurer would pay the bills for repairs to and loss of time of claimant's vehicle is insufficient to show a waiver by insurer of its policy provision requiring as a condition precedent that insured's liability be established by judgment or by written agreement of the parties, there being no evidence that the person answering the telephone in insured's claim department was acting within the scope of her authority or that her promise was supported by consideration or that claimant had surrendered any right in reliance upon her promise.

3. Principal and Agent § 5—

A person dealing with a known agent must be reasonably diligent to ascertain whether the agent is acting within the scope of his authority, and there is no presumption that one who answers the telephone in the business office of the principal may waive verbally provisions of the principal's written contract in direct violation of its terms, or otherwise bind the principal in matters of importance, and the burden of showing the agent's authority to waive written provisions of a contract is upon the party asserting such waiver.

APPEAL by plaintiff from *Falls, J.,* at August 1966 Term, of HENDERSON Superior Court.

Plaintiff brought suit against the defendant to recover upon an alleged oral agreement whereby the defendant agreed to reimburse the plaintiff the sum of $759.80 for cost of repairing plaintiff's tractor and the additional sum of $1,600 for loss of the use of the tractor.

The plaintiff's evidence tended to show that the defendant had issued to Riegel Textile Mills, Inc., a policy of insurance in which the defendant agreed to pay all claims for which the Riegel Textile Mills became liable arising out of the ownership and negligent operation of its motor vehicles; that on 18 May, 1965, while the policy was in full force and effect, that Riegel's truck negligently damaged the tractor of the plaintiff; that the plaintiff later called the office of the defendant in Charlotte, asked to speak to someone in the claims department about an accident and, thereupon, talked with Mrs. B. Graham, who worked in the claims department of defendant.

Plaintiff's evidence tended to show that after looking into the matter Mrs. Graham said to "have the truck fixed and they would pay the bills — and pay the lost time on the truck"; that the cost of repairs was $759.80; that it took 16 days to complete the repairs, during which time the plaintiff rented a tractor at a cost of $100 a day. Plaintiff's evidence was to the effect that later his son went to Charlotte to try to collect the bill, and that Mrs. Graham said "she was sorry but they could not pay the bill."

During the presentation of plaintiff's evidence he introduced the insurance policy issued by the defendant to Riegel Textile Mills, Inc., which included the following provisions:

"*Action Against Company.* No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. Any person or organization or the legal representative thereof

who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability. * * *

"*Changes.* Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any rights under the terms of this policy; nor shall the terms of this policy be waived or changed; except by endorsement issued to form a part of this policy, signed by an executive officer of the company."

The plaintiff offered no evidence as to the authority of Mrs. Graham other than that she worked in the claims department of the defendant.

The defendant offered no evidence and at the conclusion of plaintiff's evidence moved for judgment as of nonsuit, which motion was allowed.

The plaintiff appealed.

Redden, Redden & Redden for plaintiff appellant.
William J. Cocke, Boyd Massagee for defendant appellee.

PLESS, J. The obligation of Riegel Textile Mills to pay the plaintiff has not been determined either by judgment, or "by written agreement of the insured, the claimant and the company". Under the terms of the policy the above is a condition precedent to any claim or action against the defendant. It also provides that the terms of the policy cannot be "waived or changed, except by endorsement issued to form a part of this policy, signed by an executive officer of the company".

In *Muncie v. Ins. Co.*, 253 N.C. 74, 116 S.E. 2d 474, in which the plaintiff was seeking to hold the defendant under an automobile liability policy, the Court said where a provision of the policy is valid, the parties are entitled to have it enforced as written, and "this Court has consistently held that plaintiff has the burden of showing that he has complied with those conditions precedent to his right to maintain his action"; and "the general rule requiring plaintiff to establish compliance with contractual conditions precedent has general recognition". It also holds that "the general rule imposing on plaintiff the burden to establish his compliance with conditions precedent to the maintenance of his action has been frequently applied in actions on liability policies by courts of sister

States". Fourteen North Carolina cases and more than a dozen from other States are cited to substantiate the above.

But the plaintiff contends that the defendant entered into a verbal agreement to pay which gave rise to an action in favor of the plaintiff to enforce it. While he does not plead in technical terms a waiver of the provisions of the policy, his position, if sustained, would have that result. Thus, unless the plaintiff can offer evidence waiving by other means the provisions of the policy, he cannot prevail.

He seeks to prove this by an alleged statement of a lady in the claims department of the defendant that they would pay the bills for having the plaintiff's truck fixed, and that they would pay for another tractor to do the hauling while the vehicle was being repaired. The evidence is completely silent as to the position of Mrs. Graham with the defendant company. There is no presumption that one who answers the telephone in a business office may waive the provisions of an insurance policy in direct violation of its terms, nor otherwise bind the employer in matters of importance.

"A third person dealing with a known agent may not act negligently with regard to the extent of the agent's authority or blindly trust the agent's statements in such respect. Rather, he must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of his powers. The mere opinion of an agent as to the extent of his powers, or his mere assumption of authority without foundation, will not bind the principal; and a third person dealing with a known agent must bear the burden of determining for himself, by the exercise of reasonable diligence and prudence, the existence or nonexistence of the agent's authority to act in the premises." 3 Am. Jur. 2d, Agency § 78.

In his brief the plaintiff cites a number of North Carolina cases as well as other authorities to the effect that an agent of an insurance company may by his acts or declarations waive certain provisions of the policy. An examination of the authorities cited shows, however, that these usually refer to requirements as to proof of loss, filing them on time, and other similar technicalities. In all instances cited wherein a waiver results, it requires that if the insurer "through the conduct of an agent acting within the scope of his authority" cause the third party to lose a substantial position, etc., the insurer may be bound.

In *Williams v. Highway Comm.*, 252 N.C. 514, 114 S.E. 2d 340, the plaintiffs sought to introduce a statement made by an employee of the defendant in regard to damages which was excluded by the lower court. Winborne, C.J., speaking for the Court, said: "The extra-judicial declarations were not competent to prove the

agency of the declarant. * * * Even if it be conceded that declarant was respondent's agent, there was no showing that the quoted statements were within the scope of authority of declarant, and the burden of so showing was on petitioners. *Fanelty v. Jewelers*, 230 N.C. 694, 55 S.E. 2d 493; *Sledge v. Wagoner, supra.*"

Here we have nothing more to show agency than that Mrs. Graham answered the telephone and the plaintiff has noticeably failed in the necessary requirement of showing that she was acting within the scope of her authority.

The record does not indicate any consideration moving to the defendant for the alleged admission of liability by Mrs. Graham, and the plaintiff has surrendered no right in the transaction. We can find nothing in this record to prevent the plaintiff from suing Riegel and establishing its negligence, (which would eventually result in liability on the part of the insurer) if the evidence as to the collision will permit.

We are of opinion that the action of the lower court in sustaining the motion for judgment as of nonsuit was correct, and it is hereby

Affirmed.

ASSOCIATES FINANCIAL SERVICES CORPORATION v. EARL WELBORN, T/A HILLSIDE POULTRY FARM.

(Filed 1 March, 1967.)

1. Pleadings § 12—

Upon demurrer, a complaint will be liberally construed in favor of the pleader, and the demurrer should be overruled unless the pleading is wholly insufficient or fatally defective.

2. Chattel Mortgages and Conditional Sales § 17—

Provision in a conditional sales contract for private sale of the chattel after default and repossession, is not contrary to statute or public policy of this State, and is valid; nevertheless, the seller or his assignee must act promptly and in good faith and use every reasonable means to obtain the full value of the property.

3. Chattel Mortgages and Conditional Sales § 18— Complaint held sufficient to state cause of action for deficiency judgment.

In this action by the assignee of a conditional sales agreement to recover a deficiency judgment, the complaint alleged that plaintiff repossessed the property under the terms of the agreement and at the request of the purchaser, and deficiency after credit for all payments and set-offs. Plaintiff attached to the complaint the agreement which provided for repossession upon default and for public or private sale, and an account showing the value assigned the property by plaintiff at the time of repossession, with adjustments for gain and loss on the resale of the property. *Held:* The complaint does not admit that plaintiff, upon repossessing the property, exercised dominion as owner, and is sufficient, as against demurrer, to state a cause of action for a deficiency judgment.

APPEAL by plaintiff from *Gambill, J.*, in chambers at WILKES on January 8, 1966. This appeal was docketed in the Supreme Court as Case No. 444 and argued at the Fall Term 1966.

Action under G.S. 45-21.38 to recover a deficiency judgment for the balance due on the purchase price of personal property sold under a conditional sales agreement. Defendant demurred to the complaint, which contains the following allegations:

On January 9, 1963, defendant executed and delivered to Motorola Communications and Electronics, Inc. (Motorola) a conditional sales contract to secure a balance of $12,115.20 due on electronic equipment, described therein, which he had purchased from Motorola. The balance due was payable in monthly installments of $201.92. (A copy of the conditional sales agreement is attached to the complaint as Exhibit A.) Thereafter, on March 27, 1963, for value, Motorola assigned this contract to plaintiff. On April 24, 1964, plaintiff repossessed the equipment *under the terms of said conditional sales contract and at the express request of defendant.* The contract provided, *inter alia,* that if defendant defaulted in the payment of any installment, Motorola might declare the entire

balance due, retake the equipment, and sell it *at public or private sale* without demand for performance and without notice to the public or defendant. If the proceeds of the sale were insufficient to pay the cost of retaking and selling the property and to satisfy the debt due Motorola, it might recover the deficiency from defendant.

At the time of the retaking, plaintiff assigned a value of $5,000.00 to the equipment covered by the conditional sales agreement.

On March 22, 1965, plaintiff stated defendant's account as follows:

Original Contract Price	$13,135.88
Less: Down Payment	1,020.68
	$12,115.20
Payments Received	2,221.12
	$ 9,894.08
Unearned Income	1,679.85
	$ 8,214.23
Retaken Equipment	5,000.00
	$ 3,214.23
Plus: Retaking Costs	104.72
NET CONTRACT DEFICIENCY	$ 3,318.95
Plus: Loss on Resale of Retaken Equipment	394.42
	$ 3,713.37
Less: Gain on Resale of Retaken Equipment	150.88
ADJUSTED CONTRACT DEFICIENCY	$ 3,562.49

(This account was attached to the complaint as Exhibit B.)

Plaintiff prayed judgment in the amount of $3,562.49 with interest thereon from April 24, 1964, until paid.

Defendant demurred to the complaint on the ground that plaintiff had failed to allege (1) that defendant, at the time plaintiff repossessed the equipment, had defaulted in the payment of any sum due under the contract; (2) the manner in which plaintiff had disposed of the repossessed equipment; and (3) that plaintiff and its assignor had complied with the terms of the conditional sales contract. Judge Gambill sustained the demurrer and dismissed the action. Plaintiff appeals.

Fairley, Hamrick, Hamilton & Monteith by Laurence A. Cobb for plaintiff.

McElwee & Hall for defendant.

SHARP, J. In order to recover a deficiency judgment under a conditional sales contract as authorized by G.S. 45-21.38, plaintiff must allege and prove facts showing (1) that defendant executed and delivered to him or his assignor the contract upon which he sues; (2) that defendant is in default under the terms of the contract; (3) lawful repossession and sale of the property or facts establishing the impossibility of such repossession and sale; (4) the application of the proceeds of the sale; and (5) the amount of the deficiency.

In assaying a demurrer, the rule is that the pleader must be given "every reasonable intendment in his favor" and that a complaint will be upheld "unless the pleading is wholly insufficient or fatally defective." 3 Strong, N. C. Index, Pleadings § 12 (1960). Thus assessed, plaintiff's allegations that it repossessed the equipment under the terms of the conditional sales contract, and at defendant's request, coupled with the allegation that defendant owes a balance of $3,562.49 under the contract, justify an inference that defendant had defaulted in his payments at the time plaintiff repossessed the property, or that there had been an anticipatory breach of contract by defendant. Defendant contends, notwithstanding, that plaintiff has failed to allege that it advertised and sold the repossessed equipment as provided by G.S. 45-21.16 *et seq.;* that, on the contrary, Exhibit B shows that plaintiff took possession of the property, treated it as its own, assigned an arbitrary value to it, and credited defendant with that amount. Upon this premise, defendant argues that this case is controlled by *Cooperative Exchange v. Holder,* 263 N.C. 494, 139 S.E. 2d 726, and that the court's order sustaining the demurrer and dismissing the action should be upheld.

In *Cooperative Exchange v. Holder, supra,* defendant voluntarily released to the plaintiff the tractor upon which he had executed a conditional sales agreement to secure the balance of the purchase price. In the event of a default, the contract authorized the plaintiff to sell the tractor *only* at public auction. The plaintiff, after repossessing it, kept and used the tractor as its own for nearly a year before selling it at a private sale. Thereafter, it sued for a deficiency judgment. The trial court nonsuited the case and, upon appeal, this Court affirmed its judgment under the rule that where the mortgagee "assumes to deal with the estate as its absolute owner, and conveys it to another, it proves a merger." *Id.* at 496, 139 S.E. 2d 728.

The allegations in the complaint in suit, standing alone, are not sufficient to establish that plaintiff dealt with the equipment as its absolute owner. Exhibit B, a statement of its account against defendant as of March 22, 1965, is not *prima facie* an admission that plaintiff had exercised absolute ownership over the property. On the

contrary, it seems to indicate that at the time of repossession, for bookkeeping purposes, plaintiff gave the property a value of $5,000.00, a figure to be adjusted up or down when the property was finally sold. Exhibit B shows two such "adjusting entries" upon resales of the property. Presumably these sales were private sales; there is no suggestion that they were public. The conditional sales contract, however, authorized plaintiff to sell the equipment at either public or private sale upon defendant's default.

The Uniform Commercial Code, which becomes effective in this State on July 1, 1967, specifically authorizes the disposition of collateral by either public or private proceedings. G.S. 25-9-504. As defendant points out, Article 2-A, Chapter 45 of the General Statutes, which governs the sale in suit, makes no mention of a private sale of property under a conditional sales contract. Neither, however, does it declare void the parties' stipulation that upon the debtor-vendee's default, the creditor-vendor may sell the property at private sale. "In the absence of any statute to the contrary, a power of sale in a chattel mortgage may provide for either a private or public sale of the mortgaged chattel. . . ." 15 Am. Jur. 2d, Chattel Mortgages § 219 (1964). A chattel mortgagee or his assignee authorized to sell at a private sale may not sell at any price he pleases. He must act promptly, in good faith, and use every reasonable means to obtain the full value of the property. If he fails to do so, the mortgagor is entitled to credit for the deficiency. *Id.* § 223. "Of course, where the mortgage so stipulates, the sale must be a public one, unless the mortgagor subsequently waives the requirement. On the other hand, unless such agreement is violative of statute or public policy, or is fraudulent as to third persons, where authorized by the mortgagor, the property may be sold at private sale. . . ." 14 C.J.S., Chattel Mortgages § 376 (1939). *Accord, Finance Corporation v. Smith,* 42 Wyo. 380, 295 Pac. 273, 73 A.L.R. 851; *Harbour-Longmire Co. v. Reid,* 124 Okla. 77, 254 Pac. 29; *Campbell v. Eastern Seed & Grain Co.,* 109 S.W. 2d 997 (Tex. Civ. App., 1937); *Crocker v. Associate Investment Co.,* 56 Ohio App. 136. 10 N.E. 2d 153; *Ashley & Rumelin v. Lance,* 88 Ore. 109, 171 Pac. 561; *Reynolds v. Thomas,* 28 Kan. 810. See Annot., Conditional Sale—Resale, 49 A.L.R. 2d 15 at 54 (1956).

A stipulation in a conditional sales agreement that, upon the vendee's default, the holder may sell the property described therein at private sale violates no statute or public policy of this State. The statement in the North Carolina Comment to the Uniform Commercial Code appended to G.S. 25-9-504. (Vol. 1D of the General Statutes of North Carolina at page 591) that "under prior law . . .

a public sale had to be held," is not correct, and the authorities cited do not sustain this assertion.

After applying our rules of construction, we are constrained to hold that plaintiff has stated a cause of action for a deficiency judgment which withstands defendant's demurrer. Concededly, plaintiff has made a minimal statement, and we note that Exhibit B omits the date of the sales referred to therein. Defendant's present remedy, however, is a motion under G.S. 1-153 that plaintiff be required to make its complaint more definite and certain, or under G.S. 1-150 for a bill of particulars.

When the facts are all disclosed, by pleadings or evidence, they may defeat plaintiff's action, but plaintiff has not yet alleged or proved itself "out of court." The judgment of the court below is

Reversed.

APPLIANCE BUYERS CREDIT CORPORATION v. JOSEPH HERBERT MASON, GEORGE D. LEWIS AND ROSALIE S. LEWIS.

(Filed 1 March, 1967.)

1. Chattel Mortgages and Conditional Sales § 17—

Provision in a conditional sales contract for private sale of the chattel after default and repossession, is not contrary to statute or public policy of this State, and is valid; nevertheless, the seller or his assignee must act promptly and in good faith and use every reasonable means to obtain the full value of the property.

2. Same; Chattel Mortgages and Conditional Sales § 18—

In an action by the mortgagee or his assignee to obtain deficiency judgment after repossession and private sale of the property pursuant to the terms of the agreement, the sale not being to the mortgagee or one in privity with him, the burden rests upon the mortgagor to prove as matters of defense his allegations that the property was not sold for its fair market value, that the property was returned to the mortgagee in full satisfaction of the debt, or that the value of the chattel then exceeded the debt, and plaintiff may not be nonsuited on such affirmative defenses.

APPEAL by plaintiff from *Mintz, J.*, October 1966 Session of CARTERET.

Action under G.S. 45-21.38 to recover a deficiency judgment in the amount of $2,237.39, with interest from October 15, 1963, for the balance due on the purchase price of personal property sold under a conditional sales agreement. Plaintiff alleged and offered evidence tending to show:

Defendant Mason, on September 27, 1962, bought from Parrett Manufacturing Company eight Nassau golf carts. For the unpaid balance of the purchase price he executed a note, secured by a conditional sales contract, in the amount of $5,609.39, payable, on a seasonal basis, in eleven installments. The contract provided, *inter alia,* that if the buyer defaulted in the payment of any installments, seller might "thereupon sell said merchandise at public or private sale and apply the proceeds, after deducting expenses and liens, to the payment of said indebtedness, and pay the surplus, if any, to Buyer." In case of a deficiency, buyer agreed to pay the same at once.

For the purpose of inducing Parrett Manufacturing Company to sell the golf carts to Mason, defendants Lewis executed and delivered to Parrett a separate instrument in which they unconditionally guaranteed that Mason would pay the note and perform all obligations "arising out of or in connection with the foregoing purchase of equipment." They further consented that the conditional sales contract might be amended or superseded and that indulgences might be granted Mason without affecting their liability under the guaranty. Mason also signed the guaranty along with defendants Lewis.

Parrett negotiated the note and assigned the conditional sales agreement to plaintiff before the first installment became due. After keeping the golf carts a little over a year and making only three payments of $470.00 each, or a total of $1,410.00, Mason voluntarily surrendered the carts to plaintiff. On October 15, 1963, he signed a letter to plaintiff in which he acknowledged his default and surrender of the carts, and in which he waived "advertisement and sale as required by law."

Plaintiff sold the carts at private sale to B & H Auction & Salvage Company for $2,045.00. After deducting moving and storage charges of $75.00 and the expense of the sale, $48.00, plaintiff applied the net proceeds of the sale, $1,922.00, to the note, leaving a balance due of $2,277.39. Plaintiff's demands that defendants pay this balance have been ignored.

At the close of plaintiff's evidence, defendants' motion for nonsuit was allowed, and plaintiff appealed.

Otho L. Graham, Jr. and Harvey Hamilton, Jr., for plaintiff.
Wheatly & Bennett for defendants.

SHARP, J. Defendants' motion for nonsuit was based upon the premise that a deficiency judgment under G.S. 45-21.38 cannot be predicated upon a private sale even though the conditional sales contract under which the mortgaged personalty was sold provided for such a sale. This proposition was decided adversely to defendants'

contention in *Financial Services Corporation v. Welborn. ante,* 563, 153 S.E. 2d 7, where it was held that a stipulation in a chattel mortgage or conditional sales agreement authorizing the creditor to sell the personal property described therein at private sale violates no statute or public policy of this State. Such an authorization, however, does not relieve the mortgagee, in taking possession of and selling the property, from the duty of acting in the utmost good faith. "In selling the property at private sale for the satisfaction of his mortgage debt, it (is) his duty to sell it at a fair and reasonable valuation, and failing to do so, he (becomes) liable to the mortgagor for such failure." *Zadek v. Burnett,* 176 Ala. 80, 57 So. 447. The conditional vendor, or his assignee who sells at a private sale, owes the duty to the conditional vendee "to deal justly with his equitable right and to use diligence to obtain the best price available for the property in making such a sale." *Dearborn Motors C. Corp. v. Hinton,* 221 Miss. 643, 74 So. 2d 739. *Accord, Universal C. I. T. Credit Corp. v. Byers,* 299 S.W. 2d 559 (Mo. Ct. App. 1957), 14 C.J.S., Chattel Mortgages § 381 (1939). "A mortgagee who sells at private sale is responsible and accountable for at least the fair and reasonable value of the property. . . ." 14 C.J.S., Chattel Mortgages § 393 (1939).

Plaintiff's evidence tends to show that the "basic" sales price of the eight golf carts was $5,615.00 on September 27, 1962; that the "time price differential" was $555.89; and that sometime between October 15, 1963, and September 15, 1965, plaintiff sold the carts to B & H Auction & Salvage Company for $2,045.00. Whether this latter sum represented the fair value of the property at the time Mason surrendered possession of the carts, the evidence does not disclose. The question presented by this appeal, therefore, is this: When a mortgagee takes possession of mortgaged property under the provisions of a chattel mortgage or conditional sales agreement, sells it at private sale under a power therein given, and when thereafter, in his suit for a deficiency judgment, the mortgagor alleges that the property was not sold for its fair market value, upon whom is the burden of proving that allegation? The answer is that, where the sale is to a person other than the mortgagee or one in privity with him, the burden rests upon the mortgagor. *Pryor v. Associates Discount Corp.,* 191 So. 2d 234 (Ala. Ct. App. 1966); *Zadek v. Burnett, supra; Universal C.I.T. Credit Corp. v. Byers, supra; Waltner v. Smith,* 274 S.W. 526 (Mo. Ct. App. 1925); *Bird v. Davis,* 14 N.J. Eq. 467; *Harrison v. Hall,* 239 N.Y. 51, 145 N.E. 737; *Credit Corp. v. Frazier,* 118 Ohio App. 429, 192 N.E. 2d 506; *First Discount Corporation v. Daken,* 75 Ohio App. 33, 60 N.E. 2d 711; *Ashley & Rumelin v. Lance,* 88 Ore. 109, 171 Pac. 561; *Tacker v. Mitchell,* 3 Tenn. App. 495. *Cf.*

Harbour-Longmire Co. v. Reid, 124 Okla. 77, 79, 254 Pac. 29, 30 (which contains this inconsistent statement as *dictum:* "Where the rights of third persons or junior or inferior lienholders intervene, and the sale is attacked, the burden is upon the mortgagee to show that the property sold for its fair market value and . . . the only remedy the aggrieved party has is in cases *where he can show* that the property was not sold for its reasonable market value.") (Italics ours.) and *Kolbo v. Blair,* 379 S.W. 2d 125 (Tex. Civ. App. 1964) (where the mortgagees sold to themselves).

The rule has been variously stated as follows: "The mortgagee has the burden of proving such a breach of the mortgage as will justify the sale; but the burden of proving matters in defense, such as fraud in the foreclosure and sale of the mortgaged property by the mortgagee, *or the value of the chattels* possessed by the mortgagee, is on the mortgagor." (Emphasis added.) 14 C.J.S., Chattel Mortgages § 390 (1939). "The burden of proving that the mortgagee failed to use reasonable diligence in securing a fair price, where the sale is to a person other than the mortgagee or a person in privity with him, and that he therefore acted in bad faith, is upon the person attacking the sale." 15 Am. Jur. 2d, Chattel Mortgages § 223 (1964). If the mortgagor can prove that the mortgaged goods "were sold unfairly, or at an under price, he will be permitted to do so, and will be allowed their full value." Jones on Chattel Mortgages § 708 (5th Ed. 1908). "The mortgagor has the burden of pleading and proving that the property was sold for less than its reasonable value." *Pryor v. Associates Discount Corp., supra. Accord, Zadek v. Burnett, supra; Harrison v. Hall, supra.* "The burden of proof . . . is upon the mortgagor to show that the mortgagee or his assignee failed to act in good faith and did not use every reasonable means to obtain the full value of the mortgaged property." *Universal C. I. T. Credit Corp. v. Byers, supra.*

In *Ashley & Rumelin v. Lance, supra,* plaintiff sought a deficiency judgment after a private sale of property under a power contained in a chattel mortgage. The answer, the court said, permitted defendant "to show, if he could, that the sale had not been seasonably made, or fairly conducted, or that a greater sum of money had been received than was admitted by the plaintiff, and hence the proper credit was not made on the promissory note." *Accord, Credit Corp. v. Frazier, supra.*

In *Waltner v. Smith, supra* at 527, the court said: "The burden of showing that plaintiff (mortgagee) failed to act in good faith and did not use every reasonable means to obtain the full value of the mortgaged property was in the defendant (mortgagor)."

In their answer, defendants have alleged that plaintiff accepted

the return of the carts in full satisfaction of their debt and that the value of the carts then exceeded the debt. Either of these allegations, if proven, is a defense which will defeat plaintiff's action. As to each, however, the burden of proof rests upon defendants.

The judgment of nonsuit was, therefore, erroneous.

Reversed.

LEWIS B. UNDERWOOD v. B. M. OTWELL AND WIFE, MARY BELL OTWELL, AND DAUGHTER, LUCILLE LILLIAN OTWELL UNDERWOOD.

(Filed 1 March, 1967.)

1. Mortgages and Deeds of Trust § 24—

The holder of a note secured by a deed of trust may sue the makers *in personam* for the debt, and may sue *in rem* to subject the mortgaged property to the payment of the note, and may combine the two remedies in one civil action, G.S. 1-123, but in the action for foreclosure the trustee in the deed of trust is a necessary and indispensable party.

2. Same; Parties § 3—

Where a note secured by a deed of trust is payable to joint payees, they must join as parties in an action on the note and to foreclose the deed of trust, and when one of them refuses to join as a plaintiff, such payee is properly joined as a defendant. G.S. 1-70.

3. Husband and Wife § 5; Reformation of Instruments § 4; Trusts §§ 13, 16—

Where the husband alone furnishes consideration for which the borrower executes a note and deed of trust, but has the note made payable to himself and wife, there is a presumption of a gift to her of one-half of the note, and in his suit on the note his allegation merely that she had no interest in the note, without allegation of facts which would rebut the presumption, states no cause of action for a resulting trust, nor, in the absence of allegation of mistake, does his complaint state a cause of action for reformation.

4. Process § 5.1; Trover and Conversion § 2—

In an action on a note by one of the payees against the makers and against the other payee refusing to join as plaintiff, prayer that defendant payee be required to bring into court the note and deed of trust securing same, with announcement that plaintiff would apply for a subpœna *duces tecum* to this end, does not state a cause of action against the defendant payee for possession of the note and deed of trust.

5. Bills and Notes § 16; Mortgages and Deeds of Trust § 24— Complaint held to state a single cause of action to recover on note and demurrer for misjoinder of parties and causes should have been overruled.

One of the payees of a note brought this action against the makers and against the joint payee who refused to join as plaintiff, and alleged that

the note was in default and sought to recover judgment on the note and the appointment of a commissioner to foreclose the deed of trust. The allegations were insufficient to state a cause of action for reformation or against defendant payee for a resulting trust or for possession of the note. *Held:* Demurrer for misjoinder of parties and causes should have been overruled, the complaint being sufficient to allege but a single cause of action to recover on the note, but the allegations constituting the basis of the action to foreclose the instrument should be stricken unless plaintiff amends to make the trustee a party.

APPEAL by plaintiff from *Latham, S.J.*, July 1966 Civil Session of RANDOLPH, docketed and argued as Case No. 621 at the Fall Term 1966.

Action on a note secured by a deed of trust.

The complaint alleges the following: On April 17, 1959, plaintiff lent to defendant B. M. Otwell and wife, defendant Mary Bell Otwell (the parents of defendant Lucille Otwell Underwood, who was then plaintiff's wife), the sum of $1,250.00 upon a note, which was due and payable five years after date. The money lent was plaintiff's; his wife furnished none of it. The note is secured by a deed of trust on two tracts of land to Hugh R. Anderson, trustee. Both instruments were made payable to plaintiff and his wife, defendant Underwood; the latter took possession of the note and deed of trust for safekeeping and still retains them. Plaintiff and defendant Underwood were divorced on June 12, 1964.

Shortly after the note became due, plaintiff demanded payments from defendants Otwell, but no part of the principal or interest has been paid. After his demands for payment were refused, plaintiff requested the trustee to foreclose the deed of trust. The trustee advertised the property therein described for sale but refused to sell it after defendant Underwood falsely told him that the note had been paid. She has no interest in the note, which she seeks to prevent plaintiff from enforcing against her parents, defendants Otwell.

Plaintiff prays (1) that he recover judgment for $1,250.00, with interest from April 17, 1959, against defendants Otwell; (2) that defendant Underwood be required to bring into court the note and deed of trust; and (3) that the court appoint a commissioner to foreclose the deed of trust and apply the proceeds of the sale to the judgment.

Defendants demurred to the complaint for a misjoinder of parties and causes for that (1) there is a misjoinder of causes of action in that plaintiff has attempted to join actions for recovery on a note, reformation of an instrument, foreclosure of a deed of trust, and claim and delivery of an instrument; (2) there is a misjoinder of parties in that (a) the action on the note does not affect defendant Underwood, and (b) the actions to reform the note and deed of

trust and to secure their possession do not affect defendants Otwell; and (3) Hugh R. Anderson, trustee, is not a party to the action.

On August 1, 1966, Judge Latham signed a judgment sustaining the demurrer for a misjoinder of parties and causes of action, but he did not dismiss the action. From this judgment, plaintiff gave notice of appeal. The appeal entries, signed on August 2, 1966, contain this additional sparse information: "The plaintiff objects and excepts to the refusal of the Court to permit him to amend his complaint within the statutory time after sustaining the defendant's demurrer. . . ."

Ottway Burton and John Randolph Ingram for plaintiff.
L. T. Hammond, Sr., for defendants.

SHARP, J. In his complaint, plaintiff has stated a cause of action for a judgment on the note which defendants Otwell executed to him and to defendant Underwood, and he has *attempted* to state a cause for the foreclosure of the deed of trust securing the note. "A creditor whose debt is secured by way of mortgage or trust has two remedies — one *in personam,* for his debt; the other *in rem,* to subject the mortgaged property to its payment; and a resort to one is no waiver of the other." *Silvey v. Axley,* 118 N.C. 959, 963, 23 S.E. 933, 934. The creditor may combine the two remedies in one civil action. G.S. 1-123; *Credle v. Ayers,* 126 N.C. 11, 35 S.E. 128; 1 McIntosh, North Carolina Practice and Procedure § 1166 (2d Ed. 1956). In the present state of the pleadings, however, plaintiff may not have foreclosure of the deed of trust in this action, because he has not made the trustee a party. His allegations with reference to the refusal of the trustee to act and his prayer that a commissioner be substituted for the trustee are surplusage. This Court has frequently held that the mortgagee or trustee in a deed of trust is a necessary and indispensable party to an action for foreclosure. *Grady v. Parker,* 228 N.C. 54, 44 S.E. 2d 449; *Alexander v. Bank,* 201 N.C. 449, 160 S.E. 460. See *Lumber Co. v. Pamlico County,* 250 N.C. 681, 684, 110 S.E. 2d 278, 280. A decree of foreclosure entered in an action to which the trustee is not a party is void. *Grady v. Parker, supra.* See also *Bank v. Thomas,* 204 N.C. 599, 169 S.E. 189.

Defendant Underwood is a necessary party to this action, because she is one of the two joint payees in the note upon which plaintiff sues. In such case the rule is as stated in *Fishell v. Evans,* 193 N.C. 660, 662, 137 S.E. 865, 866: "Neither of them can, therefore, recover on said note in an action in which he or she alone is plaintiff. 'Where a bill or note is made payable to several persons, or is endorsed or assigned to several, they are joint holders and must

sue jointly as such.' 8 C.J., 846." *Accord, Sneed v. Mitchell,* 2 N.C. 292. See also *Bank v. Thomas, supra.*

Accepting the truth of the factual averments in the complaint, as we do in passing upon a demurrer, 3 Strong, N. C. Index, Pleadings § 12 (1960), it is patent that Lucille Otwell Underwood would not consent to be joined as a plaintiff. Plaintiff, therefore, had no choice other than to make her a party-defendant. The case which plaintiff has alleged illustrates the necessity for G.S. 1-70, which says, in part: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

Although plaintiff has alleged that defendant Underwood has no interest in the note in which she is a joint payee, he has not attempted to allege a cause of action for reformation of the note and deed of trust securing it. He has alleged no mistake of the parties or of the draftsman who prepared the papers, and he does not seek to correct or to reform them. It is established law in this State that when a husband purchases land and causes it to be conveyed to his wife, the law presumes that the land is a gift to the wife, and no resulting trust arises. *Shue v. Shue,* 241 N.C. 65, 84 S.E. 2d 302; *Williams v. Williams,* 231 N.C. 33, 56 S.E. 2d 20; *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48; *Pitt v. Speight,* 222 N.C. 585, 24 S.E. 2d 350; *Carter v. Oxendine,* 193 N.C. 478, 137 S.E. 424; 26 Am. Jur., Husband and Wife §§ 100-101 (1940). Similarly, a gift is presumed when the husband pays for personalty and procures title either in the wife's name or in their joint names. In *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543, the husband purchased an automobile and registered the title in the name of his wife. This Court said: "The wife was the owner. It is presumed that the husband intended the automobile as a gift to her." *Id.* at 725, 112 S.E. 2d at 548. See 41 C.J.S., Husband and Wife § 150, p. 623 (1944). In *Abegg v. Hirst,* 144 Iowa 196, 122 N.W. 838, 138 Am. St. Rep. 285, a husband who purchased a note and mortgage had it assigned to himself and to his wife. He was held to have given a one-half interest in the note and mortgage to his wife even though he retained possession of the instrument and she knew nothing of the transaction. *Accord, In Re Loesch's Estate,* 322 Pa. 105, 185 Atl. 191.

Plaintiff has alleged no facts which would rebut the presumption of a gift of a one-half interest in the note in suit to his wife. *Perkins v. Perkins,* 249 N.C. 152, 105 S.E. 2d 663; 4 Strong, N. C. Index, Trusts § 16 (1961). Neither has plaintiff stated a cause of action against defendant Underwood for the possession of the note.

His superfluous announcement, by way of the prayer for relief, that he intended to apply to the court for a subpœna *duces tecum* requiring defendant Underwood to bring the note and deed of trust to the trial does not state a cause of action for possession of the instruments. "One tenant in common, or joint owner of personal property, cannot maintain an action against the other tenant or owner to recover the exclusive possession of the property." *Thompson v. Silverthorne,* 142 N.C. 12, 13, 54 S.E. 782. His remedy is partition. *Coulbourn v. Armstrong,* 243 N.C. 663, 91 S.E. 2d 912; *Dubose v. Harpe,* 239 N.C. 672, 80 S.E. 2d 454.

We do not commend plaintiff's complaint as a model pleading — on the contrary. Yet, we are constrained to hold that it does not contain a misjoinder of parties and causes of action. If he intended to state and combine causes which would have resulted in a misjoinder, he failed. The complaint alleges a single cause of action against defendants Otwell, one to collect the debt evidenced by their note, and it explains why it is necessary to make Lucille Otwell Underwood a party-defendant. G.S. 1-70.

The record does not disclose in what respects plaintiff asked to be allowed to amend his complaint after the judge sustained defendants' demurrer. Apparently, he merely made an oral motion "to amend." If plaintiff desires to amend in order to make the trustee a party and to allege a cause of action for the foreclosure of the deed of trust securing the note, as provided by G.S. 1-123, he is at liberty to do so. In the absence of a motion to amend the complaint by making the trustee a party to the action, the court should strike from the pleadings all references to the deed of trust. The allegations of the complaint do not suggest that the trustee would refuse to act if it be established that defendants Otwell have not paid the note which it secures.

The judgment sustaining the demurrer is

Reversed.

CLARINDA SMITHSON v. W. T. GRANT COMPANY.

(Filed 1 March, 1967.)

1. Negligence § 37b—

While the proprietor of a store is under duty to exercise ordinary care to keep the premises in a reasonably safe condition he is not an insurer of the safety of his customers, and no inference of negligence arises merely from the fact of a fall by a customer in the store, nor does the doctrine of *res ipsa loquitur* apply thereto.

2. Negligence § 37f—

Evidence tending to show that a customer in a store stepped on a screw in the aisle and fell to her injury, without evidence as to how long the screw had been on the floor prior to the accident or that the proprietor in the exercise of due care could or should have known of its presence, is insufficient to be submitted to the jury on the issue of the proprietor's negligence.

APPEAL by plaintiff from *Bundy, J.*, September 1966 Mixed Session of CAMDEN.

Civil action to recover damages for personal injuries suffered by plaintiff from falling in defendant's store. Plaintiff's evidence was substantially as follows:

Plaintiff testified that she entered defendant's store at about 10:45 in the morning on 20 October 1966; she was accompanied by her two 11-year old grandchildren and her son-in-law, William Batts. After entering the store, the two grandchildren preceded her in the aisle of the store, and when she had walked some 20 to 24 feet into the store, "I stepped on something. I felt something under my foot, my left one, and it kinda of rolled and it tripped me on my right side, and throwed me in the floor. . . . I stepped on that object." After she fell, Bill Batts assisted her until a chair was brought, and while she was sitting in the chair, Bill Batts picked up a grey screw. The screw was found right behind the chair, which was placed near where she fell. She was then removed to a hospital and treated for a broken leg.

William Batts, plaintiff's son-in-law, testified that he was walking immediately behind and to the right of plaintiff when she fell; that after she fell he assisted her into a chair and shortly thereafter he found a grey screw beside the chair. He, together with two or three other people, was looking for something that she might have stepped on, and it was somewhere between three and eight minutes after she fell before the screw was found.

There was evidence that the pattern of the floor in defendant's store was red and grey blocks, and there was some lint on the floor and some sand and dirt by the counter.

Plaintiff also offered evidence as to her injuries and of her treatment.

At the close of plaintiff's evidence defendant moved for judgment of nonsuit, which was granted by the court. From this judgment plaintiff appeals.

John T. Chaffin for plaintiff.
John H. Hall for defendant.

PER CURIAM. The defendant is not an insurer of the safety of those who enter its store for the purpose of making purchases, and the doctrine of *res ipsa loquitur* is not applicable. *Fox v. Tea Co.*, 209 N.C. 115, 182 S.E. 662. Plaintiff was an invitee to whom defendant owed a duty to exercise ordinary care to keep its premises in a reasonably safe condition. 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 slipping on an object in the aisle of defendant's store. *Graves v. Order of Elks*, 268 N.C. 356, 150 S.E. 2d 522. Plaintiff's evidence does not disclose that the object alleged to have caused her fall had been there any appreciable length of time, or that defendant in the exercise of due care could or should have known of its presence. Nor was there evidence tending to show defendant was responsible for its being there. Therefore, taking all of plaintiff's evidence as true, and considering it in the light most favorable to plaintiff, we find no evidence of neglect of duty on the part of defendant proximately causing plaintiff's injury.

Affirmed.

MRS. FRANCES M. ANDREWS, WIDOW, ARTHUR McGUIRE ANDREWS, DECEASED, EMPLOYEE, PLAINTIFF, v. COUNTY OF PITT, EMPLOYER, AND U. S. FIRE INSURANCE COMPANY, INSURER, DEFENDANTS.

(Filed 1 March, 1967.)

Master and Servant § 65—

Evidence that a sheriff, while discharging his routine duties in attempting to apprehend persons breaking and entering a building, suffered a heart attack, without any evidence of unusual exertion on the part of the sheriff, is insufficient to show that the sheriff's death from the heart attack was the result of an accident arising out of and in the course of the sheriff's employment.

APPEAL by plaintiff from *Copeland, J.*, October 24, 1966 Civil Session, PITT Superior Court.

The plaintiff, Mrs. Frances M. Andrews, as widow and only dependent of Arthur McGuire Andrews, instituted this proceeding by filing a claim before the North Carolina Industrial Commission to recover compensation for and on account of the death of her husband while he was engaged in performing his duties as Sheriff of Pitt County. All jurisdictional facts, including the monthly salary, were stipulated.

The evidence disclosed, and the Hearing Officer found, that on the night of February 25, 1965 Sheriff Andrews received a tip that thieves intended to break and enter into Red's TV Shop in Farmville. The Sheriff and other officers concealed themselves at different stations around the shop. The Sheriff was about 135 feet from the building. Near 3 o'clock in the morning at least three men broke out a window and entered the building. Sheriff Andrews, by hand radio, gave the signal for the close in. As the officers approached, two of the men fled. Some of the officers gave chase, firing shots from their revolvers, in an unsuccessful effort to stop them. Sheriff Andrews did not participate in the chase. He went to the broken window, threw the beam of his flashlight inside and immediately collapsed. He died within a few minutes as the result of a heart attack. He was uninjured otherwise.

At the time of his death, Sheriff Andrews had hardening of the arteries and was overweight. For six years he had suffered from some form of heart ailment. He carried nitroglycerine tablets under doctor's orders for use in the event of a sudden seizure.

The Hearing Officer concluded that Sheriff Andrews did not die by accident arising out of and in the course of his employment, and entered an order denying compensation.

On review, the full Commission adopted the findings and conclusions of the Hearing Officer and denied the claim. Judge Copeland affirmed. The claimant appealed to this Court.

Blount and Taft by Benner Jones III, for plaintiff appellant.

Young, Moore, Henderson & Adams by B. T. Henderson II, for defendant appellees.

PER CURIAM. The evidence fails to disclose death or injury by accident arising out of and in the course of the Sheriff's employment — an indispensable finding before compensation may be awarded. *Lewter v. Abercrombie Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410; *Bellamy v. Stevedoring Co.*, 258 N.C. 327, 128 S.E. 2d 395; *Ferrell v. Sales Co.*, 262 N.C. 76, 136 S.E. 2d 227; *Horn v. Insurance Co.*, 265 N.C. 157, 143 S.E. 2d 70.

The judgment entered in the Superior Court of Pitt County is Affirmed.

MARVIN G. ABBOTT, EXECUTOR OF THE ESTATE OF J. S. ABBOTT, DECEASED, v. CARRIE NIXON ABBOTT.

(Filed 1 March, 1967.)

1. Wills § 15—

A plaintiff executor asserting his right to administer the estate by reason of the will cannot assert the invalidity of the will on the ground of mental incapacity of the testator.

2. Wills § 7—

The fact that testator becomes mentally incompetent and is thereafter unable to change the will, even if such incapacity continues until testator's death, does not revoke the will. G.S. 31-5.7.

3 Wills § 60.1—

The right of the widow to take a devise or bequest under the will of her husband is not forfeited by her abandonment of him. G.S. 31A-1.

4. Wills § 71—

In an action by an executor for a declaration that testator's widow was not entitled to share in the estate because she had abandoned him, the complaint which fails to allege that the widow had attempted to dissent from the will or that she had filed any claim against the estate, either as creditor, distributee, or widow, or that the will contained any bequest or devise for her benefit, fails to allege a justiciable controversy, and demurrer thereto is properly sustained.

APPEAL by plaintiff from *Bundy, J.*, at the September 1966 Session of CAMDEN.

The defendant is the widow of the plaintiff's testator. The complaint, having been twice amended, now alleges: The defendant and the plaintiff's testator were married and lived together until 30 December 1964, when she, without cause or provocation, removed herself and her belongings from the home and abandoned him knowing that he was bedridden and unable to care for himself; the testator, "prior to the month of December 1964," was mentally incompetent to manage his business affairs or to understand the extent of his holdings; he died on 23 May 1965, the defendant never having returned to his home; and, by reason of her wilful abandonment of the testator, the defendant has "lost those certain rights specified in Article I, § 31A-1, of the General Statutes of North Carolina * * * and by reason thereof is not entitled to share in the estate of the deceased." The prayer of the complaint is for judgment that the defendant "has no part, right or interest in the estate," and that the plaintiff executor be empowered by the judgment of the court to settle the estate as if the testator had died unmarried.

The defendant demurred to the complaint on the ground that it

does not state facts sufficient to constitute a cause of action in that it does not specify any right, claim or interest which the defendant has in or against the estate which would be lost if the facts alleged in the complaint be true.

From a judgment sustaining the demurrer, the plaintiff appeals. The record does not show any motion by the plaintiff for permission to amend his complaint further.

W. C. Morse, Jr., and J. W. Jennette for plaintiff appellant.
Small & Small for defendant appellee.

PER CURIAM. Since the plaintiff alleges that he is the duly qualified executor of the estate of the deceased, it is apparent upon the face of the complaint that the deceased died testate. The will is not made part of the complaint nor are its provisions referred to therein. Thus, it does not appear that the will contains any bequest or devise to or for the benefit of the defendant or that it created in or conferred upon her any right or interest in any property owned by the deceased at his death. Obviously, the defendant was not named executrix. It is not alleged in the complaint that the defendant has attempted to dissent from the will or that she has filed any claim against the estate, either as creditor, distributee or widow.

The plaintiff executor, while asserting his right to administer the estate by reason of the will, cannot assert its invalidity on the ground of lack of testamentary capacity in the testator. See *In Re Will of Covington,* 252 N.C. 551, 555, 114 S.E. 2d 261. He alleges that prior to the acts of the defendant of which he complains, the testator was "mentally incompetent to manage his business affairs and/or to understand the extent of his holdings." He does not allege that this mental condition continued to the death of the testator. If it did, that circumstance would not revoke the will in whole or in part. G.S. 31-5.7; *Warner v. Beach,* 4 Gray (Mass.) 162; Atkinson on Wills, 2d ed., § 85; Williams on Executors 19, note (r), 191; 57 Am. Jur., Wills, § 525; 95 C.J.S., Wills, § 295.

The right of the widow to take under her husband's will that which he saw fit to bequeath or devise to her is not among the rights which G.S. 31A-1 declares forfeited by her abandonment of him.

Since the complaint alleges no claim or assertion of any right by the defendant in or to any property of the estate, it alleges no justiciable controversy between the parties and, therefore, no cause of action. Consequently, the demurrer was properly sustained.

Affirmed.

GARDNER *v.* REIDSVILLE.

THOMAS L. GARDNER, A CITIZEN AND RESIDENT TAXPAYER OF THE CITY OF REIDSVILLE, ON BEHALF OF HIMSELF AND OF OTHER CITIZENS, RESIDENTS AND TAXPAYERS OF REIDSVILLE, SIMILARLY AFFECTED AND SITUATED, v. CITY OF REIDSVILLE, A MUNICIPAL CORPORATION, CLAUDE S. BURTON, CLIFFORD MOORE, AND JAMES EVERETTE, MEMBERS OF THE PURPORTED CITY OF REIDSVILLE ABC BOARD.

(*Filed 8 March, 1967.*)

1. Appeal and Error § 19—

In a trial by the court under agreement of the parties, assignments of error to the court's conclusions of law and its judgment, which assignments are specific and definite and point out the alleged errors relied upon, may be taken as a sufficient compliance with the Rules of Court, even though they are not technically in strict compliance therewith. Rule of Practice in the Supreme Court 19(3).

2. Elections § 8—

Every reasonable presumption will be indulged in favor of the validity of an election, including local option elections, and the burden is upon one contesting an election to prove his right to maintain the proceedings and to prove the grounds of his complaint.

3. Same; Elections § 10—

An election will not be disturbed for irregularities which are insufficient to alter the result.

4. Elections § 1—

The statute under which this local option election was held in a municipality precluded an election therein within three years after a majority of the municipal electors had voted against the proposition. In a county election less than three years prior, the proposition was defeated in the precincts in which residents of the city voted, but several of the precincts embraced territory both within and without the city limits, so that it could not be ascertained whether a majority of the municipal electors had voted for or against the proposition. *Held:* Plaintiffs have failed to carry the burden of showing that the municipal election was precluded. Chapter 650, Session Laws of 1965.

5. Statutes § 2—

A statute applicable to a single municipality, without reasonable distinction between such city and other cities or towns for the purpose of classification, is a local act.

6. Same—

The word "trade" is used in Article II, § 29 of the State Constitution in association with the words "labor," "mining" and "manufacturing" and under the maxim *noscitur a sociis*, the word "trade" as so used imports a business venture embarked upon by a person or business corporation for gain or profit, and does not embrace an activity conducted by the State itself for the purpose of control in the exercise of the police power.

7. Same—

The statute authorizing a vote by municipal electors to determine whether the city should operate liquor stores under the Alcoholic Bev-

erage Control Act is a statute enacted in the exercise of the police power for the control and regulation of intoxicating liquor, and is not a statute regulating "trade" within the purview of Article II, § 29 of the State Constitution.

8. Constitutional Law § 10—

Every presumption is in favor of the constitutionality of a statute, and the courts will not pronounce an Act of the General Assembly unconstitutional unless it is plainly so.

PARKER, C.J., concurring.

LAKE, J., dissenting.

SHARP, J., concurs in the dissenting opinion.

APPEAL by plaintiff from *Copeland, S.J.*, May 1966 Regular Civil Session of ROCKINGHAM. Docketed and argued as No. 766 at Fall Term 1966.

Civil action brought under the Declaratory Judgment Act (G.S. 1-253 through 1-267) to have declared invalid and void a referendum election conducted in the City of Reidsville, County of Rockingham, to determine whether liquor stores might be established within the City of Reidsville, and further to have declared unconstitutional Chapter 650 of the 1965 Session Laws of North Carolina: AN ACT TO ALLOW THE CITY COUNCIL AND THE QUALIFIED VOTERS OF THE CITY OF REIDSVILLE TO DETERMINE WHETHER OR NOT ALCOHOLIC BEVERAGE CONTROL STORES SHALL BE ESTABLISHED IN SAID CITY, AND TO PRESCRIBE THE DISPOSITION OF THE NET FUNDS THEREOF.

Chapter 650 of the 1965 Session Laws was ratified on 20 May 1965, to become effective 1 July 1965. The Act is summarized, and in pertinent part quoted, as follows:

Section 1 provides that upon petition of fifteen percent of the qualified voters who voted in the last preceding election for City Council members, the City Council of the City of Reidsville may hold an election on the question of whether or not City Alcoholic Beverage Control Stores may be operated within the City of Reidsville, and that such election shall be conducted pursuant to the same rules and regulations applicable to general elections for the City Council of the City of Reidsville, with the cost of the election to be borne by the general funds of the City.

Section 3 provides for the establishment and maintaining of a City Board of Alcoholic Control in the event the vote is in favor of authorization.

Section 4 provides that the City Board shall have all the powers and duties imposed by G.S. 18-45 on County Boards; shall be subject to the same powers and authority of the State Board as are

County Boards under G.S. 18-39; and the operation of any City Alcoholic Beverage Control Stores shall be subject to and in pursuance of the provisions of Article 3 of Chapter 18 of the General Statutes, except where in conflict with this Act.

Section 5 provides for the disbursement of the net profits derived from operation of Alcoholic Beverage Control Stores within the City of Reidsville.

> "Section 6. In the event the County Commissioners of Rockingham County call an election on the question of whether or not Alcoholic Beverage Control Stores shall be established in the county and before an election is held in the City of Reidsville under the provisions of this Act, and if a majority of the voters in the City of Reidsville who vote in the county election vote against establishing liquor stores in Rockingham County, then no election shall be held under the authority of this Act within 3 years after the date of the county election. . . ."

A county-wide election was conducted in Rockingham County on 27 July 1965, wherein a majority of the voters voted against the establishment of liquor stores in Rockingham County. Five of the thirty precincts within the county lie partially within and partially without the city limits of Reidsville. One of the thirty lies wholly within the city limits. The majority of the aggregate vote of these six precincts was against the establishment of an ABC system, the vote being 1825 to 1786. However, as a result of the manner in which the election was conducted, it was (and is) impossible to determine how a majority of the voters *within the City of Reidsville* cast their vote.

On 23 October 1965 a municipal election was conducted within the City of Reidsville, where only those registered voters who resided within the city limits were allowed to vote. The result of the election was 1,659 in favor of the establishment of liquor stores in the City of Reidsville and 1,628 opposed to liquor stores within the City of Reidsville.

Pursuant to the "Reidsville Act", an Alcoholic Beverage Control Board was subsequently appointed and an Alcoholic Beverage Control system put in operation. Thereafter, plaintiff brought this action, including as defendants the City of Reidsville and the members of the City of Reidsville Alcoholic Beverage Control Board. Trial by jury was waived by consent of the parties, and the case came on for trial on the pleadings, affidavits, and stipulated facts. The trial court rendered judgment in favor of defendants. Plaintiff appeals.

Everett, Everett & Everett and Allen W. Brown for plaintiff appellant.

McMichael & Griffin; Albert J. Post; and Joyner & Howison for defendants, appellees.

BRANCH, J. Appellees contend that appellant cannot challenge the procedures of the Reidsville election since appellant failed to comply with Rule 19(3) of the Rules of the Supreme Court, 221 N.C. at p. 554. The following is appellant's assignment of error:

> "Plaintiff assigns as error the Court's signing of the Final Judgment which contained erroneous findings of fact and erroneous conclusions of law; and further assigns as error the Court's failure to hold that Chapter 650 violates the terms of Article II, Section 29, of the North Carolina Constitution; and its further failure to hold that even under the specific terms of Chapter 650 irrespective of its constitutionality defendants were not entitled to conduct a municipal liquor referendum; and its failure to hold that the establishment of ABC Stores in the City of Reidsville was unauthorized and in violation of law."

While not in strict compliance with Rule 19(3), plaintiff's assignments of error are specific and definite. Since the Rules of the Court are made for our convenience and in dispatch of our appellate jurisdiction, *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912, we will consider appellant's assignment of error as to election procedure.

The question is raised whether Section 6 of Chapter 650, 1965 Session Laws, prevents the holding of a valid election within three years after the county-wide election of 27 July 1965. The pertinent provision of that section is as follows:

> "In the event the County Commissioners of Rockingham County call an election on the question of whether or not Alcoholic Beverage Control Stores shall be established in the county and before an election is held in the City of Reidsville under the provisions of this Act, and if a majority of the voters in the City of Reidsville who vote in the county election vote against establishing liquor stores in Rockingham County, then no election shall be held under the authority of this Act within 3 years after the date of the county election. . . ."

By paragraph 18 of his amended complaint plaintiff alleges:

> "XVIII. That as these plaintiffs are advised, believe and so allege, the defendant City of Reidsville had no right or au-

thority to call and hold a city election on the question of establishment of liquor stores, for that in the countywide election held prior to the city election, a majority of the voters of the City of Reidsville voted against the establishment of liquor stores; that, therefore, the election called and held on October 23, 1965, by the City of Reidsville was null and void."

Defendants by their answer deny these allegations.

Every reasonable presumption will be indulged in favor of the validity of an election. 26 Am. Jur., Elections, § 343, p. 162. This applies as well to a local option election. See 48 C.J.S. Intoxicating Liquors, Contesting Elections, § 87(d), p. 217, where in this regard it is said: "The burden is on one instituting a contest to prove his right to maintain the proceeding and to prove the grounds of his complaint. . . . The usual rules as to the admissibility and the weight and sufficiency of the evidence generally apply to local option election contests."

An election will not be disturbed for irregularities where it is not shown such irregularities are sufficient to alter the result. *Owens v. Chaplin*, 228 N.C. 705, 47 S.E. 2d 12; *Watkins v. Wilson*, 255 N.C. 510, 121 S.E. 2d 861. In the instant case it is stipulated by the parties that, "(I)t is now impossible to ascertain how many of the votes cast in Reidsville Township precincts were cast by persons residing in the City of Reidsville and how many were cast by persons residing outside the City limits."

Plaintiff contends the burden is on defendants to prove that a majority of the votes cast within the City of Reidsville in the county election was not against the establishment of a city Alcoholic Beverage Control system. In support of this contention, plaintiff cites the rule that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more particularly within his knowledge, or of which he is supposed to be cognizant. *Cf. Hosiery Co. v. Express Co.*, 184 N.C. 478, 114 S.E. 823. However, this rule does not apply here, since there is nothing in the record to show that the city election officials or any of the defendants had any control or influence over or access to the officials who held the county-wide election of 27 July 1965. The contrary is inferred since the first election was a *county* election and the election under attack is a *municipal* election.

The prevailing rule is that the burden of proof is on the party holding the affirmative. *Wilson v. Casualty Co.*, 210 N.C. 585, 188 S.E. 102. Although not decisive, we note, in passing, that the only unquestioned vote by the voters in the City of Reidsville resulted in a majority vote "for Alcoholic Beverage Control Stores and Law Enforcement."

Plaintiff depends entirely on the provision of Section 6 of Chapter 650, 1965 Session Laws, and the results of the total votes cast in the six precincts encompassing the City of Reidsville to sustain his allegations. This is not sufficient to meet the burden of proof which he must carry. Furthermore, a careful reading of the section evidences that only where, in the event of a prior election, *it is shown the voters within the City of Reidsville voted against the establishment of ABC stores shall a city election be deferred for three years.* The clear intent of this provision was to prevent a repetitious election where the probable outcome had already been determined. By stipulation it is admitted the probable outcome of a city election could not be determined from the prior county election. We therefore hold that the city election was authorized by the statute.

The principal question presented for decision is whether the Reidsville Act, Chapter 650 of the 1965 Session Laws, is in violation of Article II, Section 29, of the North Carolina Constitution, which provides:

> "§ 29. Limitations upon power of General Assembly to enact private or special legislation. — The General Assembly shall not pass any local, private, or special act or resolution relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns, and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges; relating to nonnavigable streams; relating to cemeteries; relating to the pay of jurors; erecting new townships, or changing township lines, or establishing or changing the lines of school districts; remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury; regulating labor, trade, mining, or manufacturing; extending the time for the assessment or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability; giving effect to informal wills and deeds; nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private or special laws enacted by it. Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

Appellees do not seriously contend that the Act is not local.

In the case of *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 142 S.E. 2d 697, the Court stated:

> "A statute is either 'general' or 'local'; there is no middle ground. . . . Conceivably, a statute may be local if it excludes only one county. On the other hand, it may be general if it includes only one or a few counties. It is a matter of classification. For the purposes of legislating, the General Assembly may and does classify conditions, persons, places and things, and classification does not render a statute 'local' if the classification is reasonable and based on rational difference of situation or condition; ' "universality is immaterial so long as those affected are reasonably different from those excluded and for the purpose of the statute there is a logical basis for treating them in a different manner." ' A law is local, ' "where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, and where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where classification does not rest on circumstances distinguishing the places included from those excluded." ' On the other hand, a law is general ' "if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law." . . . Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction and operate the same on all parts of the State under the same conditions and circumstances. Classification must not be discretionary, arbitrary or capricious.' "

Here the statute is applicable in only one city. Neither the statute nor the appellees show any reasonable distinction between the City of Reidsville and any other city or town for the purpose of classification under the terms of the statute. See also *State v. Dixon*, 215 N.C. 161, 1 S.E. 2d 521; *Sams v. Board of Com'rs.*, 217 N.C. 284, 7 S.E. 2d 540; *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310.

Therefore, we conclude that the Act under consideration is a local act. For the purposes of this decision we need not consider whether the Act is special or private.

The more serious question posed for decision is whether the dispensing of intoxicating liquors by the State is a 'trade' within the meaning of the constitutional provision.

"Questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments, 11 A. J. 658, and, 'the fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it,' . . .

"Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished. Inquiry should be directed to the old law, the mischief, and the remedy. The court should place itself as nearly as possible in the position of the men who framed the instrument. 11 A. J. 675; *Ex parte Bain,* 121 U.S. 1, 30 L. Ed. 849." *Perry v. Stancil,* 237 N.C. 442, 75 S.E. 2d 512.

Article II, Section 29 removed some sixteen or more subjects from the field of local, private and special legislation. Prior to its framing in 1915, more than eighty percent of the laws enacted by the General Assembly were local, special or private laws. Thus it is apparent that the purpose of this amendment, when framed by the legislature in 1915, was to relieve the General Assembly from the necessity of passing on laws relating to certain specified matters in which only a small territory or a few persons were concerned, and to thereby enable members of the General Assembly to devote their time and attention to the enactment of legislation important to the entire State.

The problem of intoxicating liquors was a major problem for the General Assembly of 1915, just as it has been for hundreds of years and is today.

"While the moderate and temperate use of intoxicants, and more especially vinous liquors, is reviewed by what appears to be the greater portion of the populace, not with disfavor, but rather 'as a lawful comfort which God alloweth to all men,' overindulgence has been recognized from remote antiquity, not only as an evil in itself, but also as a cause of crime, cruelty, indolence, neglect, and poverty and, therefore, as a fit subject of moral and legal condemnation. As early as 1552 the British Parliament by statute, restricting the keeping of alehouses and tippling houses, and in America, the problem of liquor traffic has received legislative attention for more than three centuries." 30 Am. Jur., Intoxicating Liquors, § 1, p. 525.

In this state it has long been considered a proper subject of legislative control. *State v. Joyner,* 81 N.C. 534. In connection with the problem, the Court stated in *Guy v. Commissioners,* 122 N.C. 471, 29 S.E. 771: "Nor is it essential that the regulation (of intoxicating liquors) shall be uniform throughout the State." Although we note this statement was made some nineteen years prior to the enactment of the amendment, it evidences early recognition of the fact that due to varying social and cultural differences within the state, the control of intoxicating liquors was not a subject easily susceptible of uniform regulation. The truth of this fact has been subsequently borne out and was recognized by the 1937 legislature when they, after the end of prohibition, adopted a "local option" plan of liquor control. G.S. 18-61. This plan and many local acts have generally been acquiesced in and abided by for thirty years.

Although sixteen specific matters are prohibited by Section 29, Article II, it is noteworthy that the framers of this proposal did not specifically refer to regulation of the sale of intoxicating liquors. It would seem that had it been the intention of the General Assembly to include this ever-present and important question among the prohibited subjects, the term "intoxicating liquor" would have been included in the enumerated list. There are eleven different definitions of the word "trade" in Webster's Third New International Dictionary, varying from "a path traversed or for traverse," to "the business one practices or the work in which one engages regularly." Certainly those who so painstakingly and carefully drafted the proposal for submission to the people would not have chosen a word capable of such varied definitions and meanings as "trade" to include this monstrous and demanding problem.

Because of the singular nature of Section 29, Article II, of the North Carolina Constitution, we find no cases in other jurisdictions actually interpreting the word "trade" in the connection presented by this appeal. However, in the case of *Cohen v. State,* 53 Tex. Cr. R. 422, 110 S.W. 66, defendant was indicted under a statute providing for the punishment of anyone engaged in the "business or occupation" of keeping or storing intoxicants for others in any county, etc., where the sale of intoxicants had been prohibited, who permitted another to drink intoxicants within such place of business. Defendant claimed that the intoxicants drunk on the premises were not kept for hire or profit, nor as a business or calling, but that such keeping was casual and incidental. The court held that an instruction defining "business or occupation" to be "that which engages one's time and attention or labor, or that about which one is engaged or employed," was misleading and that the correct defi-

nition of the words "business and occupation" is meant "a calling, trade, or vocation which one engages in for the purpose of making a living or of obtaining wealth."

The case of *State v. University Club,* 35 Nev. 475, 130 P 468, is one which considered whether a statute imposing a license tax on persons engaged in the "business of selling liquor" applied to a bona fide social club where liquor was sold for a fixed charge, and profit went to the general expenses of the organization. The court held that the term "business" as used in the law imposing the license tax on business, professions and callings ordinarily means "a business in the trade or commercial sense; one carried on with a view to profit or livelihood."

In the case of *City of St. Louis v. Smith,* 325 Mo. 471, 30 S.W. 2d 729, the court held that a municipality was not an "incorporated company" within the constitutional provision providing for the right of trial by jury in a condemnation proceeding. The distinguishing difference between a municipal corporation and a business corporation was made in that the latter is one organized for the purpose of carrying on a *business for profit,* while the former is organized with political and legislative powers for the purpose of local civic government and police regulation of the people of a particular district included within its boundaries, and is a subordinate branch of the government of a state.

Our own Court has considered the prohibitions contained in Section 29, Article II, of the North Carolina Constitution in other connections, but has never directly passed on the question of whether the operation of an alcoholic beverage control store by the State or a municipality is a trade. However, in the case of *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297, defendant appealed from conviction under an act which banned all motor vehicle races on Sunday in Wake County. Defendant contended the act violated Article II, Section 29 of the North Carolina Constitution. The Court held the statute constitutional, stating through Bobbitt, J.:

> "Conceding, *arguendo,* that the statute, directly affecting conduct in a single county, is a local act, *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521, is it an act *regulating labor or trade* within the meaning of Art. II, sec. 29? Were the statute directed solely against labor, *e. g.,* compensated employment, or trade, *e. g., business ventures, for profit,* in relation to the conduct of motor vehicle races on Sunday in Wake County, the question posed would be serious indeed. But where the statute in sweeping terms bans an activity, to-wit, all motor vehicle races on Sunday in Wake County, making it a misdemeanor to promote

> or engage in the proscribed activity, without regard to the *commercial or non-commercial character of the activity,* the fact that there defendants promote and engage in such activity *for profit and for compensation* puts them in no better position than those who promote and engage in such activity without reference to profit or compensation." (Emphasis ours)

On the other hand, the Court, in the case of *Speedway, Inc. v. Clayton,* 247 N.C. 528, 101 S.E. 2d 406, interpreting a statute which regulated professional racing in Orange County, held the statute invalid as being a local act regulating trade, prohibited by Article II, Section 29, North Carolina Constitution. The Court so held on the basis that this was an act aimed at *persons, firms or corporations* promoting and conducting motorcycle or motor vehicle races *for profit* in Orange County.

The results reached in *Clayton* and *Chestnutt* are distinguishable in that they recognized the difference in an absolute prohibition under the State's police power and a regulation of a *business venture* entered into for profit by persons, firms or corporations. Both *Chestnutt* and *Clayton* differ from the instant case in that here there is a *State agency* as opposed to persons, firms or corporations, and here the defendants are engaged in a governmental operation as opposed to pleasure or a business venture for profit.

> "The will of the people as expressed in the Constitution is the supreme law of the land. . . . In searching for this will or intent, all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. . . . The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected. *Noscitur a sociis* is a rule of construction applicable to all written instruments." *State v. Emery,* 224 N.C. 581, 31 S.E. 2d 858. "The maxim is, *noscitur a sociis:* the meaning of a doubtful word may be ascertained by reference to the meaning of words with which it is associated." *Morecock v. Hood,* 202 N.C. 321, 162 S.E. 730.

The framers of the Constitution have enumerated a great many specific subjects, then grouped the words "regulating labor, trade, mining, or manufacturing." Applying the rule of *noscitur a sociis* to the word "trade," in reference to the words with which it is associated, we are led to the conclusion that "trade" refers to a business venture embarked in for gain or profit by a person or a business corporation. It refers to commerce engaged in by citizens of

the State, and not a restricted activity conducted by the State itself.

As one of his principal authorities, appellant cites and relies on *Taylor v. Carolina Racing Association,* 241 N.C. 80, 84 S.E. 2d 390, where an act providing for the operation of a dog-racing track in Morehead City was held unconstitutional by the Court as being a local and special act regulating trade. Under provisions of the act the track was to be operated by a corporate licensee of a city racing commission. It is noted there were other reasons for declaring the act invalid in the *Taylor* case, in that Article II, Section 7, was violated because there was a grant of privilege and immunity, and further, there was an unlawful delegation of legislative power. This was also a case where a private corporation was unquestionably embarked on a business venture for the purpose of profit. In deciding the case, pertinent principles as to the sovereign police power were clearly and concisely stated by the Court, speaking through Bobbitt, J., as follows:

> "Legislative power vests exclusively in the general assembly, Constitution of North Carolina, Article II, and except as authorized by the Constitution, as in case of municipal corporations, may not be delegated. . . . (A)n act, otherwise valid, may be enacted so as to take effect upon approval by a majority of the qualified voters of the affected locality, . . .
>
> " 'The power of the legislature to enact laws conferring police powers and regulating traffic, etc., within particular localities, seems to be well settled.' . . .
>
> "Legislation enacted in the exercise of the police power for the benefit of the public is as extensive as may be required *for the protection* of the public health, safety, morals and general welfare of the people."

Again considering the exercise of the sovereign police power, the Court, speaking through Parker, J. (now C.J.) in the case of *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864, said: "Under its inherent police power the State of North Carolina has the right to prohibit, regulate or restrain the use, manufacture and sale of beer within its bounds. . . . The liquor business 'stands, by universal consent, in a class peculiarly within the police power.' " This police power allows the State of North Carolina to prohibit, restrain or *regulate* the sale of intoxicating liquor within particular localities upon approval by a majority of the qualified voters of the affected locality. If there exists in the sovereign, under the exercise of its police power, the right to regulate intoxicating beverages, it logically follows that

the sale or dispensing of intoxicating beverages must either be permitted by the sovereign state or be sold or dispensed by the sovereign state. As stated by Stacy, C.J., in *Amick v. Lancaster,* 228 N.C. 157, 14 S.E. 2d 733: "It would be strange indeed, if the same government which authorizes the establishment of a 'liquor control store,' should also provide for its padlocking at the instance of a private citizen. . . ."

It is noted that profits were contemplated under the statute. However, these profits, if any, would be distributed primarily to governmental agencies and for law enforcement.

The Act under consideration made any board authorized thereunder subject to the provisions of Article III, Ch. 18, of the General Statutes, commonly known as the ABC Act of 1937. The first section of the Article, *i. e.*, G.S. 18-36, provides in part: "The purpose and intent of this article is to establish a system of *control* of the sale of certain alcoholic beverages in North Carolina." (Emphasis ours) G.S. 18-39 provides: "Powers and authority of Board. — Said state board of alcoholic control shall have power and authority as follows, to wit: (1) To see that all the laws relating to the sale and *control* of alcoholic beverages are observed and performed." (Emphasis ours). G.S. 18-46 provides in part:

> "No alcoholic beverage shall be sold knowingly to any minor, or to any person who has been convicted of public drunkeness or of driving any motor vehicle while under the influence of intoxicating liquors, or has been convicted of any crime wherein the court or judge shall find as a fact that such person committed said crime or aided and abetted in the commission thereof as a result of the influence of intoxicating liquors (within one year of any such conviction), or to any person known to be an habitual drunkard or who has within one year been confined in the inebriate ward of any State institution. The manager and the employees of and in any county store may, in their discretion, refuse to sell alcoholic beverages to any individual applicant, ...
>
> "It shall be unlawful for any person to buy any alcoholic beverage if he be within the class prohibited from purchasing same as set out in this section, and it shall further be unlawful for any person to buy any alcoholic beverage for any person who may be prohibited from purchasing for himself under any of the provisions of this article."

G.S. 18-53 prohibits advertising by any county ABC store and on billboards, signs, or other device.

G.S. 18-54 prohibits advertising of alcoholic beverages by any radio broadcast.

G.S. 18-58 regulates the transportation of alcoholic beverages.

These statutory acts and pronouncements of intention by the legislature lead us to the conclusion that the purpose of the alcoholic beverage control act of 1937 and the many local acts of regulation and prohibition were to *control* every possible facet of intoxicating liquor.

Considering our Court's definition of the word "trade", *i. e.*, a "business venture for profit," *Speedway v. Clayton, supra,* in connection with the recognition that it has never been the philosophy of the people of North Carolina or their elected representatives to put the State in competition with private enterprise, we conclude that it would necessitate cynical, strained and illogical reasoning to hold that it was the intent of the legislature in passing the 1937 Act or of the 1965 legislature in passing the "Reidsville Act" to place the sovereign state in a "business venture for profit" for the purpose of dispensing a product to its people which is recognized as a cause of crime, cruelty, indolence, neglect and poverty.

We cannot conceive that the people of North Carolina, speaking through their representatives, contemplated under Section 29 of Article II that the sovereign state would enter any trade or business venture for profit. Nor did they intend to limit or fetter the police power of the State in any manner in its control of intoxicating liquor. Rather, we conclude that it is evident the people of North Carolina recognize that decreeing total abstinence from intoxicating liquor is futile, and that in localities where a majority of the qualified voters approve, the State may undertake the controlled dispensation of alcoholic beverages in the exercise of its police power. "Undoubtedly, the State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society." *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731.

This Court recognizes a presumption in favor of the constitutionality of a statute. In the case of *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888, the Court said: " 'It is well settled in this State that the Courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional — but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.' "

"Every presumption is in favor of the constitutionality of a

statute, and the courts will not pronounce an act of the General Assembly unconstitutional unless it is plainly so." Strong, N. C. Index, Vol. 1 (Supp.) Constitutional Law, § 10.

And again considering the constitutional question in the case of *Assurance Co. v. Gold,* 249 N.C. 461, 106 S.E. 2d 875, the Court stated: "Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." See also 16 C.J.S., Constitutional Law, § 99(b).

Thus applying these recognized rules of construction, we hold that Chapter 650 of the 1965 Session Laws does not violate Article II, Section 29 of the North Carolina Constitution, as the act of dispensing intoxicating liquors by the State is not a trade, but is a valid exercise of its police powers. Nor does this exercise of the police power violate the terms of Article II, Section 29 of the North Carolina Constitution as being a partial repeal of a general law.

Affirmed.

PARKER, C.J., concurring in the majority opinion.

". . . (T)he liquor traffic is admittedly dangerous to public health, safety, and morals, and is therefore essentially within, and its regulation or prohibition is fully justified under, the police power. . . ." 30 Am. Jur., Intoxicating Liquors, § 23.

"Publicly owned liquor establishments are governmental agencies, established in the exercise of the police power, to accomplish governmental purposes, and to perform a governmental function." 30 Am. Jur., Intoxicating Liquors, § 204.

"In some earlier cases, it was argued in support of the contention of the unconstitutionality of laws providing for the sale of liquor through state liquor stores or dispensaries, and prohibiting sales by any other persons, that traffic in intoxicating liquors was a private pursuit in which the government, whose undertaking must be confined to those of a public character, could not engage in. Such reasoning, however, never attained general acceptance; the prevailing view is that these laws do not violate the inalienable rights of citizens, are not class legislation, and do not infringe upon the due process clause or any other provision of the Federal Constitution, but are a valid exercise of the police power in controlling the liquor traffic; and are police enactments, and thus within the meaning of the Wilson Act." 30 Am. Jur., Intoxicating Liquors, § 205. See also *Ziffrin v. Reeves,* 308 U.S. 132, 84 L. Ed. 128.

In *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864, the Court said, "The liquor business, 'stands by universal consent, in a class peculiarly within the police power.'"

In my opinion, there is nothing in the law or statutes of this State permitting the sale of intoxicating liquor in State ABC stores to support the theory that the State of North Carolina or any of its counties or municipalities operating ABC stores is engaged in a trade or business within the purview of the word "trade" as used in Article II, section 29 of the North Carolina Constitution. The rationale behind the statutes of this State permitting, controlling, and regulating the sale of intoxicating liquors by publicly owned ABC stores is that such ABC stores are governmental agencies, established in the exercise of the police power of the sovereign State of North Carolina to accomplish governmental purposes and to perform a governmental function under the inherent police power of the State. The systematic purchase and resale of a commodity for profit by private individuals, or an association of private individuals, or a private corporation, is primarily to make a private gain or profit. In my opinion, that is trade in the connotation of the word "trade" as used in Article II, section 29 of the State Constitution. Any gain or profit made by any ABC store of this State operating under our State statutes is not a private gain or profit, but is a gain or profit for the public and not any individual. The North Carolina Department of Motor Vehicles through its Commissioner is charged with the responsibility of administering the laws regulating the operation of motor vehicles in the State of North Carolina. G.S. 20-39. Receipts from the sale of registration plates for motor vehicles by the Department of Motor Vehicles during the fiscal year ended 30 June 1966 exceeded the cost of these registration plates by more than forty-two and one-half million dollars, according to figures furnished from the accounting records of the Department of Motor Vehicles by the Director of the Division of Accounts. Can it be successfully maintained that by reason of this, the Department of Motor Vehicles is engaged in trade or business? In my opinion, the answer is, No. In my opinion, the provision of Article II, section 29 of the North Carolina Constitution inhibiting the General Assembly to enact any private or special legislation or any local, private, or special act or resolution relating to trade connotes a trade engaged in by a person, or group of persons, or a private corporation for private gain or profit, and the local act challenged by plaintiff in the instant case is not in conflict with this provision of our State Constitution.

I concur in the majority opinion.

LAKE, J., dissenting. The systematic purchase and resale of a commodity for profit is trade. This is true even though the one engaged in such course of action be a municipal corporation or an agency thereof. It is true even though the commodity purchased and resold be an alcoholic beverage. A law which provides that one person can engage in a trade within a certain locality and no one else can do so is a regulation of that trade. It is nonetheless a regulation because its primary purpose is to protect the public morals. Article II, § 29, of the Constitution of North Carolina provides, "The General Assembly shall not pass any local, private, or special act or resolution * * * regulating * * * trade * * *." The Act under which the defendants propose to establish and operate liquor stores within the city of Reidsville is a special or local act. Consequently, it is unconstitutional and the establishment and operation of such stores within the city is not authorized thereby.

It is no answer to say that this Act is an exercise of the police power. Of course it is. So is every valid regulation of trade. It is nonetheless a regulation of trade. This exercise of the police power in regulation of trade is unconstitutional because it is done by a local act, which Article II, § 29, of the Constitution forbids the General Assembly to do.

The majority of the Court say they "cannot conceive that the people of North Carolina, speaking through their representatives, contemplated under § 29 of Article II that the sovereign state would enter any trade or business venture for profit." I am sure this correctly represents the political philosophy of the people and their legislators when this provision was put into the Constitution. The implication, however, that the statutes authorizing the sale of alcoholic beverages in county and municipally operated stores do not put these governmental units into a "trade or business venture for profit" attributes to the members of the General Assembly a degree of naivety which I believe is unwarranted in view of their demonstrated awareness of conditions in North Carolina and their astute judgment with reference to fiscal matters. The State Alcoholic Beverage Control Board publishes an annual report of "Public Revenues From Alcoholic Beverages — North Carolina ABC Boards," unit by unit. The report for the fiscal year July 1, 1965 to June 30, 1966 shows Gross Sales $118,304,628.51; Net Revenue (to the counties and municipalities operating stores) $14,979,597.67; State Tax (in addition to the Net Revenue to counties and municipalities) $12,404,408.60. In other words, the State and local governments combined derived from the sales of these beverages in those 12 months a total profit of $27,384,006.27, which is over 23% of the gross sales. The share designated for "Education" was $316,683.76;

that for "Law Enforcement" was $1,187,085.26; and that for "Rehabilitation Contribution" $1,990,671.28. These figures leave one with some reasonable basis for concluding that the profit motive is not wholly divorced from the sale of alcoholic beverages by these governmental agencies.

I am authorized to say that SHARP, J., joins in this dissenting opinion.

CLARENCE E. PHILBROOK, HENRY ROYALL, G. A. WHITE, JR., AND MRS. LOUISE H. HAYES, INDIVIDUALLY AND AS REPRESENTATIVES OF OTHERS SIMILARLY SITUATED AND LONAS A. WILLIAMS AND ELIZABETH R. WILLIAMS AND JAMES C. BROWN AND DIANE D. BROWN, ADDITIONAL PLAINTIFFS, v. CHAPEL HILL HOUSING AUTHORITY.

(Filed 8 March, 1967.)

1. Pleadings §§ 2, 12—

A cause of action consists of the facts alleged, G.S. 1-122, and the facts alleged, but not the pleaders' conclusions, are deemed admitted where the sufficiency of a complaint is tested by demurrer.

2. Municipal Corporations § 26.1—

The selection of a site for low cost housing rests in the discretion of the housing authority, and its selection of a site may be challenged only for arbitrary or capricious conduct amounting to an abuse of discretion, and its act in selecting a site in a well developed residential area, and not an area in which the existing dwellings are substandard, unsafe, and unsanitary, cannot be considered arbitrary or capricious or an abuse of its discretion.

3. Same—

A housing authority is not required to select a site in a slum district.

4. Same— Where site for public housing is suitable for that purpose, selection may not be challenged for motives of housing authorities.

Plaintiffs sought to restrain defendant housing authority from proceeding to construct low cost housing at a site selected by the authority on the ground that the use of the property for such purpose would depreciate the value of plaintiffs' property. Plaintiffs alleged that the site selected was in a well developed residential district and was selected in order to force racial integration in housing, and to obtain the approval of the Public Housing Administration, and that the authority had thus abdicated the discretion vested in it. *Held:* There being no allegations of fact supporting the conclusion that the site selected was not suitable for use as low rental public housing, plaintiffs may not challenge the selection of the site on the ground of the motives of the authorities.

5. Same—

Property owners may not complain that the defendant municipal housing authority approved an option to purchase a site for public housing without a meeting at which a majority of the housing commissioners were present, the housing authority having ratified the acceptance of the option and plaintiffs being in no position to challenge its action, even though the commission itself could set aside unauthorized action or rescind action previously authorized.

6. Appeal and Error § 2—

The Supreme Court, in the exercise of its supervisory jurisdiction, may determine the sufficiency of the amended complaint, including matters stricken therefrom in the lower court, as though a demurrer *ore tenus* to the amended complaint in its entirety had been lodged in the Supreme Court, and its ruling that the pleading, thus considered, is insufficient to state a cause of action necessarily includes an affirmance of the order of the lower court sustaining the demurrer *ore tenus* to the amended complaint exclusive of the portions previously stricken therefrom.

APPEAL by plaintiffs from *Hall, J.*, March 21, 1966 Session of ORANGE, docketed and argued as No. 847 at Fall Term 1966.

Original plaintiffs instituted this action for injunctive relief on August 6, 1964, and then obtained an order extending the time for filing complaint. On August 19, 1964, they filed a complaint and an affidavit and motion for a temporary restraining order; and on that date Judge Mallard signed an order temporarily restraining defendant "from exercising the option held by it from M. A. Abernethy to acquire, or acquiring, a 1.6-acre tract of land situate on the east side of North Columbia Street in the Town of Chapel Hill and from using or attempting to use said property for the location of a public housing project," and fixing the time and place for a hearing to determine whether the temporary order should be continued until final determination of the action.

On September 3, 1964, Judge Mallard signed an order which, after reciting a hearing on a motion of defendant to strike portions of said complaint, (1) struck designated portions thereof and allowed plaintiffs twenty days to file an amended complaint, and (2) fixed a new time and place for the hearing to determine whether the restraining order should be continued *pendente lite.*

Plaintiffs filed their amended complaint on September 22, 1964, alleging therein, stated separately, a cause of action and a "further cause of action," referred to hereafter as first cause of action and second cause of action, respectively.

The matters set forth in the following numbered paragraphs (our numbering) are alleged in both causes of action.

1. Defendant was created and organized pursuant to the provisions of G.S. Chapter 157.

2. Plaintiffs reside and own property within the residential area of Chapel Hill known as Noble Heights, a subdivision bounded on the west by Pritchard Avenue, on the north by Noble Street and on the east by North Columbia Street. Noble Street, approximately 100 yards long, "extends only between North Columbia Street and Pritchard Avenue." Neither North Columbia Street nor Pritchard Avenue is a through street, each being a narrow, paved residential street.

3. The property of (original) plaintiffs is located on Noble Street or Pritchard Avenue "within a distance of 200 to 400 feet of the Abernethy property." "(T)he residences of the (original) plaintiffs and practically all of the structures located within and adjacent to this area are privately owned and occupied single-family residential structures, the area being almost exclusively developed and occupied by private homes, with the exception of the Abernethy site."

4. Many others reside and own property within Noble Heights and the area adjacent thereto whose property "is situated in as close proximity to the . . . Abernethy property as is the plaintiffs', and whose interest in this cause is similar to that of the plaintiffs."

Following the matters set forth in the above numbered paragraphs, allegations of the first cause of action continue as set forth below.

Surveys made by or for defendant reveal that the areas of Chapel Hill in which substandard, unsafe and unsanitary dwelling structures were located and where safe and sanitary dwelling accomodations were needed were "in the western and northwestern area of the Town of Chapel Hill, being the areas occupied by members of the Negro race." Subsequent to these survey findings, defendant "selected and approved several sites in the western and northwestern sections of Chapel Hill, which sites consisted of improved and unimproved real estate, the majority of the improved being substandard and unsanitary; that at least two of said sites were selected and approved, each being in the area where the need for adequate housing existed and in areas which would be improved by the construction of public housing facilities."

Paragraphs IX and X, stricken by an order of Judge Mallard dated October 8, 1964, are as follows:

"IX. Plaintiffs are informed and believe, and upon such information and belief, allege that such sites were thereafter submitted for approval to the Public Housing Authority but that said Authority declined to approve said sites and its representatives, after conferring with various persons, groups and organizations in

the community, rejected them and directed that they not be approved since the areas in which they were located were not substantial developed residential areas of the community, would not assure racial integration, and would not serve the ends sought to be accomplished by such various other persons, groups and organizations whose aims were not those of the Housing Authorities Act.

"X. Plaintiffs are informed and believe, and upon such information and belief, allege that subsequent to the action of the Public Housing Authority, the Chapel Hill Housing Authority then considered sites on the basis of what the Public Housing Authority would approve, rather than those where better housing was needed, such sites being within the well-developed residential areas of Chapel Hill and in those areas occupied by members of the Caucasian race."

The Public Housing Authority "advised that it would approve a site previously selected by the Authority in the western section of Chapel Hill and adjacent thereto if incorporated within the town and if the local Authority would approve, select and acquire the 1.6-acre (Abernethy) tract located on North Columbia Street adjacent to the Noble Heights area . . . and any other site selected through approval of the Public Housing Authority." In June 1964, defendant "agreed to approve, select, and acquire both such sites, which the Public Housing Authority would approve and any other property satisfactory to the Public Housing Authority and which it would approve for the purpose of constructing low rental public housing without consideration or regard for the interests of the community, the character of the area in which such site might be located, the need for low rental public housing in the area, the effect of such selection, acquisition, and development on the social, economic, political or practical interest of the community or its citizens, residents or property owners, the well-being, harmony, welfare, health, happiness of the residents of the area and the well-being and best interests of the tenants and without regard to whether such site were a fit or proper site for the construction of low rental public housing, the sole consideration being the approval or disapproval of the Federal Public Housing Authority, or its representatives or agents."

Pursuant to the blanket authorization to acquire sites which the Public Housing Authority would approve, including the Abernethy site, defendant, during the month of July 1964, "procured from one M. A. Abernethy an option to purchase the 1.6-acre tract located on North Columbia Street at the intersection of Noble Street adjacent to the Noble Heights area as hereinbefore described, for the

purpose of constructing thereon low rental public housing, although it would not eliminate a single occupied slum structure."

Defendant selected and has attempted to acquire the Abernethy tract wholly by reason of the external pressures applied by the Public Housing Authority and by persons, groups and organizations *"desirous of integrating the races in housing within the corporate limits of the Town of Chapel Hill,"* and not on account of its being a proper location for public housing. Defendant has heretofore approved and abandoned "many previous prospective sites." Although the Abernethy site involved "is an insubstantial portion of the over-all public housing project proposed for Chapel Hill and is not connected with any other prospective site," the Public Housing Authority and defendant "have taken the position that unless this site is acquired and developed, there will be no public housing in the Chapel Hill community."

The Abernethy site consists primarily of vacant land in a well developed residential neighborhood in which the structures are substantial, safe, sanitary and well above minimum standards. Location of low cost public housing apartment units in this "already densely populated" area would cause congestion, increase traffic hazards and in general "greatly devalue" the surrounding property. Within a few hundred yards, with different access, areas are available to defendant where there is a need for adequate housing facilities; and in these areas construction of low cost public housing apartment units will enhance the value of the surrounding property. Defendant's selection of the Abernethy site is arbitrary, capricious and constitutes an abuse of discretion.

Paragraph XVIII, stricken by an order of Judge Mallard dated November 4, 1964, is as follows:

"That plaintiffs are informed and believe that the actions of the Public Housing Authority in directing the selection of sites through approval or disapproval has been controlled, influenced and directed on the basis of integration of the races rather than a desire to provide low rental public housing for those in need and/or the elimination of the slum areas of the community."

The Abernethy property is the only site defendant "purports to select and acquire which would have the effect of placing low rental public housing *in an area occupied by members of the Caucasian race and in which enforced integration of the races would occur and* in an area which would be down graded or depreciated in value through the construction of such facilities, or in which the existing structures are adequate, safe, sanitary and equal to or superior to those to be provided by public housing."

Defendant "persists in its attempts to acquire the Abernethy

property solely by reason of the dictates of the Public Housing Authority *and the pressures by those persons desiring to convert public housing into an instrument of integration of the races* and not the purposes for which it is properly used of improving the standards of an area and affording decent, safe and sanitary housing accommodations for persons of low income." Defendant has abdicated the discretion vested in it by law, basing its determination of sites "on *race factors and* other extraneous factors" and not on the basis of whether it is a proper and suitable site for public housing.

The construction of low rental public housing apartments on the Abernethy property will substantially change the character of the neighborhood, render plaintiffs' properties less desirable for residential purposes, depreciate the value of plaintiffs' properties, etc., and thereby cause plaintiffs to suffer irreparable injury for which they have no adequate remedy at law.

Following the matters set forth in the above numbered paragraphs, allegations of the second cause of action continue as set forth below.

In July 1964, defendant procured from M. A. Abernethy an option to purchase said 1.6-acre tract. Prior thereto, two members of defendant had resigned and have not, since June 1964, acted as members of defendant. A third member of defendant, who has stated his intention to resign, was "without the continental United States" when the option was obtained. Under G.S. Chapter 157, defendant consists of five members; and no meeting, with a quorum present, was held to approve the option price, to authorize the exercise of the option or to acquire the property pursuant to the option. The agents of defendant, without authority, "have arbitrarily proceeded to attempt to exercise the option and acquire the Abernethy property." There being no authorization therefor, said action was arbitrary and capricious.

Allegations in the second cause of action, as to irreparable injury for which there is no adequate remedy at law, are substantially the same as those in the first cause of action.

Upon motion of defendant, Judge Mallard struck from the complaint Paragraphs IX, X and XVIII and the phrases italicized above from Paragraphs XIV, XIX, XXI and XXII. Plaintiffs excepted.

By order of October 8, 1964, Judge Mallard *vacated and dissolved* the portion of the temporary restraining order of August 19, 1964, that enjoined defendant from exercising the option, but *continued until the final hearing* the portion of said restraining order that enjoined the defendant from "using or attempting to use" said property. Plaintiffs excepted to the first part of the order; defendant to the latter.

Defendant filed answer on November 6, 1964. The record contains an "ORDER OF MISTRIAL" entered by Judge Braswell at March Civil Session 1965. This order indicates that, after the jury had been selected and impaneled, the presiding judge, in the exercise of his discretion and on grounds not pertinent to this appeal, withdrew a juror and ordered a mistrial, continuing in effect the temporary restraining order of August 19, 1964, as modified by the order of October 8, 1964. By order of September 27, 1965, Judge Johnson, in accordance with their petitions, ordered that additional plaintiffs be made parties in this cause; and, as permitted by Judge Johnson's order, these additional plaintiffs filed complaints in which they adopted as their own the amended complaint of original plaintiffs. Defendant answered these complaints by adopting in respect of the additional plaintiffs its answer to the amended complaint.

Upon the call of the case for trial at March 21, 1966 Session, defendant, through counsel, demurred *ore tenus* "as to the first and second causes of action on the grounds that the complaint does not contain facts sufficient to constitute a cause of action against the defendant." The court, being "of the opinion that the demurrer should be sustained," entered the following order:

"Now therefore, IT IS ORDERED that the demurrer *ore tenus* be and the same is hereby sustained.

"IT IS FURTHER ORDERED that the restraining order heretofore entered, dated the 8th day of October, 1964 by Judge Mallard is hereby continued and shall be in full force and effect pending appeal to the Supreme Court and the ultimate determination of this cause."

Plaintiffs excepted to the court's ruling and judgment and appealed therefrom.

Haywood, Denny & Miller for plaintiff appellants.
James C. Harper for defendant appellee.

BOBBITT, J. Plaintiffs base their alleged right to maintain this action solely on their status as residents and property owners. Their alleged grievance is that the construction by defendant of low rental public housing apartments on the Abernethy tract will seriously and adversely affect the desirability of their property for residential use and substantially depreciate its value.

The cause of action consists of the facts alleged. G.S. 1-122; *Lassiter v. R. R.*, 136 N.C. 89, 48 S.E. 642. The facts alleged, but not the pleader's conclusions, are deemed admitted where the sufficiency of a complaint is tested by demurrer. *Stamey v. Membership Corp.*, 247 N.C. 640, 101 S.E. 2d 814; 3 Strong, N. C. Index, Pleadings § 12. The facts considered below are *alleged* by plaintiffs.

Defendant was created and organized pursuant to the provisions of G.S. Chapter 157, Article 1, entitled "Housing Authorities Law." Hence, all housing projects of defendant are "subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated." G.S. 157-13. Plaintiffs do not allege or contend that the contemplated construction of low rental public housing apartment units on the Abernethy tract would violate any zoning or other governmental regulation applicable to the locality. Nor do they allege or suggest that the Abernethy tract is subject to any covenant imposed by deed or contract purporting to prevent its use for the contemplated purpose.

In view of the references to racial integration in plaintiffs' stricken allegations, it is noted that a zoning ordinance purporting to restrict the occupancy and use of property solely on the basis of race is unconstitutional and void. *Clinard v. Winston-Salem,* 217 N.C. 119, 6 S.E. 2d 867, 126 A.L.R. 634 (1940). A covenant in a deed or contract purporting to impose such a restriction is not enforceable in equity by injunction. *Shelley v. Kraemer,* 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441. A breach thereof is not ground for the recovery of damages in an action at law. *Barrows v. Jackson,* 346 U.S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031.

Under the facts alleged, plaintiffs would have no right to restrain an individual or private corporation from acquiring the Abernethy tract and constructing thereon low rental apartment units.

The constitutionality of said "Housing Authorities Law" was upheld when challenged by taxpayers in *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693, and in *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252, and in *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281. No provision of said "Housing Authorities Law" is challenged by plaintiffs as being unconstitutional or otherwise void. Plaintiffs assert defendant's selection of the Abernethy property as a site for the construction of low rental housing apartments is "arbitrary" and "capricious" and constitutes "an abuse of discretion" by defendant.

"In the selection of a location for a housing project as authorized under the Housing Authorities Law, the project may be built either in a slum area which has been cleared, or upon other suitable site. The housing authority is given wide discretion in the selection and location of a site for such project." *In re Housing Authority,* 233 N.C. 649, 660, 65 S.E. 2d 761, 769, and cases cited. "There is nothing in the law in this jurisdiction that requires housing projects to be located only where slum districts exist." *Housing Authority v. Wooten,* 257 N.C. 358, 367, 126 S.E. 2d 101, 107. Defendant's pri-

mary objective is to make low rental public housing available to persons who are now living in "substandard, unsafe and unsanitary dwelling structures."

"In determining what property is necessary for a public housing site, a broad discretion is vested by statute in housing authority commissioners, to whom the power of eminent domain is delegated. G.S. 157-11; G.S. 157-50; G.S. 40-37. Indeed, so extensive is this discretionary power of housing commissioners that ordinarily the selection of a project site may become an issuable question, determinable by the court, on nothing short of allegations charging arbitrary or capricious conduct amounting to abuse of discretion." *In re Housing Authority,* 235 N.C. 463, 70 S.E. 2d 500. In that case a jury found the selection of a part of the campus of Livingstone College as a site for a housing project to be arbitrary and capricious, considering the present and future needs of the college and the availability of other suitable sites nearby. This Court held there was ample evidence to warrant submission of the issue, and to support the verdict.

Each of the three cases last cited was a proceeding by a Housing Authority, in the exercise of the power of eminent domain conferred by G.S. 157-11, to condemn land for use as a site for the construction of low rental public housing apartments. In the present action, defendant (Housing Authority) does not seek to condemn or otherwise acquire any property owned by any of the plaintiffs. There is no controversy between it and the owner of the Abernethy tract. It is not alleged or contended that the Abernethy tract is not suitable for use as a site for low rental public housing. The gist of the complaint is that plaintiffs do not want low rental public housing apartments in close proximity to their residences and property. While plaintiffs' apprehensions are understandable, the complaint alleges no facts sufficient to show the selection of the Abernethy tract was "arbitrary" or "capricious" or "an abuse of discretion." Defendant's failure to select a site in an area in which the present dwelling structures are substandard, unsafe and unsanitary cannot be considered arbitrary or capricious or an abuse of discretion.

We have not overlooked plaintiffs' contention that the Abernethy property was selected in order to meet the requirements or approval of the United States Public Housing Administration, created and established pursuant to U.S.C.A. Title 42, Chapter 8. Plaintiffs' allegations imply that defendant depends wholly or largely on federal financial assistance for the acquisition of land and the construction of public housing thereon. There being no factual allegations sufficient to show the Abernethy tract is not suitable for use as a site for low rental public housing, whether defend-

ant was induced to select it to meet the requirements or approval of the Public Housing Administration is immaterial. If suitable for the contemplated use, the selection thereof is not subject to successful challenge by searching the motives either of defendant or of the Public Housing Administration. *Cf. Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5.

With reference to the alleged second cause of action: Defendant's exercise of the option, if not properly authorized at a duly constituted meeting of the Commission, is ratified by defendant's pleadings and position in this action. Assuming *the Commission* could set aside unauthorized action or rescind previously authorized action, the internal affairs and functioning of the Commission are not subject to challenge by plaintiffs. *Cf. Carringer v. Alverson,* 254 N.C. 204, 118 S.E. 2d 408.

It is unnecessary to pass upon whether Judge Mallard erred in any of his rulings with reference to striking portions of the amended complaint. In our view, the amended complaint fails to state facts sufficient to constitute a cause of action either including or excluding these allegations. Accordingly, exercising our supervisory jurisdiction (N. C. Const. Art. IV, Sec. 10), we consider the case as if a demurrer *ore tenus* to the amended complaint in its entirety had been lodged in this Court; and, when so considered, such demurrer is sustained. This ruling, of course, necessarily includes an affirmance of Judge Hall's order sustaining the demurrer *ore tenus* to the amended complaint exclusive of the portions previously stricken therefrom.

Affirmed.

LOUISE G. HUTCHINS v. RUSSELL V. DAY.

(Filed 8 March, 1967.)

1. Seduction § 6—

In order to maintain a civil action for seduction, plaintiff must show that intercourse was induced by promise of marriage or by deception, enticement or other artifice, and when plaintiff's evidence discloses that the first act of intercourse was consented to by plaintiff, voluntarily and knowingly, without promise or inducement, the maxim, *volenti non fit injuria* applies, and nonsuit is properly entered.

2. Breach of Promise of Marriage—

A promise of marriage by a man already married will not support an action for breach of promise of marriage, but promises made subsequent to his divorce may be made the basis of such an action.

3. Same—

It is not required that a promise of marriage embrace a definite date, it being sufficient if the evidence justifies a finding by the jury of the existence of an engagement, but the marriage of one of the parties to another person is a definite breach of promise.

4. Same—

Plaintiff's evidence *held* sufficient to show a valid contract of marriage entered into by the parties in this State and a breach of the contract in this State, precluding nonsuit, notwithstanding evidence that would also permit a finding that the promise of marriage was made in another state which does not recognize such cause of action.

5. Same; Courts § 20—

Where the promise of marriage is made in a state not recognizing a cause of action for breach of promise, a plaintiff may not maintain a cause of action here for breach of promise of marriage, and therefore defendant's allegations that the promises of marriage were made exclusively in such other state sets up a valid defense and motions to strike such allegations are properly denied.

HIGGINS and LAKE, J.J., concurring in part and dissenting in part, vote to affirm the judgment of nonsuit as to both causes of action.

APPEAL by plaintiff from *Johnston, J.*, at June 1966 Civil Session of GUILFORD County Superior Court, docketed and argued at Fall Term, 1966 as No. 703.

Plaintiff instituted this civil action against the defendant for damages allegedly resulting from seduction and breach of promise to marry.

Plaintiff's evidence tends to show that she came to work as a teacher in Sumner School in Guilford County at the age of twenty-two years upon graduation from college. Defendant, a married man of forty-nine years of age was the principal. Plaintiff and defendant began dating each other secretly in the Greensboro area, and within a few weeks they began an affair spending weekends in motels, and seeing each other two or more times per week for some four years. At that time (summer of 1959) the defendant lost his position because he was having an affair with another one of his teachers, Coleen Long. The defendant then went to Alaska for a year and returned to California, where he remained until the end of the school year 1964.

Meanwhile, the plaintiff had also gone to California, and they continued their relationship.

The plaintiff testified that for some seven years the defendant spoke of their marriage when he obtained a divorce, which occurred in 1962. The defendant then stated he wanted to improve his financial condition before they got married, and in 1963 when the plain-

tiff had become pregnant, he offered the excuse that he was too old to have children and that an illegitimate child was no way to start their marriage. The plaintiff had an abortion in early 1964.

From 1960 to 1964 plaintiff and defendant traveled together from California to North Carolina on several trips. In that year the defendant told the plaintiff that he was going to marry Miss Coleen Long, and invited the plaintiff to attend the wedding as a guest! The plaintiff attended the wedding and as the bride passed her, she threw red ink on her and other members of the wedding party.

The plaintiff testified that she had never had sexual relations with any man except the defendant.

At the close of plaintiff's evidence the motion of defendant for judgment as of nonsuit was allowed, and plaintiff appealed.

Alston, Alexander, Pell & Pell for plaintiff appellant.
Russell V. Day (In propria persona) for defendant appellee.

PLESS, J. While an action for civil seduction may be maintained without a promise to marry, the mere proof of intercourse, and no more, is not sufficient to warrant recovery. *Volenti non fit injuria. Hardin v. Davis,* 183 N.C. 46, 110 S.E. 602. This Latin phrase is translated to mean "To the consenting no injury is done. A person who consents to a thing cannot complain of it as an injury." Upon the plaintiff's testimony she started spending weekends with defendant in a motel within a few days after she had met him, but claims she did not have sexual relations with him until several weekends of this kind, that is, on 10 October, 1955.

It is further said in *Hardin v. Davis, supra,* that intercourse induced by deception, enticement or other artifice will suffice, however. The plaintiff fails to bring herself within any of the above requirements as there is no claim that defendant promised to marry her prior to the first intimate relations, although he did say he did not love his wife and did not intend to live with her any more. The evidence of the plaintiff cannot be read without coming to the conclusion that the plaintiff voluntarily and knowingly consented, and quickly surrendered herself to the defendant. There was no element of deceit and she testified that she enjoyed the sexual pleasures he offered her.

The court was correct in sustaining defendant's motion for judgment as of nonsuit on the count charging civil seduction and it is hereby *affirmed.*

As to the cause of action based upon breach of contract of marriage:

"Any promise of marriage made by or to a person who, to the

knowledge of the parties has a husband or wife living, is absolutely void in its inception and is ineffectual to give rise to an action even though such a promise is not to be performed until after the death of the promissor's or promisee's husband or wife. Likewise, such a promise is void when made by a married person in expectation of a divorce by force of a pending suit. Such contracts are opposed to morality and public policy; they are in themselves a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie." 12 Am. Jur. 2d, Breach of Promise, Sec. 7, page 708.

But it is also held that after the disability is removed "a renewal by the defendant of the promise after the dissolution of the marriage relation existing while the promise was made will sustain an action for its breach." 12 Am. Jur. 2d, Breach of Promise, Sec. 7 (1964). *Elmore v. Haddix,* 254 Ky. 292, 71 S.W. 2d 620; *Sanctuary v. Cary,* 51 R.I. 224, 153 Atl. 316; *Ferguson v. Jackson,* 248 S.W. 66 (Tex. Ct. Civ. App.); *Edelbaum v. Lustig,* 250 N.Y. Supp. 561 (New York City Ct.); Keezer, Marriage and Divorce, Sec. 90, p. 127 (3rd Ed. 1946). See *Strickland v. Anderson,* 186 S.C. 482, 196 S.E. 185.

The following excerpts from the testimony of the plaintiff, taken in the light most favorable to her, tend to show that the marriage contract was renewed after the disability of the defendant had been removed: "He promised to marry me in California, and he promised periodically. He promised even before he got his divorce and after too. This was done periodically — North Carolina, across the country, and California, all the way across. * * * That was in 1962 when he drove back here in the spring, and he told me that the divorce was final. I believe it was in 1962, the spring we drove back to North Carolina in the spring of 1962. He told me periodically, not every day, but we talked about it. Sometimes it would come up once a month or occasionally. When I first learned that he had gotten a divorce or his wife had divorced him was in North Carolina in the spring of 1962. That is what he told me, and he kept telling me the following year that he had the divorce but we wouldn't be married until he paid his bills. * * * He was free to marry me from September 1962 up until the time he got married to somebody else two years later. During the whole two-year period, he did say that he was going to marry me. He said this periodically. I can't give you the date or day. I do not mean once a week. The matter came up approximately once a month."

A contract to marry need be in no specific terms. "If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is immaterial as to what means they

have arrived in that state." Lee, North Carolina Family Law, Vol. 1, § 2, page 10. While a contract of marriage requires an agreement between the parties and a meeting of the minds, human nature is such that a courtship does not follow any formal pattern and, as above stated, conduct and terms of endearment between the parties may be sufficient to justify a jury in finding the existence of an engagement. "If either party refuses to perform, the only legal remedy of the other party is an action for damages for the breach of the promise * * * and the marriage to another is, of course, a definite breach." Lee, *supra,* page 11.

Construing the evidence in the light most favorable to plaintiff, it is sufficient to justify a finding that defendant promised to marry plaintiff after the defendant's disability was removed.

In his further defense the defendant denied entering into a contract of marriage with the plaintiff, but asserted that if such contract were made it was in California, whose statute (Civil Code of California, § 43.4) provides that a fraudulent promise to marry does not give rise to a cause of action for damages. Another California statute *(Ibid* 43.5) pleaded by defendant provides that a breach of promise of marriage is not an actionable wrong. He further pleaded that any cause of action * * * arose outside of North Carolina and, the plaintiff and defendant both being nonresidents of the State of North Carolina, cannot maintain her action against defendant in the courts of North Carolina. In addition the defendant pleads the provisions of G.S. 1-87.1, which provides for dismissal of an action arising out of the State when parties are nonresidents.

The plaintiff moved to strike the foregoing portions of the further answer and the facts relating thereto. This was denied and the plaintiff excepted.

The quoted excerpts from the plaintiff's testimony are sufficient to sustain a finding by the jury that there was a valid contract of marriage entered into by the parties in North Carolina; that it was breached in North Carolina; and upon such findings she would be entitled to recover damages in the courts of this State.

On the other hand, the defendant is entitled to present his defense to the effect that there was no contract of marriage in North Carolina; that if any contract were made it was in the State of California, which, under its statutes, does not permit a cause of action for the breach thereof.

In our research we find a number of cases in which the courts of States having a statute similar to the two California statutes have refused to allow recovery where the contract and breach occurred in a State not having this legislation. *O'Conner v. Johnson,* 74 F. Supp. 370; *Thome v. Macken,* 58 C.A. 2d 76; 136 P. 2d 116; *Albert*

v. McGrath, 278 F. 2d 16, 165 F. Supp. 461, *A. B. v. C. D.,* 36 F. Supp. 85, *Calcin v. Milburn,* 176 F. Supp. 946, *Gaines v. Poindexter,* 155 F. Supp. 638.

While we have been unable to find a decision on the exact converse of this case, we think that by analogy *Shaw v. Lee,* 258 N.C. 609, 129 S.E. 2d 288, is applicable. In that case the plaintiff was a resident of North Carolina and was injured in Virginia while riding as a guest of her husband in an automobile owned and operated by him. She sued her husband and the driver of the other vehicle involved. The court sustained a demurrer, saying that the plaintiff alleged a right of action in Virginia to recover for injuries sustained there; Virginia does not give a right of action to one spouse to recover damages from the other for injuries to the person negligently inflicted. In upholding the ruling of the lower court, Rodman, J., quoted with approval from *Dawson v. Dawson,* 138 So. 414 (Ala.) "The only true doctrine is that each sovereignty, state or nation, has the exclusive power to finally determine and declare what acts of omissions in the conduct of one to another — whether they be strangers, or sustain relations to each other which the law recognizes, as parent and child, husband and wife, master and servant, or the like — shall impose a liability in damages for the consequent injury, and the courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired."

Justice Rodman also quoted from *Gray v. Gray,* 94 A.L.R. 1411; "The common law rule that the spouses cannot sue each other is more than a prohibition against maintaining an action, but is a substantive rule which prevents the creation of a cause of action as between the spouses."

He concluded that "Claimant's right to recover and the amount which may be recovered for personal injuries must be determined by the law of the State where the injuries were sustained. If no right of action exists there, the injured party has none which can be enforced elsewhere."

It follows that a party to a contract made in a State which denied recovery for its breach should not be allowed to recover in another State, although the breach occurred in the forum State, and that a contract unenforceable in the State where it is made should not be enforceable in the courts of this State. Thus if the alleged marriage contract were made in the State of California, the defendant would not have been liable. The motion to strike the allegations offered by the defendant was therefore properly denied.

The judgment of nonsuit on the action for seduction was cor-

rect, but the judgment for nonsuit for breach of marriage contract is hereby

Reversed.

HIGGINS and LAKE, J.J., concurring in part and dissenting in part, vote to affirm the judgment of nonsuit as to both causes of actions.

OLZIE C. RODMAN, CLARK RODMAN AND WIFE, MAVIS L. RODMAN *v.* ALBERT MISH, CHARLIE CRAIG, J. D. ALLIGOOD, MRS. R. F. VENTERS, AUBREY PIPPIN AND MITCHELL WOOTEN.

(Filed 8 March, 1967.)

1. Cemeteries § 3—

The heirs of a decedent at whose grave a monument has been erected may maintain an action for damages for the removal of the monument, even though they are not owners of the fee, but their pleading should allege their relationship to the decedent so as to disclose that they are heirs entitled to maintain the action, and mere allegation that they were heirs of the decedent is insufficient, and demurrer *ore tenus* to their pleading in the lower court and written demurrer filed in the Supreme Court must be sustained.

2. Pleadings § 21.1—

Where demurrer is properly sustained for want of an essential averment, the action should not be dismissed until the pleader has had an opportunity to amend. G.S. 1-131.

APPEAL by defendants, other than Mitchell Wooten, from *Hubbard, J.,* at October 1966 Term of BEAUFORT Superior Court.

The plaintiffs are the owners of a lot in Riverside subdivision some three miles from the town of Washington, North Carolina. The deed to them in 1957 and again in 1962 has no exceptions, reservations or restrictions.

They allege that the defendants are trespassing upon their property and are in the process of erecting thereon a wire fence with iron fence posts, digging holes in the ground and damaging flowers, shrubbery, etc., planted by the plaintiffs; and that the plaintiffs are the absolute owners of the premises, and the defendants have no interest therein, and ask that the defendants be "enjoined and restrained from further trespass upon said property".

The defendants in their answer say that the title of the plaintiffs is subject to reservations contained in a deed from John D. Doughty and wife to Thomas Payton, dated 13 April, 1885, which

conveys title to the lands now owned by the plaintiffs and which contained the following reservation: "Saving and excepting from this conveyance what is known as the Robason Burial Ground, not exceeding one-third of an acre." They allege that the same reservation is contained in all the deeds affecting the said property from that date (1885) down to and including the deed from W. H. Russ to Olzie C. Rodman dated 24 September, 1912. They further allege that the reservation was omitted for the first time when Mrs. Rodman conveyed the lot to her son (the plaintiff) on 22 January, 1957, and in another deed on 10 February, 1962. They allege that as the descendants of Gabe Robason they are possessed of an easement to the Robason Burial Ground, and that they have the right to build and construct the fence around the one-third acre for the purpose of preserving the same, and also that the plaintiffs were estopped by virtue of the lapse of time and by virtue of the long acquiescence by themselves, and those under whom they claim, to now interfere with or prevent the defendants from using the property as a burying ground. They say there are approximately 30 graves in the plot, and that tombstones and markers had been erected at said graves, and through the years since 1880 that the descendants of Gabe Robason have enclosed the plot with fences, the last of which fences was torn down by the plaintiffs along with certain of the monuments which had been erected by the kinsfolk and the immediate family of those who are buried there, and in a cross-action seek damages therefor. Throughout their pleadings the defendants refer to themselves as descendants of Gabe Robason.

A preliminary injunction was issued restraining the defendants from proceeding with the erection of the fence, and when the matter came on for hearing upon the return date the plaintiffs demurred *ore tenus* to the reply of the defendants which was sustained. In the argument before this Court the plaintiffs sought permission to file a written demurrer, which was granted. It has now been filed upon the grounds that the defendants' pleadings do not state facts sufficient to constitute a cause of action in favor of said defendants against the plaintiffs herein, in that the same does not allege that the defendants are the next of kin of any particular person whose grave is alleged by them to have been desecrated.

The lower court sustained the demurrer *ore tenus* and the defendants excepted and appealed.

W. B. Carter, Rodman & Rodman for plaintiff appellees.
Albion Dunn, M. E. Cavendish for defendant appellants.

PLESS, J. Throughout the defendants' pleadings they refer to themselves as the "descendants" of Gabe Robason and also speak of the latter as their ancestor. Nowhere do they state their relationship to Gabe Robason, nor to any other person buried in the "Robason Burial Ground".

In *King v. Smith*, 236 N.C. 170, 72 S.E. 425, Barnhill, J., speaking for the Court, said: "If the graves of the ancestors of plaintiffs were desecrated as alleged, then the cause of action created thereby vested in the next of kin of the Kings who were then living, but, in ascertaining who are the next of kin, it must be determined: First, who were the nearest of kin in equal degree; second, were there others who, if living, would be kin in equal degree; and third, did those who, if living, would be kin in equal degree, leave children or other lineal descendants surviving at the time the right accrued. If it appears that there were others who, if living, would be kin in equal degree and that they left children surviving then such children are deemed next of kin by representation and are vested with the same right which would have accrued to the parent had he or she been living at the time the right accrued."

Also in 14 Am. Jur. 2d, Cemeteries, § 41, it is stated: "But except where the right to maintain the action is based on the theory of title or right to possession of the soil itself, it is generally held that the paramount right of action is in the surviving spouse, and if there is no surviving spouse, in the next of kin in the order of their relationship to the deceased. In this character of case, the term 'next of kin' means those who would take under the statute of descent or distribution, and are to be ascertained as of the date the cause of action arose. However the next of kin may not each maintain a separate action, but are limited to a single action with all the party plaintiffs joining therein, or, in a proper case, a class action may be maintained."

"In a case involving injuries to a family burial ground it was said in *Mitchell v. Thorne* (1892), 134 N.Y. 536, 32 N.E. 10, 30 Am. St. Rep. 699, that it had been decided many times that the heirs of a decedent at whose grave a monument has been erected, or the persons who rightfully erected it, could recover damages from one who wrongfully injured or removed it, or restrain one who threatened without right to injure or remove it, even though title to the ground wherein the grave lay was not in the plaintiff but in another. But an allegation that the 'ancestors and collateral relatives' of the plaintiffs had been buried in the cemetery in question was not the equivalent of an allegation that the plaintiffs were the heirs of such descendants within the meaning of such rule, since no one is an heir to all his ancestors." 130 A.L.R. 259.

Also "Persons having a right to protect private cemeteries or graves therein may erect a fence around the cemetery." *Kenner v. Cousin* (1927), 163 La. 624, 112 So. 508. See also *Lay v. Carter* (1915), 151 N.Y.S. 1081, *infra,* III c, holding that any member of a family whose dead were buried in a family cemetery might enjoin the removal of a fence or an interference with any portion of the cemetery. However, any one or more of the heirs of persons buried in a private cemetery may prevent an interference with the rights held in common. *Mitchell v. Thorne (N.Y.) supra,* followed in *Lay v. Carter* (1915), 151 N.Y.S. 1081. 130 A.L.R. 255 and 259.

The lower court sustained the demurrer *ore tenus* "to that portion of the counterclaim or cross-action contained in the answer of the defendants * * * which seeks damages of the plaintiffs for alleged desecration of the graves on the property described in the complaint for that such portion of the counter-claim does not state facts sufficient to constitute a cause of action in favor of said defendants against plaintiffs herein."

The description of themselves as the "descendants and relatives" of those buried in the "Robason Burial Ground" is not sufficient to maintain the cross-action. A definite allegation that they are the next of kin of Gabe Robason or of others buried therein is required. Their alleged relationship to the deceased persons is peculiarly within the knowledge of the defendants, and plaintiffs are entitled to definite information which should be contained in the answer or cross-action.

In view of the authorities above cited we are of the opinion, and so hold, that the court was correct in this ruling, in which the demurrer *ore tenus* was sustained, but not that the cross-action should have been dismissed. The defendants may be able to make allegations in an amended answer which would meet the foregoing objections and the defendants should have been authorized to further plead pursuant to the authority of G.S. 1-131.

Likewise, and based upon the authorities already cited, we hold that the written demurrer filed in this Court for that the defendants' pleadings do not allege that the defendants are the next of kin of any particular person whose grave is alleged by them to have been desecrated is good, and it is hereby sustained.

Usually the reservation and exception of a part of the lands being conveyed would leave the title in the reserved section in the grantor. Thus, except that a burial ground is involved, the title to the disputed property would now be in the heirs of Doughty who first reserved it. But the ruling in *Mitchell v. Thorne, supra,* is applicable here when it says that the heirs of a decedent could recover damages from one who wrongfully injured or removed a monument

thereon "even though title to the ground wherein the grave lay was not in the plaintiff, but in another."

Questions other than those herein considered may arise in the future development of the case, but they do not require determination at this time.

The demurrer *ore tenus* and the written demurrer filed in this Court are hereby sustained, but the order of the lower court in dismissing the cross-action is modified and the cause remanded that the defendants may proceed, if so advised, under G.S. 1-131.

Modified and affirmed.

BECKER COUNTY SAND & GRAVEL COMPANY v. A. R. TAYLOR, ADMINISTRATOR OF MARY JANE (MOLLIE) GILCHRIST ESTATE, DECEASED; W. C. GILCHRIST AND WIFE, CLARA GILCHRIST; ELSIE T. WESTER AND HUSBAND, HORACE WESTER; CLARA T. BROWN AND HUSBAND, W. HAL BROWN; GERTRUDE T. MYERS AND HUSBAND, FRED MYERS; AND WAYNE BROWN AND WIFE, DOROTHY BROWN.

(Filed 8 March, 1967.)

1. Courts § 6—

Construing G.S. 1-276 and G.S. 1-272 *in pari materia*, it *is held* that the Superior Court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved.

2. Statutes § 5—

Statutes dealing with the same subject matter will be construed *in pari materia* and harmonized to give effect to each.

3. Judicial Sales § 5—

The rights of the last and highest bidder at a judicial sale, whose bid has been confirmed by order of the clerk, may not be divested except on the ground of mistake, fraud or collusion, in a hearing after notice and opportunity to be heard by all parties in interest.

4. Notice § 1—

All parties in interest must be given notice of motion before the clerk, except in regard to motions which may be granted as a matter of course.

5. Partition § 10—

While there was pending in partition proceedings a motion to dismiss on the ground that movant had acquired the entire interest in the property, the assistant clerk entered an order confirming the prior public sale of the property, and thereafter the clerk allowed the motion to dismiss without notice to the last and highest bidder. *Held:* The entering of the order of confirmation while the motion to dismiss was pending was ir-

regular, and the dismissal of the proceeding without notice to the last and highest bidder was also irregular, and therefore both orders must be vacated and the cause remanded for a plenary hearing before the clerk after notice to all the parties of record, including the purchaser at the judicial sale.

6. Judicial Sales § 8—

While the commissioner conducting a judicial sale may protect his right to commissions, G.S. 1-408, or defend an attack upon his accounts, he has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property in his hands.

APPEAL by plaintiff from *Bailey, J.,* 16 May 1966 Civil Session of HARNETT. This case was argued at the Fall Term 1966 as No. 619.

Special proceeding for partition of land by sale.

On 28 September 1965 plaintiff filed with the clerk of superior court of Harnett County a petition for partition of certain land formerly owned by Mary Jane (Mollie) Gilchrist, who died intestate 1 February 1965. Plaintiff alleged it was the owner of a one-fifteenth undivided interest as a tenant in common, and made the other tenants in common parties defendant in said proceeding. A. R. Taylor, administrator of the estate of Mary Jane (Mollie) Gilchrist, was made a party defendant on petitioner's allegation, *inter alia,* that the estate was without sufficient personal assets to pay debts. The petition contained the other usual allegations for partition by sale, including allegation that actual partition of the land could not be had without injury to petitioner and other interested parties.

Answer, verified by A. R. Taylor as administrator, was filed denying the material allegations of the petition.

After hearing, the clerk ordered partition by sale and appointed A. R. Taylor commissioner to sell the land at public or private sale. On 6 January 1966, the commissioner reported to the clerk that he had agreed, subject to confirmation of the court, to sell the property at private sale to plaintiff for $18,000, and recommended confirmation of the sale if no advance bid be made within ten days, as by law provided. Thereafter, the commissioner reported to the clerk that within the ten days he had received an upset bid, and the clerk thereupon ordered the property sold at public auction after due advertisement according to law, upon an opening bid of $18,950. On 18 February 1966, the commissioner reported a sale to Elsie Taylor Wester, one of the tenants in common, at the price of $18,950.

Prior thereto, plaintiff had filed a motion before the clerk on 16 February 1966 requesting that the matter be dismissed, stating in the motion that plaintiff had acquired the interests of all other

parties in the proceeding to the property described therein. The motion contained, *inter alia,* the following:

> "4. That Becker County Sand and Gravel Company herewith tenders to the court and to the administrator whatever sum is necessary to pay the debts and administration costs of the deceased Mary Jane (Mollie) Gilchrist."

Before this motion was acted on, the assistant clerk entered an order dated 4 March 1966, confirming the sale to Elsie Taylor Wester, which order directed the commissioner to pay the costs of the proceeding, including the sum of $947.50 as commissioner's fees, and to thereafter distribute the remainder to the parties entitled thereto.

On 22 April 1966 the clerk entered an order allowing plaintiff's motion of 16 February 1966 and dismissing the proceeding on condition that plaintiff pay to the administrator of the estate of Mary Jane (Mollie) Gilchrist $2,011.95 and that plaintiff pay the costs of the proceeding, including $600 to A. R. Taylor as commissioner's fees.

On 16 May 1966, Judge Bailey entered an order in which he found facts substantially as set out above and also found that A. R. Taylor had been appointed commissioner by consent of all parties, and that at the hearing on the petition for partition all parties were represented by counsel. The trial judge found that the commissioner had no notice of plaintiff's motion to dismiss the proceeding; that Mary Jane (Mollie) Gilchrist had been dead for less than two years; and that administration of her estate was still pending, with debts unpaid. Upon these findings Judge Bailey ordered that the clerk's order dismissing the proceedings be set aside and that the sale confirmed by order of the assistant clerk be confirmed. The order directed that the proceeds from the sale be paid to A. R. Taylor, commissioner, and that after payment of the costs of this action the remaining proceeds be paid to the administrator.

To the signing of the order plaintiff appeals, excepting to the finding of facts as not being based on evidence appearing of record, and to the court's refusal to permit plaintiff to introduce evidence.

Edgar R. Bain for plaintiff appellant.
Robert B. Morgan and Robert H. Jones for defendant appellee.

BRANCH, J. G.S. 1-276 provides in pertinent part: "Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon

the request of either party, to proceed to hear and determine all matters in controversy in such action . . ." However, G.S. 1-272 provides in pertinent part: "But an appeal can only be taken by a *party aggrieved,* who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof." (Emphasis ours) As these statutes deal with the same subject matter, they must be construed *in pari materia,* and harmonized to give effect to each. Strong, N. C. Index, Vol. 4, Statutes, § 5, at p. 182. In so doing, we note that the record does not disclose an appeal taken from the clerk of superior court to the superior court by a "party aggrieved" or "for any ground whatever."

Thus, the proceeding was not properly before the judge of superior court, since the record does not show an appeal from the clerk of superior court.

We have the anomalous situation of two orders of equal authority being entered by the office of the clerk of superior court of Harnett County. The order of confirmation dated 4 March 1966 purported to vest an equitable interest in the lands described in the petition in Elsie Taylor Wester, one of the tenants in common, of which she could be divested only on the ground of mistake, fraud or collusion. Strong, N. C. Index, Vol. 3, Judicial Sales, § 5, p. 71; *Perry v. Jolly,* 259 N.C. 305, 130 S.E. 2d 654. Yet the record is void as to her participation in any manner in this appeal or as to her continued claim or interest in the property. As a general rule, the order entered on 22 April 1966 allowing plaintiff's motion of 16 February 1966 to dismiss the proceeding on condition that plaintiff pay to the administrator a sum sufficient to pay all of decedent's debts, including costs of court and commissions, would seem proper. Ordinarily, heirs or their successors in interest have the right to pay off the debts of the estate in order to prevent sale of real estate. *Alexander v. Galloway,* 239 N.C. 554, 80 S.E. 2d 369. Further, if the tenancy in common is extinguished by the petitioner becoming the sole owner of the property, it would be a vain and useless thing to have the commissioner execute a deed to the person who already owns the entire interest in the property. However, there is no evidence of complete ownership in the plaintiff, except in his allegation and in the findings of fact by the clerk of superior court in a now-vacated order.

Further considering the proceedings in this cause, we find irregularities in that the office of the clerk entered an order on 4 March 1966 confirming the sale while there was a motion pending in the same office to dismiss the entire proceeding. Also, the order

entered on 22 April 1966, which allowed plaintiff's motion to dismiss the proceeding, was entered without notice to adverse parties. "'(A)ll motions . . . other than those grantable as a matter of course . . . must be on notice.' . . . The court was powerless to take away the vested interest of (a purchaser at a judicial sale) without notice and opportunity to be heard." *Perry v. Jolly, supra.*

We are unable to determine with certainty the identity of the real appellant from the clerk to the superior court. However, both appellant and appellee contend in their respective briefs that this appeal arose solely from a dispute as to the amount of commissions to be paid the court-appointed commissioner.

"'A special commissioner in a chancery cause, or a receiver of the court, is simply an officer of the court, and as such he has no right to intermeddle in questions affecting the rights of the parties, or the disposition of the property in his hands. . . . (H)e cannot interfere in the litigation or ask for the revision of any order or decree affecting the rights of the parties; but when his own accounts or his personal rights are affected, he has the same means of redress that any other party so affected would have.'" *Summerlin v. Morrisey,* 168 N.C. 409, 84 S.E. 689.

G.S. 1-408 sets out the proper procedure for determination of fees to be allowed court-appointed commissioners. See also *Welch v. Kearns,* 259 N.C. 367, 130 S.E. 2d 634.

Therefore, the order of Judge Bailey dated 16 May 1966, the order of the assistant clerk of superior court of Harnett County dated 4 March 1966, and the order of the clerk of Harnett County superior court dated 22 April 1966, are vacated. This cause is remanded to Harnett County Superior Court to the end that the court direct the clerk of superior court to hold plenary hearing upon notice to all parties of record (including the purchaser at the judicial sale) and at such hearing to take evidence and find facts as to the interest of all parties to this proceeding, and to enter judgment thereon according to law.

Error and Remanded.

WILLIAM BAXTER WELLS v. JOAB F. JOHNSON, JR.

(Filed 8 March, 1967.)

Animals § 3—

In an action to recover for injuries received by a motorist when his car collided with cattle on the highway, evidence that defendant's cattle had been out of pasture, unattended, on prior occasions, and permitting the inference that defendant knew or should have known that his pasture fences were insufficient to restrain his cattle, *held* sufficient to take the issue of negligence to the jury.

APPEAL by defendant from *Fountain, J.*, October 3, 1966 Civil Session of PENDER.

The issues raised by the pleadings were answered by the jury as follows: "1. Was the plaintiff injured by the negligence of the defendant, as alleged in the Complaint? ANSWER: Yes; 2. If so, did the plaintiff, by his own negligence, contribute to his injury, as alleged in the Answer? ANSWER: No; 3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? ANSWER: $5,000.00." Judgment for plaintiff, in accordance with the verdict, was entered. Defendant excepted and appealed.

Marshall & Williams and Moore & Biberstein for plaintiff appellee.

Joseph C. Olschner for defendant appellant.

PER CURIAM. Plaintiff's action is to recover damages for personal injuries he sustained as a result of a collision between the Chevrolet Corvair he was driving and four black Angus cattle owned by defendant. The only evidence was that offered by plaintiff.

There was evidence that Highway #53 runs through defendant's farm; that plaintiff, on November 3, 1963, about 1:00 a.m., when proceeding east on #53, came upon a herd of defendant's cattle, some of which were on the paved portion of #53, and collided with four of them; that, on other occasions during the month or so preceding November 3, 1963, cattle of defendant were out of pasture and on or near #53; and that defendant's pasture fences were rusty and otherwise defective.

When considered in the light most favorable to plaintiff, the evidence was sufficient to permit a jury to find that defendant knew or should have known that his cattle had been out of pasture, unattended, on prior occasions, and that defendant knew or should have known that his pasture fences were defective and insufficient to restrain his cattle, and that defendant's negligent failure to keep his

cattle from running at large on #53 proximately caused the collision and plaintiff's injuries. Under legal principles set forth in *Kelly v. Willis,* 238 N.C. 637, 78 S.E. 2d 711, and in *Shaw v. Joyce,* 249 N.C. 415, 106 S.E. 2d 459, the evidence, in our opinion, was sufficient to require submission of the issues raised by the pleadings. Hence, defendant's assignment that the court erred in overruling his motion for judgment of nonsuit is without merit.

Defendant's other assignments of error, relating principally to rulings on evidence and portions of the charge, have received careful consideration. Error, if any, with reference thereto, is not considered of such prejudicial nature as to justify a new trial or to merit particular discussion. Hence, the verdict and judgment will not be disturbed.

No error.

FRED THOMAS ROUSE, JR., MINOR, BY HIS NEXT FRIEND, FRED THOMAS ROUSE, SR., v. FRED HAMILTON SNEAD, JR.

AND

FRED THOMAS ROUSE, SR., v. FRED HAMILTON SNEAD, JR.

(Filed 8 March, 1967.)

Trial § 51—

A motion to set aside a verdict on the ground that it is contrary to the weight of the evidence must be made and heard at the trial term unless the parties consent that it be heard thereafter, and where the motion is made and denied at the trial term, agreement of the parties that the court could sign the judgment at the succeeding term does not authorize the court to grant the motion to set aside the verdict at the succeeding term, and the court's order doing so must be vacated and the cause remanded for entry of judgment on the verdict.

APPEAL by plaintiffs from *Fountain, J.,* December 5, 1966 Criminal Session of NEW HANOVER.

These two civil actions for the recovery of damages resulting from a collision between two automobiles were consolidated for trial at the November 1966 Civil Session of the Superior Court of New Hanover County. In December 1966, the jury returned a verdict awarding damages to each plaintiff. Defendant immediately moved that the verdict be set aside. The court overruled the motion, and the parties agreed that Judge Fountain could sign the judgments on Monday, December 5, 1966, when he returned to the county to hold a two weeks' criminal session. Thereafter, upon further con-

sideration, Judge Fountain concluded that the verdict was contrary to the greater weight of the evidence. On December 8, 1966, he signed an order in which he purported to vacate the verdict and to order a new trial. Plaintiffs objected and excepted to the order and simultaneously gave notice of appeal. Judge Fountain signed the appeal entries at the time he signed the order setting aside the verdict.

Aaron Goldberg and James L. Nelson for plaintiffs.
Marshall & Williams for defendant.

PER CURIAM: A motion to set aside a verdict because it is against the greater weight of the evidence must be made and heard at the term (or session) at which the case is tried, G.S. 1-207, unless the parties give their express or implied consent that it may be heard thereafter. *Acceptance Corp. v. Jones,* 203 N.C. 523, 166 S.E. 504; *Bailey v. Mineral Co.,* 183 N.C. 525, 112 S.E. 29; *Stilley v. Planing Mills,* 161 N.C. 517, 77 S.E. 760; *Clothing Co. v. Bagley,* 147 N.C. 37, 60 S.E. 648; 2 McIntosh, North Carolina Practice and Procedure § 1595 (2d Ed. 1956). See also *Edwards v. Motor Co.,* 235 N.C. 269, 69 S.E. 2d 550. On this record plaintiffs gave no consent to a continuance of defendant's motion to set aside the verdict. Indeed, it affirmatively appears that the motion had already been heard and determined at the session at which the trial was held. Only the ministerial act of signing the judgments was delayed until December 5, 1966, at which time each plaintiff was entitled to judgment on the verdict. In setting aside the verdict after the civil session at which it was rendered, the judge exceeded his authority.

The order entered by Judge Fountain on December 8, 1966 is vacated and the cause remanded for entry of judgments on the verdict. At that time, defendant, if so advised, may give notice of appeal. G.S. 1-277.

Error and remanded.

THE NORTH CAROLINA STATE BAR, COMPLAINANT, v. REGINALD LEE FRAZIER, ATTORNEY AT LAW, NEW BERN, CRAVEN COUNTY, NORTH CAROLINA, RESPONDENT.

(Filed 22 March, 1967.)

1. Attorney and Client § 9—

The North Carolina State Bar has jurisdiction to institute proceedings against an attorney for unethical conduct constituting a basis for disbarment or suspension of license, and has authority to review the proceedings of the trial committee appointed pursuant to G.S. 84-28(3)d2. Upon appeal by the attorney from the Full Council of the State Bar, the Superior Court of the county of the attorney's residence has jurisdiction to review the order in accordance with the laws and rules relating to civil actions in which there has been a reference by consent. G.S. 84-28(3)f.

2. Same—

The Council of the State Bar may initiate proceedings against an attorney for disbarment or suspension of license upon information of unethical conduct received from any source, and it is not required that its proceedings be based upon complaint of a client defrauded by the attorney.

3. Same; Constitutional Law § 20—

In this proceeding by the State Bar against an attorney for alleged unethical conduct, the attorney demanded the minutes of the Bar in regard to complaints and actions taken by the Bar in other cases in order to support his assertion of racial discrimination in disciplinary action taken by the Bar. *Held:* The denial of the request was not error since the inquiry is whether the respondent is guilty of unethical conduct, and whether others had or had not been guilty of unethical conduct cannot be germane to respondent attorney's rights.

4. Attorney and Client § 9—

A respondent attorney may not object to the refusal to strike allegations of the complaint against him which are relevant and competent in stating the position of the Bar Council and informing the respondent of the charges against him.

5. Same; Evidence § 19—

In a civil action by the payee of a note against the makers and the payee's attorney, the payee recovered judgment against her attorney for funds paid by the makers to the attorney, which funds were not turned over by the attorney to the payee. The payee died prior to the hearing of the trial committee of the State Bar. *Held:* Both the civil action and the proceedings before the trial committee were based upon the alleged withholding of the money of his client by the attorney, and testimony of the payee at the civil action was properly admitted in the proceedings before the trial committee.

6. Attorney and Client § 9—

In this proceeding against an attorney for alleged unethical conduct, the evidence *is held* amply sufficient to support findings that the attorney, during the pendency of an action, communicated with one of the litigants

who was represented by other counsel and made a tape recording of his conversation with her without her knowledge, in violation of Canon No. 9 of the Canons of Ethics of the State Bar.

7. Same—

On an appeal to the Superior Court by an attorney from disciplinary action taken by the State Bar, the Superior Court is required to consider the evidence and make its own findings of fact and conclusions of law, and the attorney who has appealed and thus sought the review may not complain that the penalties imposed by the judgment of the Superior Court were in excess of those ordered by the State Bar Council, the penalties being well within those authorized by statute.

8. Same—

An attorney may not avoid responsibility for retaining without lawful excuse money belonging to his client on the ground that he was inexperienced in the legal profession, since the matter relates to honesty rather than competency.

APPEAL by respondent at October 1966 Civil Session of CRAVEN Superior Court, before *Mintz, J.*

At the October 1963 Session of the Superior Court of Craven County an action was tried, entitled as follows:

"James Henry White and wife, Wealthy White, v. Hattie McCarter, Reginald L. Frazier, Individually, and Reginald L. Frazier, Trustee."

In it the plaintiffs had alleged that they purchased a piece of property from Mrs. Hattie McCarter for $1250, of which $250 had been paid at the time of the conveyance and the balance of $1000 was secured by a note and deed of trust. The respondent acted as defendant's attorney throughout the transaction, named himself trustee in the deed of trust, and his name was inserted in the note as co-payee with Mrs. McCarter. The plaintiffs alleged that they had made 13 payments of $50 each to Frazier, and that the balance was then $350. They further alleged that they had sought to obtain cancellation of the deed of trust upon payment of $350, and that Mrs. McCarter had refused to accept it. The action was brought to obtain cancellation of the deed of trust upon that payment.

Mrs. McCarter in her answer denied that the plaintiffs had made the payments claimed and in a cross-action asserted that if the payments had been made to Frazier he had failed to account to her for them, and sought judgment over against him for the amount received by him. Frazier denied receiving the payments alleged, and at the trial the jury answered the issues quoted below as follows:

"Was the defendant, Reginald L. Frazier, acting as attorney and agent of the defendant, Hattie McCarter, in connection with the sale of the lots in question to the plaintiffs, and the collection of the money therefor? Answer: Yes.

"In what amount, if any, are the plaintiffs White indebted to the defendant Hattie McCarter? Answer: $350.00.

"In what amount, if any, is the defendant Hattie McCarter entitled to recover of the defendant Reginald L. Frazier on her cross-action and counterclaim, as alleged? Answer: $428.00."

Judgment was signed upon the verdict and the defendant Frazier appealed to the North Carolina Supreme Court. The judgment was affirmed as reported in 261 N.C. 362, 134 S.E. 2d 612.

The North Carolina State Bar received information about the case and instituted this action against Frazier seeking appropriate punishment for his alleged unethical and improper conduct. The lengthy complaint setting forth the above facts with full details and with exhibits appended which included the note, the deed of trust, and an alleged tape recording of a conversation between Respondent Frazier and Mrs. McCarter was served upon him. The complaint was verified by E. L. Cannon, Secretary of the North Carolina State Bar.

Frazier filed an answer partially admitting and partially denying the allegations of the complaint, and setting out as defenses his lack of experience in the practice of law; that the transaction in which he drew the note and deed of trust occurred when he had been practicing law less than six months; that his name had been placed in the note by his secretary and without his knowledge; that he immediately remitted to Mrs. McCarter each payment made by the Whites, which totaled $650.00, but that Mrs. McCarter had failed to give him receipts for the payments made to her; that the action of the State Bar was due to the ill will of the Secretary of the Bar toward him and "is a personal vendetta solely by reason of the ill will which the Secretary harbors against this Respondent". He later filed a motion to quash or dismiss the proceeding by reason of racial discrimination.

Respondent requested that a trial committee be appointed by the Supreme Court pursuant to G.S. 84-28(3)d2. A committee of three highly respected attorneys, one of whom was a member of the respondent's race, was appointed by the Chief Justice, who heard the evidence in the case. In the civil action Mrs. McCarter had testified *under oath* and *was cross-examined* by Frazier's attorney (Frazier being *present* at the time) that she got $23 through Frazier three or four times, and $50 three or four times, and that she

never received any money directly from the Whites. The Committee reported their findings with appropriate details, concluding as a matter of law that the respondent is guilty of corrupt or unprofessional conduct. They thereupon unanimously ordered that Frazier be suspended from the practice of law for a period of 12 months.

Frazier appealed to the Full Council of the State Bar which, after considering the evidence, briefs, and oral argument, overruled the respondent's exceptions to the significant findings of fact made by the Committee, made full findings of fact and held that the respondent was guilty of unethical conduct, and ordered that he be given a reprimand by the Council of the North Carolina State Bar at such time and place so designated by the Council, and that respondent pay the cost connected with the proceeding.

The respondent filed exceptions to the Resolution of the Council and appealed to the Superior Court of Craven County.

The appeal was heard in Superior Court by Hon. Rudolph Mintz, presiding Judge, at the October 1966 Civil Session of Craven Superior Court. It was heard on the full record of the previous proceedings before the Trial Committee and the Council and respondent's exceptions and assignments of error thereto, and upon the briefs and argument of counsel for Complainant and Respondent.

Judge Mintz made full findings of fact which in effect approved and affirmed the findings previously made by the Committee of the State Bar Council and concluded as a matter of law that the respondent is guilty of corrupt or unprofessional conduct in the following particulars:

"(a) That the Respondent did detain without a bona fide claim thereto, money collected in his capacity as attorney for Hattie McCarter in the sum of $428.00, contrary to the provisions of G.S. 84-28(2)b.

"(b) That the conduct of Respondent in conferring with Hattie McCarter, done without the permission or knowledge of her then counsel, and recording without her permission or knowledge, the conversation, during the pendency of the aforesaid Civil Action No. 7954, was reprehensible, inexcusable, and in violation of the Canons of Ethics, and more particularly Canon 9 as promulgated and adopted by the Council of the North Carolina State Bar, and a flagrant violation of his oath as an attorney."

The Court thereupon ordered that the respondent be suspended from the practice of law for a period of 12 months for his corrupt and unprofessional conduct in detaining without a bona fide claim thereto money collected in his capacity as attorney for Hattie McCarter; and also that he be suspended from the practice of law for a period of six months for his corrupt and unprofessional conduct

in violating Canon 9 of the Canons of Ethics of the North Carolina State Bar, the said suspensions to run concurrently, and that the respondent pay the costs.

The defendant noted exceptions to Judge Mintz' findings of fact, conclusions of law and judgment, and thereupon appealed to the Supreme Court.

Robert D. Rouse, Jr., for Complainant appellee.

Mitchell & Murphy, Moses Burt, Jr., Herman L. Taylor, John H. Wheeler, J. LeVonne Chambers, Lisbon C. Berry, Jr., Earl Whitted, Jr., Charles Morgan, Jr., for Respondent appellant.

PLESS, J. G.S. 84-28 in pertinent part is as follows:

"Discipline and Disbarment. — The council or any committee of its members appointed for that purpose, or designated by the Supreme Court,

(1) Shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina State Bar;

(2) May administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes:

a. Commission of a criminal offense showing professional unfitness;
b. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity;
c. Soliciting professional business;
d. Conduct involving willful deceit or fraud or any other unprofessional conduct;
e. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney;
f. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina State Bar."

The Canons of Ethics of the North Carolina State Bar, Art. X, Canon 9, is as follows:

"A lawyer should not in any way communicate upon the subject or controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mis-

lead a party not represented by counsel, and he should not undertake to advise him as to the law."

The respondent was found guilty of violating both the above, and appropriate punishment has been ordered. He groups his exceptions and assignments of error under five arguments.

The first is that the proceedings were at all times unlawful and in excess of the jurisdiction of the North Carolina State Bar and the Craven County Superior Court. However, the provisions quoted above give the State Bar jurisdiction in such cases and provide for punishment.

G.S. 84-28(3)f provides that an appeal from the proceedings and judgment of the Council may be had to the Superior Court of the County in which the person charged resides if he resides within the State, and that "all proceedings in connection with the charge shall be conducted in the Superior Court in term in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, but neither party shall be entitled to a trial by jury. Both parties shall have the right to appeal to the Supreme Court in accordance with the procedure permitting appeals in civil actions".

This argument and the exceptions relating thereto are not sustained.

He complains that no layman, and especially the person whom he defrauded, if the jury verdict is correct, made any complaint against him. This is not required. The object of the regulations is to protect the public from unethical conduct by one vested with an attorney's license. A well educated lawyer, whose position and achievement bring trusting persons to his office in a search of guidance and protection has the duty of conducting himself with the highest degree of honor, integrity and ethics. The duty of patrolling the conduct of licensed attorneys is placed on the Council of the State Bar, and there are no requirements that it shall be limited to any particular source for its information or instigation of proceedings.

Further complaint is made that the respondent was denied the right to freely inspect, use and study the minutes of the Grievance Committee of the Bar. He was offered the right to inspect the minutes as they related to him, but he replied that "If we cannot have *all* (emphasis ours) the minutes, we do not care to see what we have before us".

On several occasions the respondent's attorneys asked for the minutes "in order that we could compare what was done in Mr. Frazier's case and what was done in the other cases".

At another time they said: "We want to see what disciplinary

actions were taken on that date; what type of actions were taken; who the names of the attorneys were, and so that we can inquire what the bases of them is so we can determine whether or not Frazier is being accorded the same protection and the same treatment as any other lawyer."

Also they said: "We have alleged that this man is seeking equal protection of the laws and the equal treatment and the comparison of the treatment of this defendant with other defendants who were discussed at the time of the Bar meetings."

In response to these motions and statements, counsel for the Bar tendered certified copies of the minutes as they relate to Frazier and stated that in his opinion he would not have legal authority to provide the respondent with certified copies of the minutes in their entirety. He said: "It may be that you do have the right to examine the contents of those records in their entirety; if so, I would not want to voluntarily agree. I would prefer that you have an appropriate subpœna *duces tecum* issued and that an appropriate court official order the contents of those minutes disclosed * * * I will now offer to permit a representative of your counsel to examine those minutes as they relate to your client." The respondent declined the offer and did not pursue the suggestion that he seek a subpœna *duces tecum.*

It is possible that the minutes contained references to other complaints against other attorneys, some of which may have been justified. Others may not have been, which would prove nothing. The question here is: Has the *respondent* been guilty of unethical conduct? That others have, or have not been, cannot change the guilt or innocence of Reginald Lee Frazier.

The respondent also excepts to the refusal to strike a number of allegations in the complaint against him. A careful perusal of all of them shows that they are relevant and competent in stating the position of the Bar Council and in informing the respondent of the charges against him.

Argument IV of the respondent's brief relates to "Reception in evidence of hearsay evidence pertaining to a civil action in which parties, issues and proceedings are dissimilar" to those in the instant case. While the parties are not technically the same, the inquiry is entirely based on the alleged unethical conduct of the respondent in his dealings with his aged and illiterate client, Mrs. Hattie McCarter. So was the civil action in which he was found by the jury to have withheld the money of his client while acting as her agent and attorney.

Mrs. McCarter died after the trial of the civil case and before the hearings of the Committee. Her evidence at the trial is clearly

admissible in this proceeding. It meets all the requirements so clearly and concisely stated in Stansbury on Evidence, 2d Ed. Sec. 145, regarding "the testimony of a witness at a former trial or other judicial hearing (which) may be given in evidence at a subsequent trial, whether civil or criminal, if it complies with all of the following conditions:

"(1) If the witness has since died, or become incapacitated by insanity or illness, or has removed from the jurisdiction or has otherwise become unavailable to testify as a witness at the present trial.

"(2) If the proceeding at which he testified was a former trial of the same cause, or a preliminary stage of the same trial, or the trial of another cause involving the same issue and subject matter as the one to which his evidence is directed at the present trial.

"(3) If the parties at the former trial were the same as those at the present trial, or in privity with them, or if the situation was such that the party against whom the evidence was then offered had the same opportunity and motive to cross-examine the witness as the party against whom it is now offered has at the present trial."

In view of this we hold that the other features of the respondent's argument IV necessarily fail.

In argument V the respondent largely recapitulates and repeats the foregoing conditions, all of which have been considered and rejected.

The respondent's violation of Canon 9 is hardly contested. He admitted that, while the civil action was pending and Mrs. McCarter was represented by other counsel, he not only "communicated upon the subject or controversy", but made a tape recording of his conversation with her, without her knowledge.

Frazier testified that she came to his office after the civil action had been instituted for her by the firm of Ward & Ward, attorneys of New Bern, and that he discussed the case with her. From the recording it is seen that he told Mrs. McCarter that "We have got to get the Whites straightened out about those lots"; that Mrs. McCarter said she had not received the money that the Whites claimed they had given her — "they have not give me the money". He asked her if she believed they had hoodwinked her into something, to which she replied that she knew they did, and that she had told Frazier they "would hoodoo him". She also said that Frazier had authority to receive the money for her; that he was her lawyer; that the Whites were supposed to pay Frazier the money and he was supposed to bring it to her, and that he did. Frazier asked her the following question: "I just wanted to establish that

you came to me and hired me as your lawyer to go by and pick up the money for you and that I would bring the money to your house when I picked it up when they did pay me?" She answered: "When they did pay and give it to you." (It also appears that Frazier communicated with her at another time in regard to the matter).

The Secretary of the Bar testified, without objection, that after the civil trial of *White v. McCarter* "I talked to Hattie McCarter and she advised me that everything she stated was true and that Frazier had taken her money and, further, that he had been to see her and that he had asked her not to do anything in connection with this, and he said he was going to lose his license and that he was going to New York".

Judge Mintz made full and complete findings which in effect approved and affirmed the findings and conclusions of the State Bar Council, and made additional findings as follows:

"IX. That Reginald Lee Frazier detained without a *bona fide* claim thereto money in the sum of $428.00 belonging to Hattie McCarter and collected in his capacity as attorney.

"X. That the Respondent violated the laws of the State of North Carolina, and specifically G.S. 84-28(2)b in the collection and retaining of the sum of $428.00 for Hattie McCarter in his capacity as attorney.

"XI. That the Respondent violated the Canons of Ethics which have been promulgated and adopted by the Council of the North Carolina State Bar, and specifically Canon No. 9 in conferring with Hattie McCarter during the pendency of the aforesaid Civil Action No. 7954.

"That upon the foregoing findings of fact, and the evidence offered in this proceeding, the Court concludes as a matter of law that the Respondent is guilty of corrupt or unprofessional conduct in the following particulars:

"(a) That the Respondent did detain without a *bona fide* claim thereto, money collected in his capacity as attorney for Hattie McCarter in the sum of $428.00 contrary to the provisions of G.S. 84-28(2)b.

"(b) That the conduct of Respondent in conferring with Hattie McCarter, done without the permission or knowledge of her then counsel, and recording without her permission or knowledge, the conversation during the pendency of the aforesaid Civil Action No. 7954, was reprehensible, inexcusable, and in violation of the Canons of Ethics, and more particularly Canon 9 as promulgated and adopted by the Council of the North Carolina State Bar, and a flagrant violation of his oath as an attorney."

He thereupon adjudged that Frazier be suspended from the practice of law for a period of 12 months "for his corrupt and unprofessional conduct in detaining without a *bona fide* claim thereto money collected in his capacity as attorney for Hattie McCarter", and that he be suspended from the practice of law for 6 months "for his corrupt and unprofessional conduct in violating Canon 9 of the Canons of Ethics of the North Carolina State Bar"; with the suspensions to run concurrently and the respondent pay the costs.

The respondent's complaint that the judgment of Judge Mintz in which the punishment from which he had appealed was greater than that imposed by the Council cannot avail him.

Since the statute provides that the proceedings in the Superior Court shall be in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, the Judge may "affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. * * * It is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases, use his own faculties in ascertaining the truth, and form his own judgment as to fact and law." *Anderson v. McRae,* 211 N.C. 197, 189 S.E. 639.

The suspension was within the penalties authorized by the statute and the respondent was ill-advised in appealing from a mere reprimand in view of the overwhelming evidence of his misconduct. Under the statute and all of the decisions, when one appeals or obtains a new trial he runs the risk of loss as well as gain. In *S. v. White,* 262 N.C. 52, 136 S.E. 2d 205, the defendant was convicted of robbery and was sentenced to serve ten years. He later was granted a new trial at his request and was again found guilty as charged in the indictment. He was thereupon ordered imprisoned for a term of not less than 12 nor more than 15 years. He took exception to the lengthier sentence in the second case, and Parker, J. (now C.J.), said: "Defendant having been convicted of the same offense on the second trial on the same indictment, a heavier sentence may be imposed than was imposed on the first trial." He quoted from *Hobbs v. State,* 231 Md. 533, 191 Atl. 2d 238, Cert. den., 375 U.S. 914, 11 L. Ed. 2d 153: " 'In asking for and receiving a new trial, appellant must accept the hazards as well as the benefits resulting therefrom.' " We quote further from *S. v. White, supra,* "In *Bohannon v. Dist. of Columbia,* 99 Atl. 2d 647 * * * the Court accurately said: 'We readily appreciate appellant's feeling that the obtaining of a new trial after the first conviction was a hollow victory, since it resulted in a second conviction and a fine

ten times as much as the one first imposed. This, however, was a risk he took, and the second Judge was not bound to impose the same fine given by the first Judge.' "

Later on, Chief Justice Parker said: "When defendant, at his request, obtained a new trial hoping to be set free or obtain a lighter sentence, he accepted the hazard of receiving a heavier sentence if convicted at the new trial of the same identical offense, and this is not a denial to him of any constitutional right as contended by him."

In *S. v. Correll,* 229 N.C. 640, 50 S.E. 2d 717, the defendant was convicted of manslaughter and given a sentence of 3 to 5 years in State Prison. Upon appeal he was awarded a new trial, in which he was convicted of murder in the second degree and received a prison sentence of not less than 7 nor more than 10 years. Upon his appeal he took exception to his conviction of a higher offense and the imposition of a longer prison sentence. The Court overruled these exceptions and affirmed the later judgment.

While the cases cited deal with criminal cases, they are all the more applicable to this case inasmuch as the Court would deal with the imprisonment of a citizen with even more care and consideration than it would give one not involving as great penalty. The Judge was of opinion, and justly so, that the reprehensible conduct, or misconduct, of the respondent justified more severe measures than a mere reprimand and suspended his right to practice law for 12 months. That cannot be called cruel and unusual or unjustified.

The respondent in reply to the charges made against him, in effect, entered a plea of confession and avoidance. While he did not admit his guilt, it was conclusively shown.

However, he seeks to avoid responsibility on the following unimpressive grounds. He claims he was inexperienced and had been practicing law less than six months when he drew the papers for Mrs. McCarter and the payments to him, for her, began. Inexperience in the legal profession cannot excuse what amounts to embezzlement. Dishonesty and breach of trust may be committed by anyone, and no person needs a law license or experience in the practice of law to know that dishonesty and crookedness are wrong.

He cites many authorities on unquestionable (but abstract) statements of the law which cannot be argued or debated. No one would deny that every person is entitled to equal protection of the law, or that one is entitled to confront his accusers, or that hearsay evidence is incompetent and cannot be used to convict.

But the respondent is confronted with the well-recognized principle that it is not difficult to ascertain the law. The difficulty is in applying well established legal rulings to the facts of a particular

case. Therein, the respondent fails. The law he quotes is just not pertinent to the facts of this case, for the reasons we have stated.

He complains that he has been singled out for prosecution; that others have been guilty of unethical conduct who have not been punished or who have not received as severe punishment as did he, and, in effect, because all have not been prosecuted and punished, he should not be.

It is possible that others have not been apprehended, but if in the effort to enforce a high standard of conduct and ethics the Council should be required in each case to show the facts and results in every similar case it had investigated, the inquiry would go on endlessly.

This is equivalent to the position that until all murderers, robbers, and other criminals have been convicted and punished, the remainder, even though their guilt is clearly established, should not be either. The fallacy of this position is apparent from a statement of his contentions.

In his trials the respondent adopted as his tactics the old game of "trying the Solicitor". Upon the theory that the best defense is a good offense the respondent set out to try the State Bar, its Council, its Secretary, and even the completely unconnected North Carolina Bar Association. He should not be surprised that he, rather than they, was tried.

And finally he seeks to establish that he is being persecuted because of his race. Completely ignoring that the object of his dishonesty and greed and the one whom the Court in the civil action protected, was an aged, trusting and uneducated old lady — of his own race!

In the proceedings and judgment below there is no error.

Affirmed.

P. M. BRATCHER, PETITIONER, v. CARMI E. WINTERS, ELLIOTT A. BENNETT AND D. M. PARKER, JR., CONSTITUTING THE CIVIL SERVICE BOARD OF THE CITY OF NEW BERN, A MUNICIPAL CORPORATION, RESPONDENTS.

(Filed 22 March, 1967.)

1. Administrative Law § 4—

Certiorari will lie to review the act of a governmental agency in removing a public officer or employee when such removal must be based upon an order entered after a hearing at which the respondent is given an opportunity to be heard, since in such event the ouster is judicial or

quasi-judicial in nature; but if the removal is an executive act, the order of removal is not reviewable by the courts.

2. Same; Municipal Corporations § 9—

Order of the chief of police of a municipality reducing a police captain to the grade of patrolman is an executive order and not reviewable by the courts.

3. Same—

Order of the civil service board of a municipality dismissing a policeman from the police department on a hearing upon written charges is entered in the exercise of a quasi-judicial function and is reviewable by *certiorari*. G.S. 1-269.

4. Municipal Corporations § 9—

A valid rule or regulation governing the police force must be proven in order to support the dismissal of a policeman for the violation of one of such rules, and when the record fails to show that the rules had been approved by the board of aldermen and the city manager as required by the general municipal ordinances, order of the municipal civil service board dismissing a policeman is properly vacated.

5. Same—

Where order of a civil service board dismissing a policeman is entered in the exercise of a judicial or quasi-judicial function, a dismissed employee is entitled, upon demand, to a record which discloses at least the substance of the evidence introduced to support the charges against him as a basis of his right to review by *certiorari*.

APPEAL by Petitioner, P. M. Bratcher, and by Respondent, Civil Service Board of New Bern, from the judgment entered December 14, 1966 by *Mintz, J.*, regularly holding the courts of the Third Judicial District.

This proceeding originated by petition for *certiorari* filed by P. M. Bratcher asking the Court to review: (1) the order entered on October 11, 1966 by the Chief of Police of New Bern demoting Petitioner from Captain of Detectives to uniform patrolman; and (2) the order entered December 2, 1966 by the Civil Service Board of New Bern upholding the written charges filed against Petitioner and dismissing him from the Police Department.

The petition for the review and the Respondent's answer thereto disclosed that the Petitioner became a member of the New Bern Police Department in 1946. On October 11, 1966, Chief of Police H. R. Franks delivered to Petitioner the following notice:

"The above actions (citing conclusions resulting from the Chief's investigation) make it obvious that you are unqualified to hold the rank of Captain; therefore, as Chief of Police, I am taking

action and reducing you to the grade of Patrolman and transferring you to the Uniform Division; effective, this date.

* * *

Any repetition of above actions shall result in further disciplinary action."

Thereafter on November 7, 1966 the Chief of Police delivered to Petitioner a further notice charging the violation of Paragraphs 1 to 7, inclusive, of "General Order No. 7 of the General Rules governing conduct and procedures of the New Bern Police Department promulgated on December 30, 1958. . . ." The Petitioner was thereupon ordered suspended from the Police Department.

The Petitioner, in writing, demanded that the Civil Service Board, in a public hearing, inquire into the charges filed against him, that a transcript of the proceedings be made. The Board denied a public hearing and refused to have a stenographer's report made of the hearing. The Petitioner offered to provide the transcript at his own expense. This offer the Board declined. The Clerk of the Board kept sketchy minutes of the proceedings. At the conclusion of the hearing, without finding any facts, the Board entered the following order: "The Civil Service Board finds the evidence sufficient to uphold the charges and orders P. M. Bratcher discharged from the Police Department of the City of New Bern."

After hearing and pursuant to the writ of *certiorari* and the Respondent's answer thereto, Judge Mintz entered this order:

"The matter of the hearing on the return of the Respondents to the Writ of *Certiorari* duly issued herein, came on regularly for hearing before the undersigned Rudolph I. Mintz, Judge assigned to preside and presiding over the courts of the Third Judicial District, at Greenville, North Carolina, on the 14th day of December, 1966, at 5:00 o'clock P.M., after a continuance from the time set for hearing in the Writ at the request of counsel for the Respondents and with the consent of counsel for the Petitioner, the Petitioner appearing with his counsel of record and the Civil Service Board of the City of New Bern appearing with its counsel of record;

And the court having duly considered the return to the Writ and the record of the proceedings of the Civil Service Board of the City of New Bern certified to the court, and it appearing therefrom that said record does not include any testimony or findings of fact upon which the order for the dismissal of the Petitioner was made, and it having been stipulated in open court by counsel for all parties that the Charter and General

ordinances of the City of New Bern as brought forward, amended and adopted by the City of New Bern, should constitute a part of the record.

THE COURT FINDS:

(1) That the written charges or complaint filed by the Chief of Police of the City of New Bern against the Petitioner specifically charged that he had violated certain enumerated paragraphs of General Order No. 7 of the General Rules of the New Bern Police Department;

(2) That the aforesaid Rules have not been adopted by the Police Department of the City of New Bern upon the appproval of the Board of Aldermen and the City Manager, as required by Section 3 of Chapter B of the General Ordinances and Chapter F of the Charter of the City of New Bern, and the said complaint against the Petitioner was solely founded upon an alleged violation of such Rules;

(3) That the Civil Service Board of the City of New Bern was without authority or jurisdiction to order the dismissal of the Petitioner for any violation of such regulations which had not been adopted in accordance with the Ordinances and Charter of the City of New Bern;

(4) That by reason of the foregoing, the Court finds that it is not necessary to consider the other exceptions of the Petitioner as set forth in his Petition relating to his demotion, the denial of a public hearing by the Civil Service Board of the City of New Bern, the failure of said Board to make any record of the testimony at the hearing, the consideration by said Board of statements and matters not considered at the hearing, the failure of the Board to make any findings of fact upon which it based its order and that said order was not supported by competent and material evidence;

And the Court being of the opinion and having decided as a matter of law that the aforesaid order dismissing the Petitioner as a member of the Police Department of the City of New Bern, is not valid and should be set aside and that the Petitioner should be restored to his status as a member of the Police Department of the City of New Bern, effective, December 15, 1966;

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the order of the Civil Service Board of the City of New Bern dismissing the Petitioner, is void and of no force and effect, and that the said Board is without power or jurisdiction to enter said order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Peti-

tioner shall be and he is hereby reinstated to his former status as a member of the Police Department of the City of New Bern, effective December 15, 1966.

IT IS FURTHER ORDERED AND ADJUDGED that the Respondents shall be taxed with any costs of this proceeding.

Done this the 15th day of December, 1966.

/s/ Rudolph I. Mintz
Judge Presiding"

The Petitioner appealed upon the ground the Court committed error in failing to order his reinstatement to the position of Captain of Detectives in the Police Department of the City of New Bern. The Respondent appealed upon the ground the Court committed error in reversing the Board's order of dismissal and directing the Petitioner's reinstatement to the Police Department of the City.

Barden, Stith, McCotter and Sugg, by L. A. Stith; David S. Henderson for petitioner.

A. D. Ward for respondent.

HIGGINS, J. The Petitioner, P. M. Bratcher, instituted this proceeding in the Superior Court by petition for writ of *certiorari* to review: (1) the order of the Chief of Police of New Bern dated October 11, 1966 demoting him from Captain of Detectives to patrolman in the uniform division of the Police Department; and (2) to review and reverse the December 2, 1966 order of the Civil Service Board of the City dismissing him from the Police Department on the basis of written charges filed by the Chief of Police.

The Civil Service Board of New Bern filed answer to the application for the writ, setting up as its defenses: (1) the demotion order of the Chief of Police was entered as an administrative regulation of the Police Department. The order is neither judicial nor quasi-judicial and is not reviewable on *certiorari;* and (2) the Civil Service Board of New Bern is set up by the City Charter with powers to dismiss, remove, discharge, fine, or suspend, without pay, any member of the Police Department upon written charges and after hearing. The order of the Board is final, and not reviewable by the Court.

The questions of law involve the Superior Court's power by *certiorari* to review: (1) the order of the Chief of Police demoting Petitioner from Captain to patrolman; and (2) the order of the Civil Service Board dismissing the Petitioner from the Police Department upon written charges after hearing. G.S. 1-269 provides that *certiorari* is the appropriate process by which the Superior

Court may review the proceedings of bodies exercising judicial or quasi-judicial functions in cases in which appeal is not authorized. ". . . (W)hen a governmental agency has power to remove a public officer only for cause after hearing, the ouster proceeding is judicial or quasi-judicial in nature, and may be reviewed by *certiorari.*" *Russ v. Board of Education,* 232 N.C. 128, 59 S.E. 2d 589 (citing approximately 30 cases). The general rule is that if the act of removal is executive it is not reviewable on *certiorari,* but if it is on hearing and formal findings, it is reviewable. Stated in another way, the writ may be invoked only to review acts which are clearly judicial or quasi-judicial. *McQuillin, Municipal Corporations,* Vol. 4, Sec. 12.267, p. 397; *In Re Burris,* 261 N.C. 450, 135 S.E. 2d 27.

From the foregoing it seems obvious that the order entered by the Chief of Police on October 11, 1966 demoting Petitioner from Captain of Detectives to patrolman in the uniform division of the New Bern Police Department was the administrative act of the Chief of Police and neither judicial nor quasi-judicial in its nature. Hence the order is not reviewable by the Superior Court. *In Re Burris, supra.* Judge Mintz so decided and the decision is affirmed.

Judge Mintz likewise correctly held the writ did bring up for the Court's review the order entered by the Civil Service Board on December 2, 1966 dismissing the Petitioner from the Police Department. The record discloses that the Civil Service Board for the City of New Bern was created in 1957 under authority of the City Charter, which among other provisions contains the following:

> "(N)o member of the Police Department of the City of New Bern shall be dismissed, removed or discharged except for cause upon written complaint and until after he has been given an opportunity to be heard by the Civil Service Board in his own defense, and in the event such member is convicted of violating the rules and regulations of the Police Department said Board may dismiss or discharge him. . . ."

The Chief of Police charged Petitioner with having violated General Order No. 7 of the Police Department and suspended him from the Police Department. This suspension order was entered November 7, 1966. Appellant filed a written demand for a public hearing on the charges and for a stenographic record of the hearing. The Board denied the request for a public hearing and for a stenographic report thereof, although the Petitioner agreed to pay for the record. The Board conducted the hearing but failed to provide any record except the very sketchy notes of the Board's Secretary. At the conclusion of the hearing, the Board entered an order dismissing the Petitioner from the Police Department.

The Court's judgment (including the findings of fact, the conclusions of law, and the final disposition) is quoted in full in the statement of facts. Obviously Judge Mintz concluded that Order No. 7, as charged in the written accusation, was nothing more than the proposal of the Police Department. It did not become valid and binding until approved by the City Council and the City Manager. Evidence of such approval was lacking. As a basis for the findings and order, proof was required that a valid order had been violated. Proof was not offered. The record fails to show wherein Judge Mintz committed error of law in reversing the order of the Civil Service Board on the ground stated.

By what is said herein, this Court may not be understood as approving the type of record made at the hearing before the Civil Service Board. The Charter required notice, written charges, and the hearing of witnesses and the examination of pertinent documents. Upon the basis of what is made to appear at the hearing the Board may dismiss, discharge from service, fine, or suspend without pay, a member of the Police Department. Court review contemplates findings of fact supported by evidence and conclusions based thereon. An aggrieved party, if he so demands, is entitled to a record which discloses at least the substance of the evidence which he may challenge as insufficient to support the findings. The record in this case does not meet this minimum requirement.

The Petitioner will pay that part of the costs attributable to his appeal. The Civil Service Board will pay the remainder of the costs.

On Petitioner's Appeal: Affirmed.

On Respondent's Appeal: Affirmed.

EDWARD W. BRANCH, JR., v. STATE.

(Filed 22 March, 1967.)

1. Criminal Law § 173—

A post conviction hearing is not a substitute for appeal, and upon such hearing the inquiry is limited to the question of whether there was a substantial denial of the constitutional rights of petitioner in the original criminal action.

2. Criminal Law § 159—

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Criminal Law § 173—

The findings of fact of the trial court in a post conviction hearing are binding upon petitioner if they are supported by competent evidence.

4. Constitutional Law § 31—

Petitioner and another were jointly charged with murder. Petitioner was not tried until some ten months after his arrest, and was represented by counsel employed by his family at the preliminary hearing and at the trial. At no time did petitioner's attorney request a conference with petitioner's codefendant or a conference between the codefendants. *Held:* The record does not sustain petitioner's contention that he was denied the right to confer with his codefendant in private.

5. Constitutional Law § 33—

Since an accused's fingerprints may be taken, notwithstanding objection on his part and notwithstanding advice of counsel, there can be no violation of defendant's constitutional rights in taking his fingerprints prior to the employment of counsel by him and prior to any advice to him concerning his constitutional rights.

6. Criminal Law § 173—

In a post conviction hearing, the burden is upon petitioner to show a denial of some right guaranteed to him by the Constitution of North Carolina or by the Constitution of the United States in the trial or investigatory procedures resulting in his conviction.

ON *certiorari* to review judgment entered by *Froneberger, J.*, at the March 1966 Criminal Session of BURKE.

On 22 October 1964, the petitioner was convicted of murder in the first degree, the jury recommending mercy. Pursuant to this verdict he was sentenced to imprisonment for life. Notice of appeal to this Court was given, but was withdrawn the following day and no appeal to this Court was perfected. He was represented prior to and at his trial by able and experienced counsel selected and employed by his family.

On 11 February 1965, the petitioner filed in the superior court a petition for post conviction review of the above judgment, under the provisions of the Post Conviction Hearing Act, G.S. 15-217, *et seq.* The petition was supplemented by a further document entitled "Bill of Particulars," setting forth twelve "questions presented for review." The superior court appointed petitioner's present counsel to represent him in the post conviction proceeding.

At the hearing of the petition in the superior court, the petitioner was represented by his court appointed counsel. The petitioner presented evidence consisting of his own testimony and that of Sheriff David Oaks, several members of his family, his codefendant at the original trial, and two fellow prisoners in the jail in which he was confined prior to trial. He also introduced in evidence certain subpœnas for witnesses and the entire record and transcript of the evidence at the original trial. A complete transcript of the post conviction hearing, including the said exhibits and transcript of the original trial, are included in the present record.

The judgment of the superior court sets forth in detail its findings of fact. Upon these the court concluded that the petitioner's constitutional rights were not violated, that he had a fair and free trial, that his allegations are without merit, that he is properly confined in the State Prison System and that he should be remanded to the custody of the Director of the Prison System to complete the service of the sentence so imposed upon him. The court thereupon ordered that the relief sought by the petitioner in the post conviction proceeding be denied and that the proceeding be dismissed. We granted *certiorari* to review this judgment.

The findings of fact set forth in the judgment of the superior court include the following:

> "[T]he State did not suppress any evidence in the trial of the said case; that all subpœnas issued by the defendant were either served or a due and diligent search made for all witnesses to be available at the trial. * * * [T]he petitioner was not denied means of communication with David Secrest [the codefendant]. * * * [T]he petitioner Branch employed the law firm of Patton, Ervin and Starnes to represent him and that they did not request an interview with David Secrest; * * * David Secrest did not request or want to confer with Edward Branch and neither did his attorneys request the same * * *. David Secrest was cross examined at length under oath during the trial of the petitioner by his competent and highly skilled attorneys and that his testimony along with other testimony in the record was considered by the jury and the jury convicted Edward Branch of murder in the first degree. * * * [T]he petitioner was convicted on evidence competent in the record and that there was supporting substantial evidence over and beyond the testimony given by David Secrest, an alleged accomplice * * *. David Secrest voluntarily testified to the facts as set forth in the record * * * without any duress, fraud, promise of reward or any other inducement whatsoever. * * * [T]he petitioner Branch did not request, through his attorneys for himself individually, to communicate or talk directly with David Secrest. * * * The court further finds as a fact that any statement made by David Secrest, either in writing or orally, was freely and voluntarily given and that David Secrest under oath in February, 1966, at the time of this hearing reiterated the truthfulness of the same and the fact that he freely and voluntarily made oral statements and written statements. * * * Edward Branch through his attorneys and himself personally employed the law firm of Pat-

ton, Ervin and Starnes and the Honorable Russell Berry to represent him prior to preliminary hearing * * * that they were present at the preliminary hearing * * * and that he had highly skilled and competent attorneys at every hearing involving this trial. * * * That on any time Edward Branch was talked to by any officer of the law after his original arrest and employment of counsel immediately thereafter, that his counsel were advised of any conference that would be had and were present if they desired in all proceedings and that no confession or statement of any nature whatsoever was offered in evidence or obtained from Edward Branch. * * * [T]hat there has been no violation of any constitutional rights of the petitioner, Edward Branch, and that he has not offered any evidence or [*sic*] any of the alleged twelve (12) questions presented for discussion that would in any manner warrant him a new trial and no evidence was offered to show that he was prejudiced in any manner whatsoever; that he was given a full, complete, fair trial, free of error, ably represented by very highly skilled and competent attorneys in Western North Carolina at his October, 1964 trial in the Burke County Superior Court."

Attorney General Bruton and Staff Attorney Brown for the State.
Simpson & Simpson for defendant appellant.

LAKE, J. Upon the pronouncement of sentence upon him at the conclusion of his trial on the charge of murder, the petitioner, through counsel then representing him, gave notice in open court of appeal to this Court. On the following day he withdrew this notice of appeal in writing signed by him. At the post conviction hearing, he testified that no officer coerced him into signing this or any other paper or asked him to withdraw his appeal, but he and his family decided to withdraw it upon advice of his trial counsel. He also testified at the post conviction hearing that, at the time of his trial on the murder charge, his then counsel advised him not to take the witness stand but told him he could do so if he wanted to, and that he did not testify because he felt it would not be advisable for him to do so.

The procedure established by the Post Conviction Hearing Act, G.S. 15-217 to 15-222, is not a substitute for an appeal from the judgment entered at the trial of the criminal charge. *State v. Graves*, 251 N.C. 550, 112 S.E. 2d 85; *State v. Wheeler*, 249 N.C. 187, 105 S.E. 2d 615. Moore, J., speaking for the Court in the *Graves* case, said:

> "The inquiry is whether there was a *substantial denial* of the constitutional rights of petitioners in the original criminal action in which they were convicted and whether a different result would likely have ensued had petitioners not been denied such rights."

In his brief the petitioner brings forward and argues only these two assignments of error: (1) His constitutional rights were violated in that he was denied the right and opportunity to confer, prior to trial, with his codefendant, David Secrest; (2) his constitutional rights were violated in that the arresting officers took his fingerprints while he was in custody, before he had an opportunity to employ counsel and without advising him of his constitutional rights. At the trial the State introduced testimony comparing these fingerprints with those found on objects at the scene of the crime.

Exceptions to the judgment of the superior court, and assignments of error based thereon, which are not brought forward in the appellant's brief and in support of which his brief cites no argument or authority, are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court. We have, nevertheless, reviewed the entire record before us, including the transcript of the hearing upon the petition for post conviction review and the transcript of the trial on the criminal charge, and have considered each exception by the petitioner to the judgment entered at the post conviction hearing, and to the findings of fact and conclusions therein. Each such finding of fact made by the superior court is amply supported by evidence in the record. Each such finding is, therefore, binding upon this Court. *State v. Wheeler, supra.* The court's conclusions of law based upon its findings of fact are subject to our review. We have examined each such conclusion and find no error therein.

The ultimate questions are: (1) Did the petitioner have a fair opportunity, prior to being placed on trial, to prepare his defense against the charge? (2) Did the State procure his conviction by the use of trial or investigatory procedures forbidden by the Constitution of North Carolina or by the Constitution of the United States? In applying these tests to the record before us, we must begin with the assumption that the petitioner is innocent of the offense with which he is charged and consider whether the procedures used would expose an innocent man to unreasonable danger of conviction.

In each of the above cited cases, this Court reversed a judgment entered upon a post conviction hearing and ordered a new trial for the reason that the defendants therein were not allowed, prior to trial, to confer with their respective codefendants in preparation of their defenses. In *State v. Wheeler, supra,* this Court said, "The

rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities." In that case the facts were these:

> "The petitioners were arrested together the day following the robbery and after arrest were deprived of all money and other personal effects. * * * They were kept in separate jails and not allowed to communicate with one another. They were moved from jail to jail several times between the date of the arrest and the date of their trial. * * * As they were led into court they were confronted by the State's prosecutor, ready for trial with his investigators and witnesses. Each defendant was in ignorance of what the others were able to offer in defense. Each was without an attorney, relative, or friend."

In *State v. Graves, supra,* the petitioners were indicted jointly for robbery. The alleged robbery occurred Sunday afternoon; they were arrested that night and tried the following Tuesday afternoon. This Court said:

> "Neither of the petitioners was represented by counsel at the trial, none of their relatives were present and they had no witnesses. * * * Where, as here, defendants have no notice that trial is imminent and all the circumstances indicate that the case has not progressed beyond the investigation stage and they and their families, relatives and friends have been given no opportunity to communicate and confer, and defendants have had no opportunity to confer privately with each other as to what each may be able to contribute to the defense, until a short time before the unexpected trial, and available witnesses have not been subpœnæd, trial under these circumstances is a deprivation of due process of law."

In contrast, the present record shows:

Branch was arrested at the home of his grandmother, with whom he lived, and while she and other relatives were present. His grandmother and other relatives visited him in jail. They employed attorneys to represent him. At the preliminary hearing he was represented by all three of his attorneys, and a transcript of this hearing was available. Secrest, the codefendant, was arrested at substantially the same time. Neither requested permission to talk to the other. Secrest was tried first and, upon his plea of guilty, was sentenced to life imprisonment. Branch was then brought to trial and Secrest testified as a witness for the State. At the post conviction hearing, the sheriff testified that the prisoners were kept separated for the

safety of Secrest. Secrest testified that he had been threatened by Branch and had no desire, prior to their trials, to confer with him. The trial which resulted in Branch's conviction was not until nearly ten months after the employment of his counsel. In the interval, the officers carried Branch to the offices of his attorneys for conferences whenever requested to do so. At no time did Branch's attorneys request a conference with Secrest or a conference between Secrest and Branch.

The circumstances disclosed in this record are completely different from those in the *Wheeler* and *Graves* cases. Under these circumstances, it cannot be said that confining Branch and Secrest in separate cells, without opportunity to confer with each other privately, deprived Branch of a fair opportunity to prepare his defense. This procedure by the State did not deprive Branch of his liberty without due process of law and violated no other right granted to him by the Constitution of this State or by the Constitution of the United States.

There is no merit in the petitioner's contention that his constitutional rights were violated in that his fingerprints were taken while he was in custody, before he had opportunity to employ counsel and without his being advised of his constitutional rights and that, at his trial, the State was permitted to introduce evidence comparing the fingerprints so taken with fingerprints found upon objects at the scene of the crime. In *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104, this Court sustained the admission in evidence of a comparison of a bare footprint taken from the defendant, while in custody, with a footprint found at the scene of the crime. Although the footprint taken from the defendant in that case was taken with his consent, the Court, speaking through Ervin, J., said:

> "But the prisoner's standing would not be bettered a whit if the record did in fact disclose that he had furnished his footprint to the State under compulsion. The point in principle is decided against the prisoner in the following North Carolina cases: *S. v. Riddle,* 205 N.C. 591, 172 S.E. 400, * * * *S. v. Graham,* 74 N.C. 646, 21 Am. Rep. 493, and *S. v. Thompson,* 161 N.C. 238, 76 S.E. 249, * * * *S. v. Garrett,* 71 N.C. 85, * * *. These North Carolina cases are in accord with well considered decisions in other jurisdictions to the effect that the constitutional privilege against self-incrimination is not violated by the introduction of evidence of fingerprints to identify the accused, even where the fingerprints of the accused are obtained by coercion."

In the very recent case of *Schmerber v. California,* 384 U.S. 757,

86 S. Ct. 1826, 16 L. ed. 2d 908, the Supreme Court of the United States held that there was no violation of rights granted by the Constitution of the United States in taking, over objection, blood from the body of one charged with driving a motor vehicle under the influence of intoxicating liquor, analyzing the same and permitting the state to offer evidence of the result of such analysis. In reaching that conclusion the Court, speaking through Mr. Justice Brennan, said:

> "[B]oth federal and state courts have usually held that it [the protection against self-incrimination] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."

In *Holt v. United States,* 218 U.S. 245, 31 S. Ct. 2, 54 L. ed. 1021, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

> "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of a use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

To the same effect, see: *United States v. Kelly,* 55 F. 2d 67, 83 A.L.R. 122; 8 Wigmore on Evidence (McNaughton's Revision), § 2265; Annot., 28 A.L.R. 2d 1115, 1137.

Since the fingerprints of the petitioner could have been taken while he was in custody and against his will, even though his counsel had been present and had advised him not to assent thereto, see *Schmerber v. California, supra,* there was no violation of his rights in the taking of these fingerprints prior to his employment of counsel and prior to any advice to him concerning his constitutional rights.

The record of the petitioner's trial on the criminal charge discloses that no statement made by him while in custody was offered in evidence. The transcript of the post conviction hearing shows that from the time of his arrest to the conclusion of his trial the petitioner, when interrogated by the officers, refused to make any statement whatever except that he had no statement to make.

In this proceeding, the burden is upon the petitioner to show a

denial of some right guaranteed to him by the Constitution of North Carolina or by the Constitution of the United States in the trial or investigatory procedures resulting in his conviction. The petitioner has failed to do so.

Affirmed.

EARON E. GRIFFIN v. LEROY THOMAS WATKINS AND DICKERSON, INCORPORATED.

(Filed 22 March, 1967.)

1. Automobiles §§ 10, 46—

Where there is evidence that plaintiff was traveling in excess of the maximum legal speed at an hour when headlights were required by G.S. 20-129, and that he was unable to stop before hitting the rear of defendant's vehicle parked in his lane of travel, defendant is entitled to have the court charge the jury in substance in accordance with his prayer for special instructions that under the circumstances the inability of plaintiff to stop his vehicle within the radius of his headlights would constitute contributory negligence *per se*. G.S. 20-141(e).

2. Trial § 33—

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request and apply the law to the various factual situations presented by the conflicting evidence.

3. Automobiles § 46; Negligence § 28—

An instruction to the effect that if plaintiff had satisfied the jury that defendant failed to exercise due care and that such failure was a proximate cause of the injury, to answer the issue of contributory negligence in the affirmative, must be held for prejudicial error in failing to instruct the jury as to what specific acts or omissions arising under the pleadings and evidence would constitute want of due care.

PARKER, C.J., Concurring in part and dissenting in part.

APPEAL by defendant from *McConnell, J.*, August 22, 1966 Civil Conflict Session of UNION, docketed in the Supreme Court as Case No. 536 and argued at the Fall Term 1966.

Plaintiff sues for personal injuries and property damages resulting from a collision between plaintiff's 1965 Pontiac automobile and a 1960 John Deere tractor owned by the corporate defendant (Dickerson) and operated by its agent, defendant Watkins. Defendants deny plaintiff's allegations of negligence, plead plaintiff's

contributory negligence, and defendant Watkins counterclaims for personal injuries. The collision occurred in a 55 MPH speed zone on August 19, 1965, on U. S. Highway No. 601 about two miles north of Monroe and three-tenths of a mile south of a rural paved road, known as Ridge Road. At this point the pavement, unlined black asphalt newly laid, was 24 feet wide. The west shoulder was 9 feet in width; the east shoulder, 15 feet.

Plaintiff alleged and offered evidence tending to show: At about 7:25 p.m., plaintiff was traveling south on Highway 601 at a speed of 30 MPH. The weather was cloudy, and it was dark at the time. (Plaintiff alleged that the accident occurred at about 7:25 p.m.; he testified that he "figured it was 7:45.") All the cars which he met had their headlights burning; his were on low beam. He met and passed a truck with blinding headlights. As soon as the truck passed, plaintiff saw Dickerson's tractor, stopped 40-50 feet ahead in his lane of travel without lights of any kind on it. There were no flags, flares, or flambeaux to give warning of the tractor's presence. Plaintiff applied his brakes and skidded 37 feet, but he was unable to avoid a collision with the rear end of the tractor. Plaintiff, 71 years old, was seriously and permanently injured, and his automobile was damaged in the sum of $2,350.00. The force of the impact knocked the right rear wheel from the tractor. The tractor came to rest about 81 feet from a pool of oil, which apparently came from its axle, broken in the collision.

Defendants alleged and offered evidence tending to show: Defendant Watkins, operating Dickerson's tractor, which was equipped with a front rotary-sweeper broom, ran out of gasoline in the southbound lane of Highway 601 about 7:00 p.m. He was able to get only the right wheels (18 inches wide and about 5 feet high) off the pavement. The total weight of the tractor and sweeper was 4,300 pounds; its total width, 5 feet 10 inches. The rear of the tractor was equipped with a large, elevated sign saying CAUTION. This sign was approximately 3 feet above the rear wheels of the tractor. On each side of it, at the top, was a yellow light, which blinked when turned on. The tractor was also equipped with headlights and a tail lamp. Leaving all the lights burning on the tractor, Watkins boarded the truck of another employee of Dickerson and went for gasoline. They returned in 15-20 minutes, put the gasoline in the tractor, and Watkins was attempting to start its engine when plaintiff, traveling at a speed of 60-65 MPH, crashed into the rear of the tractor. Defendant Watkins was thrown to the shoulder of the road and his back was injured. At the time of the collision, all the lights on the tractor were burning, and the two yellow lights were blinking. It was, however, not yet dark; sunset was at 7:06

p.m. Neither plaintiff nor operators of other vehicles on the highway had then turned on their headlights.

Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff injured and his automobile damaged by the negligence of the defendants, as alleged in the complaint? ANSWER: Yes.

"2. If so, did the plaintiff by his own negligence contribute to his injuries and damages, as alleged in the answer? ANSWER: No.

"3. What amount, if anything, is the plaintiff entitled to recover of the defendants?

"(a) For damages to his automobile: ANSWER: $ None.

"(b) For personal injuries: ANSWER: $40,000.

"4. Was the defendant, LeRoy Thomas Watkins, injured by the negligence of the plaintiff as alleged in the answer? ANSWER: ————.

"5. What amount, if anything, is the defendant entitled to recover of the plaintiff? ANSWER: $....."

From the judgment entered upon the verdict, defendants appeal.

Smith & Griffin and Wardlow, Knox, Caudle & Wade for plaintiff.

Walter B. Nivens and Kennedy, Covington, Lobdell and Hickman by Charles V. Tompkins, Jr., for defendants.

SHARP, J. In specifying the acts of omission and commission which they contend constituted negligence and contributory negligence on the part of plaintiff, defendants allege that he failed to operate his automobile at a speed which would permit him to stop within the range of his headlights. With reference to the second issue, they assign as error violative of G.S. 1-180 the judge's failure to charge the jury in words substantially to this effect: If the jury should be satisfied by the greater weight of the evidence that, at the time of the accident, the hour or visibility was such that it became mandatory under G.S. 20-129 for every vehicle upon the highway to have its headlights burning and if they should be satisfied that plaintiff was operating his vehicle at a speed in excess of 55 MPH (the maximum speed permitted by law for that area), then plaintiff's failure or inability to stop his automobile within the radius of his headlights or range of his vision would constitute negligence (or contributory negligence) *per se*. And, if they further found that such failure to stop was a proximate cause of the collision, they should answer the second issue YES.

Prior to April 29, 1953, the effective date of Section 3 of Chapter 1145 of the 1953 Session Laws, now codified as G.S. 20-141(e), the failure of a nocturnal motorist to drive in such a manner and at such a speed that he could stop his vehicle within the radius of his headlights or range of his vision was negligence, or contributory negligence, *per se*. G.S. 20-141(e) modified this rule with the following proviso:

> "(T)he failure or inability of a motor vehicle operator who is operating such vehicle *within the maximum speed limits* prescribed by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator." (Emphasis added.)

This provision by its terms does not apply, however, when a motorist is operating his vehicle in excess of the maximum speed limits fixed by G.S. 20-141(b). *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601; *Burchette v. Distributing Co.,* 243 N.C. 120, 90 S.E. 2d 232; 35 N.C. L. Rev. 247 (1957). See *Sharpe v. Hanline,* 265 N.C. 502, 144 S.E. 2d 574; *Brown v. Hale,* 263 N.C. 176, 139 S.E. 2d 210; *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40.

Plaintiff's own evidence tended to show that headlights were required by G.S. 20-129 at the time of the collision, and a witness for defendants testified that plaintiff was traveling at 60-65 MPH just prior to the accident — a speed 5-10 MPH in excess of the legal limit. Plaintiff testified that although the lights of the truck he was meeting bothered him, he did not slow down until he saw the tractor. Under their pleadings and evidence, defendants were entitled to the substance of the instruction, the omission of which they have assigned as error. "It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request and to apply the law to the various factual situations presented by the conflicting evidence." 4 Strong, N. C. Index, Trial § 33 (1961).

Defendants also assigned as error the following portion of his Honor's instruction to the jury:

> "(I)f plaintiff has satisfied you from the evidence and by its greater weight that the defendants were negligent in any one or more of the following respects, *i. e.: that they failed to exercise due care;* that they failed to have the lights on as provided by statute if it was thirty minutes after sunset or the

visibility was less than two hundred feet; or (that) they parked on the highway when it was practical or reasonably practical to park off the highway as provided by section 20-161 of the General Statutes; and . . . (that) the negligence in any one or more of those respects was a proximate cause of the collision and the injury and damage resulting to the plaintiff, then it would be your duty to answer the first issue YES in favor of the plaintiff." (Emphasis added.)

Failure to exercise due care is the failure to perform some specific duty required by law. To say that one has failed to use due care or that one has been negligent, without more, is to state a mere unsupported conclusion. "(N)egligence is not a fact in itself but is the legal result of certain facts." *Shives v. Sample,* 238 N.C. 724, 726, 79 S.E. 2d 193, 195. In his charge, the trial judge must tell the jury what specific acts or omissions, under the pleadings and evidence, constitute negligence, that is, the failure to use due care. Defendants justly complain that this instruction gave the jury *carte blanche* to find them *generally* careless or negligent for any reason which the evidence might suggest to them.

For the errors indicated, there must be a new trial. We do not consider defendants' other assignments of error; the questions presented may not arise in the next trial.

New trial.

PARKER, C.J. Concurring in part and dissenting in part.

I agree with the majority opinion that the defendants are entitled to a new trial for failure of the court in its charge to apply the provisions of G.S. 20-141(e) to defendants' evidence tending to show that plaintiff was guilty of contributory negligence, as set forth in the second issue. I do not agree with this statement in the majority opinion: "To say that one has failed to use due care . . . is to state a mere unsupported conclusion," and that "defendants justly complain that this instruction gave the jury *carte blanche* to find them *generally* careless or negligent for any reason which the evidence might suggest to them."

Sir A. P. Herbert wittily and happily said in the Uncommon Law, p. 1: "The Common Law of England has been laboriously built about a mythical figure — the figure of 'The Reasonable Man.'" To this may be added: The law of negligence has been laboriously built about the figure of "The Reasonable Man's" failure to use due care. "Due care" is a duty lying at the root of the social compact. In the dawn of the history of the human race, the Lord said unto Cain: "Where is Abel thy brother? And he said, I know not: Am I

my brother's keeper?" Genesis, Ch. 4, v. 9 (King James Version). An old, old question but yet new with all. Whatever doubt may have arisen in the mind of the unhappy man who first asked it, no doubt exists in the law on the right answer, then and now. The law hedges around the lives and persons of men with much more care than it employs when guarding their property, so that, in this particular, it makes, in a way, everyone his brother's keeper. Negligence is the failure to exercise that degree of care for others' safety which a reasonably prudent man, under like circumstances, would exercise. It has also been defined as the failure to exercise proper care in the performance of some legal duty which defendant owes the injured party under the circumstances in which they are placed. Of course, failure to exercise due care for another's safety to be actionable must be the proximate cause of injury, and foreseeability is an element of proximate cause. 3 Strong's N. C. Index, Negligence, § 1.

Winborne, J., in *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17, said: "And it is a general rule of law, even in the absence of statutory requirement, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances."

Bobbitt, J., said in *Henderson v. Henderson*, 239 N.C. 487, 80 S.E. 2d 383: "Apart from safety statutes prescribing specific rules governing the operation of motor vehicles, a person operating a motor vehicle must exercise proper care in the way and manner of its operation, proper care being that degree of care that an ordinarily prudent person would exercise under the same or similar circumstances and when charged with like duty. Thus, he must exercise due care as to keeping a proper lookout, as to keeping his car under proper control, and generally so as to avoid collision with persons or other vehicles on the highway."

"It may be assumed that the jury will understand that a want of 'due care,' 'ordinary care,' or 'reasonable care' given in special charges is equal to negligence, and if the plaintiff deems such charges misleading, he should request an explanatory charge." 38 Am. Jur., Negligence, § 364, p. 1078. In my opinion, the failure to use due care is not a mere unsupported conclusion, but is a fact and is generally used and understood as such in the language of the ordinary man, although speaking most technically it may be considered by some as a mere conclusion.

COLIN MURCHISON, BY HIS NEXT FRIEND, JEAN B. MURCHISON, PLAINTIFF, V. EDWARD JOYNER POWELL, DEFENDANT

AND

JEAN B. MURCHISON, PLAINTIFF, V. EDWARD JOYNER POWELL, DEFENDANT.

(Filed 22 March, 1967.)

1. Trial § 21—

On motion to nonsuit, the evidence offered by plaintiff must be taken as true and defendant's evidence in conflict therewith must be disregarded.

2. Automobiles § 14—

The two foot clearance required by G.S. 20-149 applies to the overtaking and passing of another vehicle, not a horse subject to fright by a sudden noise.

3. Automobiles § 41n—

Evidence that defendant motorist saw two boys riding their horses on a narrow and confined shoulder of the road and, at a speed in excess of that permitted by statute, undertook to pass so close to one of the horses that the motorist should have reasonably foreseen that the sound would frighten the horse, together with evidence that the vehicle struck the horse while the horse was on the shoulder of the road, resulting in the death of the horse and injury to the rider, *is held* sufficient to overrule defendant's motion to nonsuit.

4. Automobiles § 44; Negligence § 25—

Riding a trotting horse upon a shoulder of a highway is not negligence *per se*, and where there is no evidence that the rider did or failed to do anything which caused the horse to move off the shoulder of the road or that he knew of any propensity of the horse to shy at the approach of motor vehicles, it is not error to refuse to submit the issue of the contributory negligence of the rider in causing a collision occurring with a motor vehicle when the driver attempted to overtake and pass the animal at excessive speed, the natural reaction of the horse to the noise of the overtaking vehicle being foreseeable and therefore not an intervening cause.

5. Trial § 37—

The misstatement of the contention of a party must be brought to the trial court's attention in apt time in order for exception thereto to be considered.

6. Appeal and Error § 20—

A defendant may not complain of a correct statement of law in regard to sudden emergency, even though the doctrine is inapplicable, where he contends it does apply.

7. Automobiles § 38—

Persons having sufficient opportunity to observe a vehicle and form an opinion as to its speed are competent to give their opinion based upon their observation, and the fact that two of the witnesses are young boys

who had never driven an automobile goes to the weight of their testimony but not its competency.

APPEAL by defendant from *Cohoon, J.*, at the 12 December 1966 Civil Session of NASH.

The minor plaintiff, Colin, fourteen years of age, was riding a horse upon the narrow shoulder of State Highway No. 43, near Rocky Mount, about 4 o'clock in the afternoon. The defendant, driving his truck in the same direction, overtook and attempted to pass the horse and rider. The truck and horse collided. As a result, the horse was killed and Colin was thrown to the pavement of the road and injured. He alleges that the defendant was negligent in that he drove at an excessive speed, failed to keep a lookout, failed to sound his horn and, in attempting to pass, drove closer beside the horse than was reasonable and prudent. His mother, a widow, sues in a separate action for loss of her son's services and for medical expenses which she has incurred, or may incur, as a result of his injuries, her allegations as to negligence being the same as those contained in the complaint of the boy.

In each case the defendant denies that he was negligent and, by way of further defense, alleges that when the truck was about ten feet behind the horse, the horse jumped suddenly from the shoulder into the road and struck the right front fender of the truck. He alleges this was the sole proximate cause of the collision. Alternatively, he alleges contributory negligence by the boy, either in causing the horse to go onto the paved highway in the path of the truck or in riding the horse upon a narrow shoulder of a busy highway, knowing the horse had a tendency to shy when passed by vehicles.

The two cases were consolidated for trial. The court refused to submit an issue of contributory negligence tendered by the defendant. The jury found that Colin was injured by the negligence of the defendant as alleged in the complaint and awarded damages to him and his mother. Judgment was entered accordingly and the defendant appeals. The two cases were argued as one in this Court pursuant to the motion of the defendant for such consolidation.

The plaintiffs offered several witnesses. Their testimony, in addition to medical testimony and the testimony of the mother as to the extent of the injuries and the expenses incurred, may be summarized as follows:

Colin and his companion, age twelve, were mounted on separate horses riding upon the shoulder of the highway, Colin being in front. His companion observed the truck approaching and called to Colin, informing him of that fact. The truck passed the companion

at a speed of approximately 45 miles per hour. (The speed limit was admitted to be 35 miles per hour.) The horses were going at a fast trot as it had started to rain. As the truck approached and overtook the boys on their horses, the horses were on the dirt shoulder between the pavement and the side ditch, this shoulder being about five feet in width. (A photograph offered by the defendant shows that the ditch had a substantial bank on the far side, and at the top of this bank was a wire fence; mail boxes were erected in the ditch on either side of the point of impact.) The horse was 30 to 32 inches wide. When the truck and the horse collided, the horse fell in the ditch and the boy fell so that his head struck upon the pavement.

The horn of the truck was not blown. The horse was on the shoulder of the road when struck. The body of the truck, consisting of two-by-four uprights attached to a flat bed, protruded beyond the wheels. The horse was hit at a point on its left hip at about the height of the truck body. Horse hair and a bit of blood were observed near the center of the body of the truck. A short distance before the point of impact the truck was running close to the edge of the pavement, "better than 35" miles per hour.

An adjoining landowner saw the impact. He did not observe the horse shy. The impact threw it up and around. In his opinion the truck was driving in excess of 50 miles per hour at that instant. He observed that the wheels were sliding. The horse fell into the ditch 75 feet from the point of impact. The truck stopped 150 feet beyond the horse. Immediately after the impact this witness went to the scene and observed tire marks, 75 feet in length, which came to an abrupt stop three or four inches from the edge of the pavement near the point of impact.

Evidence offered by the defendant is to the following effect:

There was no protrusion of the cab or body of the truck beyond the wheels except that the front fenders extended out about two inches. There are no fenders over the back wheels.

The defendant saw the horses on the shoulder. He did not blow his horn. When he got within ten feet of Colin's horse, it seemed to shy to its left and jumped out onto the pavement. He "snatched to the left to keep from hitting it," but the horse came into the body of the truck. He did not apply his brakes. After the impact he stopped and then pulled off the highway to his right, stopping about 100 to 125 feet down the road. His first stop was 20 feet from the point of impact.

As he approached the horses, the right side of his truck was 12 inches from the right edge of the pavement. His speed was then 25 to 30 miles per hour. At the time of the impact his left front wheel

was to the left of the center line, and his right front wheel was three feet from the right edge of the pavement. He did not at any time skid his wheels. After the accident he observed skid marks on the pavement.

The horse first struck the right front fender behind the front wheel. Just prior to the horse's shying, the truck was 10 to 12 inches from the edge of the pavement and the horse was on the shoulder about a foot from the pavement. The pavement was 18 to 20 feet wide.

The defendant was meeting a pickup truck headed in the opposite direction. In the opinion of the driver of this truck and of a passenger therein, the defendant was going about 30 to 35 miles per hour, and the horse appeared to jump right into the side of the truck, whereupon the defendant cut to his left and then back on his side of the road and stopped.

In the opinion of the investigating patrolman, the pavement was 20 to 22 feet in width.

The defendant assigns as error the denial of his motion for judgment of nonsuit, the refusal of the court to submit an issue of contributory negligence, numerous rulings upon the admission of evidence, and various portions of the court's charge to the jury.

Thorp & Etheridge for defendant appellant.
Battle, Winslow, Scott & Wiley for plaintiff appellee.

LAKE, J. There was no error in the overruling of the defendant's motion for judgment of nonsuit. Upon such a motion, the evidence offered by the plaintiff must be taken to be true and that offered by the defendant in conflict therewith must be disregarded. *Lewis v. Barnhill,* 267 N.C. 457, 461, 148 S.E. 2d 536; *Dixon v. Edwards,* 265 N.C. 470, 144 S.E. 2d 408. So considered, the evidence is sufficient to support a finding that the defendant saw the boys riding their horses on a narrow and confined shoulder of the road, and, at a speed in excess of that permitted by the statute, undertook to pass so close to the horse ridden by the minor plaintiff that it should reasonably have been foreseen by him that the sound of the overtaking vehicle would frighten the horse. The two foot clearance required by G.S. 20-149 applies to the overtaking and passing of another vehicle, not a horse subject to fright by a sudden noise. Even as to the passing of an inanimate vehicle, this is a minimum requirement by the express terms of the statute. The defendant's statement that after the horse shied, he "snatched" the truck to the left and crossed the center line indicates strongly that he could with safety have gone further to the left before overtaking the horse.

The natural reaction of the horse to the noise of the truck overtaking him cannot be regarded as an intervening cause since it should have been foreseen by the defendant as a likely result of his effort to pass so close to the animal. *Nance v. Parks,* 266 N.C. 206, 146 S.E. 2d 24; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111, 65 C.J.S., Negligence, § 114.

There was no error in the refusal to submit an issue of contributory negligence to the jury. Riding a trotting horse upon the shoulder of a highway is not negligence *per se,* and there was no evidence whatever in the record to show that the minor plaintiff did or failed to do anything which caused the horse to move off of the shoulder of the road, or that he knew of any propensity of this horse to shy at the approach of motor vehicles, if indeed the horse had such a propensity.

The court in its charge told the jury that the defendant contended he was confronted by a sudden emergency and, thereupon, instructed the jury correctly as to the rule of law applicable to the conduct of one confronted by such emergency. The exception to this portion of the charge cannot be sustained. If the court misstated the contention of the defendant, that circumstance should have been called to the attention of the court before the jury retired so as to enable the court to correct the mistake. *Dickson v. Queen City Coach Co.,* 233 N.C. 167, 63 S.E. 2d 297; *Steele v. Coxe,* 225 N.C. 726, 36 S.E. 2d 288. The record shows no objection by the defendant to this statement of his contention before the jury retired to consider its verdict. While the doctrine of sudden emergency has no application to the facts disclosed in this record, since there is nothing to show that the collision and resulting injury was brought about by any act of the defendant after the horse jumped from a safe place on the shoulder, if it did so jump, and therefore this instruction should not have been included in the court's charge, the error in giving this instruction does not appear to have been prejudicial to the defendant. The defendant's argument to the jury does not appear in the record. If the court was correct in its statement as to the defendant's contention concerning the doctrine of sudden emergency, the defendant cannot complain that a correct statement of the rule with reference to that doctrine was included in the charge.

We have carefully considered each assignment of error concerning alleged failures of the court to instruct the jury and find no merit therein. The court's charge to the jury, considered as a whole, complies with the requirements of G.S. 1-180. It presented the law applicable to the issues clearly to the jury and the jury determined those issues in favor of the plaintiffs.

We have likewise considered each assignment of error relating to the admission of evidence and find all of these to be without merit. The witnesses who testified as to the speed of the defendant's truck had sufficient opportunity to observe it and form an opinion as to its speed. The fact that two of them were young boys who had never driven an automobile would go to the weight of their testimony but would not make it incompetent.

No error.

STATE v. ROY CECIL BROOME.

(Filed 22 March, 1967.)

1. Criminal Law § 18—

Upon appeal to the Superior Court from a county court, defendant is entitled to a trial *de novo* without prejudice from the former proceedings in the county court, and without regard to his plea of guilty in the county court. G.S. 15-177.1.

2. Arrest and Bail § 3—

A patrolman apprehending a person driving on a public highway while under the influence of intoxicating liquor may arrest such person without a warrant. G.S. 15-41(1), G.S. 20-188.

3. Criminal Law § 21—

A patrolman apprehended defendant driving on a public highway while under the influence of intoxicating liquor, arrested him without a warrant and gave defendant a ticket charging defendant with the offense. Defendant was not put in jail but was released upon bond. Thereafter a warrant was issued. Defendant contended that his constitutional rights were denied in that he was required to give bond before issuance of warrant and was not carried before a magistrate as required by G.S. 15-46. *Held:* The statute does not prescribe mandatory procedure affecting the validity of the prosecution in the trial court, and the facts do not disclose a deprivation of any constitutional rights of defendant.

4. Indictment and Warrant § 12—

The trial court has discretionary power to permit the amendment of a warrant charging defendant with operating a motor vehicle upon a public highway while under the influence of intoxicating liquor, so as to charge that the offense was a third offense, since the amendment does not change the nature of the offense but relates solely to punishment.

5. Automobiles § 72—

The evidence in this case *held* amply sufficient to sustain defendant's conviction of driving a motor vehicle on a public highway while under the influence of intoxicating liquor.

6. Criminal Law § 104—

Defendant pleaded not guilty and controverted the charge against him. *Held:* It was error for the court to instruct the jury that if they believed all the evidence beyond a reasonable doubt to return a verdict of guilty.

7. Criminal Law § 118—

Upon a trial on a warrant charging defendant with operating a motor vehicle on a public highway while under the influence of intoxicating liquor and charging that defendant had theretofore been twice convicted of violating the statute, verdict of the jury of guilty of a first offense amounts to an acquittal in regard to the charge that the offense was a third offense, precluding further prosecution of that matter.

8. Criminal Law § 164—

Where defendant is acquitted of the charge that his offense was a third offense, the admission of evidence in regard to his alleged prior convictions cannot be prejudicial.

9. Criminal Law § 139—

Exception to the admission of incriminating statements of defendant without a *voir dire* hearing as to whether such statements were voluntarily made need not be considered when defendant is awarded a new trial on other grounds and it is probable that the matter will not arise upon the new trial.

APPEAL by defendant from *Parker (Joseph W.), J.*, October 1966 Session of SAMPSON.

Criminal prosecution upon an amended warrant charging defendant on 21 February 1966 with unlawfully and willfully operating a "motor vehicle on public highways of the State of North Carolina while under the influence of intoxicating liquor, this being his 3rd such offense; he having previously been convicted on a charge of operating a motor vehicle on public highways under the influence of intoxicating liquor in the Superior Court of Sampson County on Feb. 11, 1960 and again on Oct. 28, 1960," heard *de novo* upon an appeal from a plea of "guilty to driving under influence (3rd offense)," entered in the county court of Sampson County, and from a judgment pronounced upon such plea imprisoning defendant for one year, suspended upon the payment of $500 fine and costs.

In the Superior Court, defendant, who was represented by his counsel, Herbert B. Hulse, entered a plea of not guilty. Verdict: "Guilty as a first offender." From a judgment that defendant be imprisoned for 12 months, suspended upon the payment of a $250 fine and the costs, defendant appeals to the Supreme Court.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Herbert B. Hulse for defendant appellant.

PARKER, C.J. Upon defendant's appeal from the county court of Sampson County to the Superior Court, he, by virtue of the provisions of G.S. 15-177.1, is entitled to a trial *de novo* by a jury, without prejudice from the former proceedings of the court below, and regardless of his plea of "guilty to driving under influence (3rd offense)," and the judgment pronounced thereon. *S. v. Meadows,* 234 N.C. 657, 68 S.E. 2d 406.

In the Superior Court, defendant, before he entered a plea of not guilty, made a motion "that the charges against him be dismissed for that it appears from the record that his constitutional rights have been violated in this matter in that he was arrested on the 21st day of February, 1966, and on that date was committed to jail and required to give bail to obtain his release from jail, and that the warrant upon which he is now being tried was not issued until the 28th day of February, 1966." The court denied the motion, and the defendant excepts and assigns this as error. This assignment of error is overruled.

Defendant's assignment of error does not state in what respect his constitutional rights have been violated. However, he contends in his brief that he has been deprived of his constitutional rights in that he was arrested by a State highway patrolman without a warrant on 21 February 1966, and the warrant was not issued until 28 February 1966, and that the provisions of G.S. 15-46 were not complied with. He contends that he was required to give bond before issuance of the warrant, and that he was not carried before a magistrate as required by G.S. 15-46. He further contends in his brief that his arrest without a warrant denied him due process of law under the Fourteenth Amendment to the United States Constitution, and that all proceedings in connection with this arrest, including the warrant subsequently issued, should be quashed.

The State has evidence tending to show the following facts: About 9:15 p.m. on Monday, 21 February 1966, C. C. Albritton, a State highway patrolman, while patrolling a public highway in the State, saw an Oldsmobile ahead of him being driven "weaving" from the right shoulder of the highway across to the center of the highway and back. He stopped the Oldsmobile by cutting on his red light and sounding his siren. The patrolman got out of his patrol car, went to the left door of the Oldsmobile, opened the door, and found defendant to be the operator. He asked defendant to step out of his car, and come to the back of it in front of the patrol car. The defendant did this. In walking to the back of the Oldsmobile he staggered. He had a very strong odor of alcohol on his breath and, in the opinion of the patrolman, defendant was very much under the influence of some intoxicating drink. The patrolman

saw a fifth of whisky lying in the middle of the front seat of the Oldsmobile about half full. There was a woman in the back of the Oldsmobile asleep. He arrested defendant for driving an automobile under the influence of intoxicating liquor. He carried defendant to jail in his patrol car, and Patrolman Saintsing drove the Oldsmobile to the jail with the woman asleep in the back seat. When they arrived at the county jail, he woke the woman up and she was drunk. He arrested her for public drunkenness.

It is unlawful for any person while under the influence of intoxicating liquor to drive a motor vehicle upon the public highways within the State, G.S. 20-138. The highway patrolman, by virtue of the provisions of G.S. 20-188 and G.S. 15-41(1), was authorized under the circumstances to arrest defendant without a warrant, and such arrest was legal. It is not an essential of jurisdiction that a warrant be issued prior to the arrest and that defendant be initially arrested thereunder. *S. v. Green,* 251 N.C. 40, 110 S.E. 2d 609.

The evidence in the record shows that Patrolman Albritton either at the scene of the arrest or when he carried defendant to jail — the record is not clear — wrote up and gave to defendant a ticket wherein it was stated, among other things, that he was charged with unlawfully and willfully operating a motor vehicle on a public highway while under the influence of intoxicating liquor. The record shows in an addendum to it that defendant was not put in jail, but was released upon a bond of $200 for his appearance before the county court at its office on 15 March 1966. After defendant's record had been checked with the Department of Motor Vehicles, a warrant was issued on 28 February 1966 charging defendant with a third offense of operating a motor vehicle upon a public highway in the State while under the influence of intoxicating liquor. G.S. 15-46 does not prescribe mandatory procedure affecting the validity of defendant's trial in the Superior Court. *S. v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589; *S. v. Green, supra.* Under the totality of the facts here, it is not shown by defendant that any of his constitutional rights under the Fourteenth Amendment to the Federal Constitution were violated, or that he was denied due process.

Defendant pleaded guilty in the county court to a warrant charging him on 21 February 1966 with unlawfully and willfully operating a "motor vehicle on public highways of the State of North Carolina while under the influence of intoxicating liquor, this being his 3rd such offense. (1st offense Sampson County Superior Court Feb. 11, 1960, 2nd offense Sampson County Superior Court Oct. 28, 1960)." In the Superior Court on appeal, the solicitor for the State moved to amend the warrant on which defendant was tried in the county court of Sampson County to allege "he having

previously been convicted on a charge of operating a motor vehicle on public highways under the influence of intoxicating liquor in the Superior Court of Sampson County on Feb. 11, 1960 and again on Oct. 28, 1960," instead of "1st offense Sampson County Superior Court Feb. 11, 1960, 2nd offense Sampson County Superior Court Oct. 28, 1960." The court allowed the solicitor's motion and the defendant excepted and assigns this as error. This assignment of error is overruled.

The trial judge in the Superior Court had discretionary power to permit the amendment to the warrant as set forth above. *S. v. Carpenter,* 231 N.C. 229, 56 S.E. 2d 713; *S. v. Grimes,* 226 N.C. 523, 39 S.E. 2d 394; *S. v. Lewis,* 177 N.C. 555, 98 S.E. 309; 2 Strong's N. C. Index, Indictment and Warrant, § 12. The amendment did not change the nature of the offense, to wit, driving an automobile upon a public highway while under the influence of intoxicating liquor. The amendment to the warrant with respect to the first and second offenses relates only to punishment. G.S. 20-179; *S. v. White,* 246 N.C. 587, 99 S.E. 2d 772.

The State introduced evidence. Defendant introduced no evidence. The State had abundant evidence to carry the case to the jury. Defendant's assignment of error to the denial of his motion for judgment of compulsory nonsuit made at the close of the State's evidence is without merit and is overruled.

Defendant assigns as error this part of the charge: "The court instructs you, gentlemen of the jury, that if you believe all of the evidence and beyond a reasonable doubt, it would be your duty to return a verdict of guilty as charged in the warrant." This assignment of error is good.

The State offered evidence tending to show that defendant on the date charged in the amended warrant did unlawfully and willfully operate an automobile upon a public highway within the State while under the influence of intoxicating liquor. C. C. Albritton, a State patrolman who arrested the defendant under the circumstances set forth above, testified as a witness for the State to this effect: After he arrested defendant and carried him to jail, he asked defendant a number of questions, and defendant in reply to some of the questions said he had had one drink of red whisky but was not under the influence of intoxicating liquor when he was driving the Oldsmobile. Whether or not upon the occasion here defendant was under the influence of intoxicating liquor when he was driving the Oldsmobile upon a public highway was an essential element of the charge against him in the amended warrant. On this point the State's evidence was contradictory. Consequently, the challenged part of the charge above quoted was prejudicial error

entitling defendant to a new trial. *S. v. Lawson,* 209 N.C. 59, 182 S.E. 692; *S. v. Shepherd,* 203 N.C. 646, 166 S.E. 745.

The verdict of the jury was, "Guilty as a first offender." The verdict amounts to an acquittal of the charge in the amended warrant that this was defendant's third such offense. 1 Strong's N. C. Index, Criminal Law, Section 118. When the case is tried again, it will be on the amended warrant charging him with unlawfully and willfully operating a motor vehicle upon the public highways of the State of North Carolina while under the influence of intoxicating liquor, and there will be omitted from the trial all reference to the charge in the warrant that this is defendant's third such offense.

Defendant has several assignments of error on the admission of evidence, over his objections and exceptions, relating to an extensive interrogation of defendant by the patrolman after his arrest in respect to the charge against him in the amended warrant and also in respect to the admission of records from the Department of Motor Vehicles in respect to alleged prior convictions of the defendant on a charge similar to the one here, the records furnished by the Department of Motor Vehicles consisting of many abbreviations. Defendant contends that evidence as to the defendant's statements in reply to Patrolman Albritton's questions "was admitted over the objection of the defendant without preliminary determination by the court upon the *voir dire.*" It is true that in the trial in the Superior Court the trial judge did not conduct a preliminary inquiry to determine the question of fact whether the statements of the defendant to the patrolman were or were not voluntary according to the rule in this jurisdiction so clearly stated by Ervin, J., in *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104. In justice to the trial judge, defendant's experienced counsel did not ask for a preliminary investigation in respect to the circumstances surrounding such statements by defendant. Defendant was acquitted of the charge that the offense alleged in the warrant was his third such offense. Consequently, the records that the State introduced in this case in respect to the defendant's alleged prior convictions will be neither relevant nor admissible upon a retrial. As it is probable that upon a retrial the question of the admissibility of defendant's statements without a preliminary investigation as to the circumstances under which they were made will not recur, it is not necessary for us to discuss defendant's assignments of error as to the admission of such evidence.

For prejudicial error in the charge of the court to the jury, defendant is entitled to a

New trial.

JENNIFER J. BROWN, BY HER LEGAL GUARDIAN, NEXT FRIEND, ROBERT F. BROWN, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION.

(Filed 22 March, 1967.)

1. Appeal and Error § 49—

The correctness of findings of fact to which no exception is entered is not presented for review.

2. Same—

Findings of fact supported by competent evidence are conclusive on appeal.

3. Same—

Findings which present mixed questions of law and fact are reviewable.

4. State § 5f—

The determinations of the questions of negligence, proximate cause, and contributory negligence in a proceeding under the Tort Claims Act involve mixed questions of law and fact and are reviewable.

5. Same—

Upon appeal from the Industrial Commission in a proceeding under the Tort Claims Act, the court may not find facts in addition to those found by the Industrial Commission, even though there be evidence of record to support such additional findings. G.S. 143-293.

6. State § 5d— Evidence held sufficient to sustain conclusion that school bus driver was negligent in striking child.

The Commission's findings that the driver of a school bus, for a substantial distance before he reached children waiting to board the bus, could see the children, that the children were pushing and shoving and some of them were banging on the door of the bus as it slowed to some two miles per hour, that one of the children was standing upon the street pavement near the gutter, there being no sidewalk, and that the driver drove the bus into this child and permitted the bus to move forward five feet after the child's head disappeared under the right front fender of the bus, *held* sufficient to sustain the conclusion of negligence on the part of the driver and, the child being only 12 years old, the evidence does not require a finding of contributory negligence on the part of such child.

7. Negligence § 16—

A 12 year old child is presumed incapable of contributory negligence.

8. State § 5f—

The amount of the award of damages in a proceeding under the State Tort Claims Act rests in the discretion of the Industrial Commission, and an award will not be set aside as excessive unless it is so large as to shock the conscience.

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

APPEAL by plaintiff from *Jackson, J.*, at the 17 October 1966 Schedule "C" Civil Session of MECKLENBURG.

This is a proceeding instituted in the North Carolina Industrial Commission pursuant to the Tort Claims Act, G.S. 143-291, *et seq.*, to recover damages for personal injuries sustained by the minor plaintiff when struck and run over by a public school bus.

The Industrial Commission entered its order directing the defendant to pay damages to the plaintiff. That order was before this Court in *Brown v. Board of Education,* 267 N.C. 740, 149 S.E. 2d 10. Upon that appeal the matter was ordered remanded to the Industrial Commission for a finding by it as to whether the salary of the driver of the bus was paid from the State nine months' school fund.

Upon such remand the parties stipulated before the Commission that at the time of the injury the driver "was a duly certified school bus driver, that his salary was paid as a school bus driver from the State nine months' school fund, and said driver, at the time in question, was operating a public school bus in the course of his employment by Charlotte-Mecklenburg Board of Education." The Commission thereupon amended its former decision and order so as to incorporate this stipulation therein. From the order, so amended, directing the defendant to pay to the guardian of the minor plaintiff damages in the sum of $7,500, together with the costs of the proceeding, the defendant appealed to the superior court. That court sustained certain of the exceptions by the defendant to the order of the Commission and entered its judgment that the plaintiff recover nothing from the defendant and that the proceedings be dismissed at the cost of the plaintiff. From the judgment of the superior court, the plaintiff now appeals.

The order of the Industrial Commission sets forth the above mentioned stipulation, and the stipulation that "the accident occurred at the intersection of Robin Hood Road and Shady Bluff Drive in Charlotte, North Carolina, on February 5, 1963, at about 8:05 in the morning." Under the caption "Findings of Fact," the Industrial Commission, in addition to numerous findings as to the nature and extent of the injuries and the treatment given the plaintiff therefor, included the following:

> "1. * * * [A]t this intersection both streets are paved, and at the northeast intersection there is a shallow, drain-like gutter, which is concrete, and that the pavement is asphalt; that beyond the drain-like gutter there is a residential yard, which is grassed, and on the occasion complained of the weather was fair, and there were several children waiting at this intersection; that the defendant's driver was able to see the children for some distance up Robin Hood Road, he approached

said intersection from the east, traveling in a westerly direction; that the plaintiff herein was standing with her feet on the asphalt section of the highway, and next to her was her sister, who was standing in the drain-like gutter, the plaintiff being on her sister's right.

"2. That as the defendant's driver approached the stop he saw the children, who were divided into two groups, * * * standing at the side of the road; the children were pushing and shoving; as the defendant's driver approached these groups he slowed the bus and pulled somewhat to the left of the curb, was traveling about two miles per hour, looking over the right front fender, the boys started to pound on the door before the bus stopped, and just before the bus came to a complete stop the driver saw the plaintiff's head disappear under the right front fender, the bus moving approximately five feet after plaintiff's head disappeared under the right front fender.

"3. That the plaintiff herein was struck by the right front fender of the defendant's bus, which knocked her down, and the right front wheel of the bus thereafter rolled over the plaintiff.

* * * *

"13. That the plaintiff's injuries herein were occasioned by the negligence of the defendant's driver in approaching the plaintiff and the other children at the intersection without that high degree of care and caution engendered by the circumstances.

"14. That the plaintiff sustained damages by reason of the negligence of the defendant's driver in the amount of $7,500.00, and that such negligence was the proximate cause of the plaintiff's damages.

"15. That the plaintiff did not contribute to the damages sustained by any negligence on her part."

The Commission thereupon concluded: (1) That the plaintiff's injuries were proximately caused by the negligence of the driver of the bus in the operation of the school bus "without due caution and without due care in approaching the children gathered at the intersection"; (2) that the plaintiff sustained damages in the amount of $7,500 by reason of such negligence; and (3) that the plaintiff was not guilty of contributory negligence.

The superior court sustained the exceptions by the defendant to the Commission's findings of fact 13 and 14, and to each of the above mentioned conclusions contained in the order of the Commission. The judgment of the court states:

"[T]he Court concludes * * * that the essential facts found by the Commission are insufficient to support its ultimate findings and conclusions of law and that the facts found by the Commission do not constitute negligence on the part of the driver but negative the existence of negligence."

Welling & Miller for plaintiff appellant.
Brock Barkley for defendant appellee.

LAKE, J. The defendant did not except to the Commission's "Findings of Fact" 1, 2 and 3. The correctness of these findings is, therefore, not before us for review. *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129. In any event, each of the findings incorporated in these paragraphs of the Commission's order is amply supported by evidence in the record and is, therefore, conclusive on appeal. G.S. 143-293.

Items 13, 14 and 15, included by the Commission under the designation "Findings of Fact," are, however, mixtures of findings of fact and conclusions of law and, therefore, were subject to review by the superior court, and by us, on appeal. As stated by Ervin, J., speaking for the Court in *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639, "Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." The determination of negligence, proximate cause and contributory negligence requires an application of principles of law to the determination of facts. These are, therefore, mixed questions of law and fact and so are reviewable on appeal from the Commission, the designation "Finding of Fact" or "Conclusion of Law" by the Commission not being conclusive.

Upon an appeal from the Industrial Commission, the reviewing court may not find facts in addition to those found by the Commission, even though there is in the record evidence to support such a finding, the appeal being "for errors of law only." G.S. 143-293.

Consequently, the question for the superior court and for this Court is whether the facts found by the Commission are sufficient to support its conclusion that the driver of the bus was negligent. We hold that they are sufficient to support such conclusion. The Commission has found that for a substantial distance before he reached the children the driver could see them and that the plaintiff was standing upon the street pavement near the gutter, there being no sidewalk; the driver did see the children, some of whom were pushing and shoving as he approached; though going only two miles per hour, he drove the bus into the plaintiff and permitted it to continue to move forward five feet after she fell in front of the

wheel. In *Greene v. Board of Education, supra,* Barnhill, J., later C.J., speaking for the Court, said:

> "We have repeatedly held that the presence of children on or near a highway is a warning signal to a motorist. He must recognize that children have less capacity to shun danger than adults; * * * This duty to exercise a high degree of caution in order to meet the standard of care required of a motorist when he sees or by the exercise of ordinary care should see children on a highway applies with peculiar emphasis to the operator of a school bus transporting children to their homes after school." (Citations omitted.)

Of course, the same duty rests upon the driver of a school bus picking up children for transportation to their schools. No doubt, on this occasion, the attention of the driver was attracted by the boys who were pounding on the door of the bus. Having observed that some of the children were rather exuberant and unruly, reasonable care for the safety of his charges would require him to stop the bus before reaching the group or to swing it well out to the left, which he could have done in safety since there was no other traffic on the street and, in any event, all other traffic would be required to stop in obedience to his display of the "Stop" signal. To continue on until the bus struck down the plaintiff whom he had seen standing in the street was negligence.

The plaintiff, being only twelve years of age, is presumed incapable of contributory negligence. *Weeks v. Barnard,* 265 N.C. 339, 143 S.E. 2d 809. The Commission did not find such negligence by her and the evidence is not sufficient to require such a finding.

Commissioner Bean dissented from the order of the Commission on the ground that the award was excessive. The amount of damages to be awarded is a matter which the statute leaves to the discretion of the Commission. G.S. 143-291. While the damages awarded in the present instance appear somewhat disproportionate to the Commission's findings as to the nature and extent of the injury, the award is not so large as to shock the conscience and, therefore, the order of the Commission may not be disturbed on that account.

The superior court was in error in sustaining the exceptions by the defendant to the order of the Commission. Its judgment must, therefore, be reversed and the cause remanded to the superior court for the entry of a judgment affirming the order of the Industrial Commission.

Reversed and remanded.

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

ARTHUR M. JENKINS v. CHARLOTTE MARTIN WRENN HAWTHORNE.

(Filed 22 March, 1967.)

1. Trial § 20—

The power of the court to grant a motion for judgment of compulsory nonsuit is altogether statutory, and when defendant's motion for nonsuit made at the close of plaintiff's evidence is not renewed at the close of all of the evidence, neither the correctness of the denial of nonsuit nor the sufficiency of plaintiff's evidence to carry the case to the jury is presented.

2. Evidence § 16—

Whether the evidence of the existence of a certain state of facts at one time is competent to prove that such state of facts existed at a prior time is to be determined upon the circumstances of each case with regard to the length of time intervening and the probability of change in condition, and the matter rests largely in the discretion of the trial court.

3. Same; Fraud § 11— Evidence held sufficient to raise inference that defects in roof and furnace of house existed at time seller made representations.

Plaintiff's evidence was to the effect that he purchased a dwelling in June upon representation of defendant that the roof of the dwelling was a twenty-year roof and did not leak, and that the furnace was in good working order and heated the house well, that in a heavy rain the following September the roof leaked badly and it was discovered that in places the roof was worn through, leaving the sheathing exposed and in a few places the lumber, and that the furnace was checked by an expert the following September and it was discovered that the body of the furnace had a crack and that there were bumps and blisters and one big hole in the pipes of the furnace. *Held:* The evidence was competent and was sufficient to raise the inference that the defects existed at the time of the purchase of the house, and is sufficient to be submitted to the jury on the question of the falsity of the representations.

APPEAL by defendant from *Froneberger, J.*, 19 September 1966, Schedule A, Civil Session of MECKLENBURG.

Civil action to recover damages in the amount of $972 allegedly caused by fraudulent representations inducing the purchase of a dwelling house in the city of Charlotte. Plaintiff and defendant introduced evidence. The following issues were submitted to the jury and answered as appears:

"1. Did the defendant Mrs. Hawthorne fraudulently represent to the plaintiff, Mr. Jenkins, that the furnace and heating system were in good working order and heated the house well, as alleged in the Complaint?

"ANSWER: Yes.

"2. If so, did the plaintiff reasonably rely upon said fraudulent representation?

"ANSWER: Yes.

"3. Did the defendant Mrs. Hawthorne fraudulently represent to the plaintiff Mr. Jenkins that the roof was in good condition and did not leak?

"ANSWER: Yes.

"4. If so, did the plaintiff reasonably rely upon said fraudulent representation?

"ANSWER: Yes.

"5. What amount of damages, if any, is the plaintiff entitled to recover from the defendant?

"ANSWER: $972.00."

From a judgment based on the verdict that plaintiff recover from defendant $972 with interest and that the costs be taxed against defendant, defendant appeals.

Ruff, Perry, Bond, Cobb & Wade by Raymond A. Jolly, Jr., for defendant appellant.

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

PARKER, C.J. Defendant assigns as error the denial of her motion for judgment of compulsory nonsuit made at the close of her evidence. After such motion by defendant was made and denied and an exception taken by defendant to such ruling, plaintiff offered in evidence the testimony of himself and another witness in rebuttal, and defendant offered in evidence the testimony of herself and another witness in rebuttal. After the close of all the evidence, defendant did not renew her motion for judgment of compulsory nonsuit. The power of the court to grant a motion for judgment of compulsory nonsuit is altogether statutory, and must be exercised in accord with the provisions of G.S. 1-183. *Biggs v. Biggs,* 253 N.C. 10, 116 S.E. 2d 178; *Warren v. Winfrey,* 244 N.C. 521, 94 S.E. 2d 481; *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257; 4 Strong's N. C. Index, Trial, § 20. The requirements of the statute must be strictly followed. 4 Strong, *ibidem.* G.S. 1-183 is the statute in this jurisdiction setting forth the procedure to make a motion for judgment of compulsory nonsuit in civil actions. G.S. 15-173 is the statute in this jurisdiction setting forth the procedure to make a motion for judgment of compulsory nonsuit in criminal actions. *S. v. Houston,* 155 N.C. 432, 71 S.E. 65; *Riley v. Stone,* 169 N.C. 421, 86 S.E. 348. G.S. 1-183 reads in relevant part: "Defendant, however, may make such motion at the conclusion of the evidence of both parties irrespective of whether or not he made a motion for dismissal or judgment as of nonsuit theretofore." Therefore, accord-

ing to the provisions of G.S. 1-183, neither the correctness of the court's ruling in denying her motion for judgment of compulsory nonsuit nor the sufficiency of plaintiff's evidence to carry the case to the jury is presented on appeal. 4 Strong, *ibidem,* p. 311.

However, we have examined closely the evidence in the case and defendant's brief. Defendant contends in her brief that plaintiff's evidence as to the condition of the furnace and heating system of the dwelling house and as to the condition of the roof of the dwelling house several months after the alleged fraudulent representations made by her to plaintiff inducing him to purchase her home for the sum of $23,000 furnishes no proof and raises no inference or presumption that the same condition of the furnace and heating system of the house and of the roof of the house existed at the time of her alleged fraudulent representations to plaintiff. In support of her contention, she cites and relies upon, among other authorities, *Childress v. Nordman,* 238 N.C. 708, 712, 78 S.E. 2d 757, 760.

Defendant testified in her own behalf that she had been in the real estate business since 1962. Plaintiff's evidence tends to show these facts: About 6 June 1965 he went to the dwelling house owned by defendant in which she and her two children were living, because he was looking for a dwelling house to buy as a home for his family and himself. In answers to his questions, defendant told him that the roof was a twenty-year roof and that it did not leak, and that the furnace was in good working order and heated the house well; that he purchased this dwelling house from defendant for the price of $23,000 a short time thereafter, and moved into it with his family on 21 July 1965. In September 1965 there was rain, and water leaked from the roof all over the house and even through the main floor into the basement. An examination of the roof at his request later in September, 1965, by men experienced in roofing showed that in places the shingles and the black paper underneath the shingles of the roof were worn through, leaving the sheathing exposed to the weather; that in a few places the lumber could be seen under the felt; and that it was a ten-year roof. In September, 1965, he had the furnace checked by a heating expert in preparation for buying oil for the winter, and it was discovered then that the main body of the furnace had a crack running horizontally for about four or five inches, and in addition there were bumps and blisters and one big hole in the pipes of the furnace.

This is stated in *Miller v. Lucas,* 267 N.C. 1, 7-8, 147 S.E. 2d 537, 542:

> "However, the general rule stated in the *Childress* case above quoted is not of universal application. 'Whether the past existence of a condition or state of facts may be inferred or

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

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

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

See *Blevins v. Cotton Mills,* 150 N.C. 493, 64 S.E. 428.

Under the particular facts and circumstances of this case, the condition as to the furnace and heating system and as to the roof of this dwelling house as shown by plaintiff's evidence was admissible in evidence, and a jury could reasonably infer from such evidence that the same condition of the furnace and heating system and of the roof existed at the time of defendant's alleged fraudulent representations to plaintiff of the condition of the furnace and heating system and of the roof about 6 June 1965.

Considering plaintiff's evidence in the light most favorable to him, and giving him the benefit of every reasonable or legitimate inference to be drawn therefrom, as we are required to do in passing upon a motion for judgment of compulsory nonsuit, 4 Strong's N. C. Index, Trial, § 21, plaintiff's evidence is amply sufficient to carry his case to the jury and to support the verdict of the jury and the judgment thereon, and if defendant had renewed her mo-

tion for judgment of compulsory nonsuit at the end of all the evidence, it would have been of no avail. It is to be noted that plaintiff in the complaint requested the recovery of $972 in damages, and the jury found he was damaged in exactly the amount he prayed for.

We have studied with care the entire charge of the court to the jury, and defendant's assignments of error thereto are all overruled.

The jury, under application of principles of law well settled in this jurisdiction, have resolved the issues of fact against the defendant. A careful examination of defendant's assignments of error discloses no new question or feature requiring extended discussion.

In the trial below we find

No error.

BETTY LOUISE WILSON v. CARL O. WILSON, JR.

(Filed 22 March, 1967.)

1. Parent and Child § 5—

The parent's primary right to the custody of the child may not be denied except for the most cogent reasons; nevertheless, the welfare and best interest of the child are paramount, and when the evidence discloses that the parent is not a fit and suitable person to have custody of the child because of misconduct or other circumstances which substantially affect the child's welfare, the court may properly refuse to award the custody to the parent, and, when the circumstances of the case warrant, the court may temporarily place custody of the child with the Department of Public Welfare with appropriate order for its support and maintenance.

2. Divorce and Alimony § 23—

Upon the hearing of this motion for custody of the minor children of the marriage, there was evidence that the wife and her present husband carried on an adulterous relationship for many months prior to their marriage, during which period he spent a good portion of his time at the home, necessarily to the knowledge of her small children, and that the father of the children is emotionally unstable, had no adequate home for the children and no one to supervise them while he worked. *Held:* The evidence warrants order of the court denominating the children dependents and wards of the court and temporarily placing them in the custody of the county welfare department.

3. Divorce and Alimony § 24—

A decree awarding custody of the minor children of the marriage is not permanent in its nature and is subject to modification for change of circumstances affecting the welfare of the children.

APPEAL by plaintiff from *Copeland, Special Judge,* November 30, 1966 Civil Session of MECKLENBURG County Superior Court.

The plaintiff and the defendant were married to each other in 1952 and lived together until 1963. During that time four children were born to them, three boys, ages 14, 12 and 9, and a girl, now 6.

The plaintiff obtained a divorce in 1965 upon the grounds of one-year separation. The husband did not contest the action, and the custody of the children was not then presented.

On July 14, 1966, the defendant filed a motion in the divorce cause in which he sought custody of the four children. In it he alleged that the marriage was broken up by his wife's association with one Robert Reed, a colored man, that she had an adulterous relationship with him and has now had a child by him. He avers that he, the defendant, is now employed as a draftsman in Gulfport, Mississippi and is financially able to support his children — that his former wife is not a fit and suitable person to have their custody.

Pursuant to this motion, Judge Copeland conducted a full and complete hearing which lasted two days. Both parties offered evidence, and the Judge called several persons as court witnesses in an effort to get the true picture of the persons involved.

Upon the evidence, the Judge made full findings of fact. In summary he found that the plaintiff had lived in adultery with Reed prior to their marriage in January, 1966 and gave birth to a child about five months thereafter. He also found that the former husband was unstable, had had emotional upsets, had no adequate home for the children, had no one to supervise them when he worked, and that therefore neither party was qualified, fit and suitable to have their custody.

He thereupon denominated the children dependents and wards of the court and temporarily placed them in the custody of the Child Welfare Division of the Mecklenburg County Department of Public Welfare with appropriate orders for their support and maintenance. The plaintiff mother appealed.

J. LeVonne Chambers, W. B. Nivens, and C. L. Brown by J. LeVonne Chambers for plaintiff appellant.

Walter C. Benson for defendant appellee.

PLESS, J. While it is true that a parent, if a fit and suitable person, is entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right. "Where there are unusual circumstances and the best interest of the child justifies such action, a court may refuse to award custody to either

the mother or father and instead award the custody of the child to grandparents or others. There may be occasions where even 'a parent's love must yield to another if after judicial investigation it is found that the best interest of the child is subserved thereby.' But the parent's right, by nature and law, to the custody of minor children should never be denied except for the most cogent reasons as where it is clearly shown to be unqualified." 3 Lee, N. C. Family Law, Sec. 224; *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144; *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759; *Holmes v. Sanders,* 246 N.C. 200, 97 S.E. 2d 683. In the same work it is said that "This right (of custody) cannot be taken from a parent merely because the court may believe that some third person can give the child better care and greater comforts and protection than the parent, a parent's right to custody of a child being forfeitable only by misconduct or by other facts which substantially affect the child's welfare." See also *James v. Pretlow, supra.*

Judge Copeland gave patient and full consideration to the evidence; he observed the parties for two days, saw the type of witnesses offered by both and thus had an opportunity to evaluate the situation that cannot be shown by the printed page.

In these days of discouraging and alarming frequency of divorce, the courts have been compelled to give more frequent application to the rule that the welfare of the child is the primary consideration. The welfare or best interest of the child is always to be treated as the paramount consideration, to which even parental love must yield, and wide discretionary power is necessarily vested in the trial court in reaching decisions in particular cases. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *Walker v. Walker,* 224 N.C. 751, 32 S.E. 2d 318.

"The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody." *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871, quoting *Kovacs v. Brewer,* 245 N.C. 630, 97 S.E. 2d 96.

There was ample evidence to support Judge Copeland's findings that the mother and her present husband had an adulterous relationship for many months prior to their marriage during which period he spent a good portion of his time at the home of the plaintiff. This was necessarily in the presence and with the knowledge of her four small children and constituted a degrading situation from which Judge Copeland found that she is not a fit and suitable person to have the care, custody and control of the children.

While the father of the children has not appealed from the order of the lower court, he also is found not to be a fit and suitable person to have their custody.

Under these conditions there was no course left open to the Judge except to place them in the hands of some responsible person or agency. He could not award their custody to either parent, and the record does not show that any relative, or even friend, sought their custody. He had little choice but to make the order he did.

The children are still the wards of the court under the Judge's temporary order. It can, and no doubt will, be changed or modified if and when conditions or suitability have materially changed. *Griffin v. Griffin, supra,* and cases there cited.

"A decree awarding the custody of minor children determines the present rights of the parties to the contest with respect to such custody, is not permanent in its nature, and is subject to judicial alteration or modification upon a change of circumstances affecting the welfare of the children." *Thomas v. Thomas, supra.*

The judgment is hereby

Affirmed.

STATE v. BILLY ARCHIE NORKETT.

(Filed 22 March, 1967.)

1. Criminal Law § 80—

Where defendant testifies but does not put his character in issue, evidence of prior convictions of other offenses ordinarily is not competent as substantive evidence, and when such evidence, elicited by cross-examination, does not come within any exception to the general rule, it is error for the court to fail to give defendant's request for an instruction that such evidence should be considered solely for the purpose of impeachment.

2. Criminal Law § 34—

In a prosecution of defendant for maliciously and unlawfully peeping into a room occupied by a female person, testimony elicited on cross-examination of defendant that he had theretofore been convicted of assault with a deadly weapon and for storebreaking and larceny is not competent as substantive evidence.

APPEAL by defendant from *Froneberger, J.,* October 3, 1966 Regular Schedule "A" Criminal Session of MECKLENBURG.

Criminal prosecution on a warrant charging that defendant on or about July 25, 1966, "did wilfully, maliciously and unlawfully peep secretly into a room occupied by a female person, to wit:

Cora Myers," etc., tried *de novo* in superior court after appeal by defendant from conviction and judgment in the Recorder's Court of the City of Charlotte.

The State's evidence consists of the testimony of Mrs. Cora Myers, and of Mr. Charles Hough, a neighbor of Mrs. Myers, and of Mr. R. T. Chance, a Charlotte Police Officer. Defendant's evidence consists of his own testimony.

The jury returned a verdict of "guilty as charged in the warrant" and judgment, imposing a prison sentence, was pronounced. Defendant excepted and appealed.

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

Grier, Parker, Poe & Thompson and A. Marshall Basinger for defendant appellant.

BOBBITT, J. A review of the evidence is not necessary to decision on this appeal. Suffice to say, the State's case rests principally on the testimony of Mr. Hough; and defendant's testimony, in material respects, is in direct conflict therewith.

No motion for judgment as in case of nonsuit having been made at the conclusion of all the evidence, the question as to whether the evidence was sufficient to withstand such motion is not presented. However, based on assignments properly brought forward, defendant asserts the court committed prejudicial error for which he is entitled to a new trial.

Defendant, on cross-examination, admitted he had been tried and convicted in 1951 for assault with a deadly weapon, and in 1959 for storebreaking and larceny. When defendant's objections to this evidence were overruled, his counsel requested that the court instruct the jury "on how to receive this evidence." The record shows the court responded as follows: "I will when the time comes to instruct them." Immediately thereafter, the court charged the jury, but in doing so, failed to give any instruction bearing upon the limited purpose for which this evidence was competent.

"The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *S. v. McClain*, 240 N.C. 171, 81 S.E. 2d 364, and cases and texts cited. "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent

crime." Stansbury, North Carolina Evidence, Second Edition, § 91. The testimony under consideration does not fall within any of the exceptions to the general rule set forth in *S. v. McClain, supra,* and it does not tend to prove any fact relevant to whether defendant was guilty of the criminal offense for which he was being tried.

Defendant testified, but did not otherwise put his character in issue. For purposes of impeachment, he was subject to cross-examination as to convictions for unrelated prior criminal offenses. However, admissions as to such convictions are not competent as substantive evidence but are competent as bearing upon defendant's credibility as a witness. Stansbury, *op. cit.,* § 112; *S. v. Sheffield,* 251 N.C. 309, 312, 111 S.E. 2d 195, 197.

Under these circumstances, defendant was "entitled, on request, to have the jury instructed to consider (this evidence) only for the purposes for which it is competent." Stansbury, *op. cit.,* § 79; *S. v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484. It is noteworthy that, prior to the adoption of the rule now included in Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 803, a defendant was entitled to such instruction even in the absence of request therefor. *S. v. Parker,* 134 N.C. 209, 46 S.E. 511; *Westfeldt v. Adams,* 135 N.C. 591, 47 S.E. 816.

The record shows defendant did request that the court instruct the jury in accordance with the well established legal principles stated above. Failure to give the requested instruction must be held prejudicial error for which defendant is entitled to a new trial.

New trial.

STATE OF NORTH CAROLINA v. WILEY RALPH KEZIAH.

(Filed 22 March, 1967.)

Trespass § 13—

Where defendant's evidence in a prosecution for trespass is to the effect that the prosecutrix had forbidden him the premises only when he was intoxicated and that on the occasion in question he was sober, defendant is entitled to an instruction on the legal effect of his evidence, and an unqualified instruction to find defendant guilty if the jury was satisfied beyond a reasonable doubt that the prosecutrix had previously forbidden defendant to come on the premises and that on the date in question he wilfully entered upon them, must be held for prejudicial error.

APPEAL by defendant from *Martin, S.J.,* October 3, 1966 Schedule C Criminal Session of MECKLENBURG.

Defendant was first tried and convicted in the Recorder's Court of the City of Charlotte upon a warrant which charged that, on September 20, 1966, he "willfully, maliciously and unlawfully DID TRESPASS UPON THE PREMISES OF MRS. MARIE PATTERSON LOCATED AT 734 W. TRADE ST. AFTER BEING FORBIDDEN TO DO SO IN VIOL. N. C. LAWS G.S. 14-134." From the prison sentence imposed, he appealed to the Superior Court, where he was tried *de novo* upon a plea of not guilty.

Evidence for the State tends to show: Defendant was once married to Mrs. Marie Patterson's daughter. On September 20, 1966, he walked into Mrs. Patterson's kitchen. He was sober at the time. She had told him 10-14 times previously never to come onto her premises. She had charged him with trespass on other occasions, and, on this day, she called the police as soon as he came into the kitchen.

Defendant's testimony tends to show: On September 20, 1966, Mrs. Patterson's son and granddaughter invited him into her kitchen. Mrs. Patterson had told him that he was welcome in her home whenever he was sober, but she had forbidden him to come there when he was drinking. On this occasion, he had not been drinking. He told Mrs. Patterson that he would like to talk to her. She replied that she would talk to him in a few minutes and disappeared into her bedroom. She stayed so long that he decided to leave. When he went out onto the porch, two policemen arrested him for trespass.

The jury's verdict was "guilty as charged in the warrant." From the judgment imposed, defendant appeals.

T. W. Bruton, Attorney General, Millard R. Rich, Jr., Assistant Attorney General, for the State.

E. Glenn Scott, Jr., for defendant.

SHARP, J. The judge charged the jury that they would return a verdict of guilty as charged if they were satisfied beyond a reasonable doubt that, on September 20, 1966, Mrs. Patterson was in possession of the premises at 734 West Trade Street, Charlotte, North Carolina; that she had previously forbidden defendant from coming onto those premises; and that on that date he wilfully entered upon them. Defendant contends that this instruction presented to the jury only the State's theory of the case and ignored the hypothesis upon which he based his defense. He assigns as error the failure of the court to charge that if the jury should find that Mrs.

Patterson had forbidden defendant to come upon her premises only when he was drinking and that he had had nothing to drink on the occasion in question, their verdict should be not guilty.

This assignment of error must be sustained. G.S. 1-180 requires the trial judge to apply the law to the various factual situations presented by the conflicting evidence. Defendant's testimony, if the jury found it to be true, would entitle him to a verdict of not guilty. He was, therefore, entitled to have the legal effect of his evidence explained to them. *Saunders v. Warren,* 267 N.C. 735, 149 S.E. 2d 19; *Faison v. Trucking Co.,* 266 N.C. 383, 146 S.E. 2d 450; *Williamson v. Williamson,* 245 N.C. 228, 95 S.E. 2d 574; 4 Strong, N. C. Index, Trial § 33 (1961).

New trial.

STATE v. CLAUDE ELLIOTT.

(Filed 22 March, 1967.)

1. Criminal Law § 154—

An appeal is in itself an exception to the judgment, presenting the face of the record proper for review, even in the absence of exceptions in the record.

2. Constitutional Law § 32—

A defendant has the right to waive counsel and elect to appear *in propria persona*, and when the trial judge informs defendant in open court of the charges against him and of his right to have counsel appointed for him, and defendant then intentionally, understandingly and voluntarily waives his right to have court appointed counsel, his waiver is effective.

3. Criminal Law § 23—

A plea of guilty does not preclude defendant from claiming that the facts alleged in the indictment do not constitute a crime under the laws of the State.

4. Escape § 1—

An indictment charging that defendant, while serving a sentence for larceny of an automobile having a value of over $200, feloniously escaped from the prison camp in which he was held, sufficiently charges the offense of felonious escape. G.S. 148-45(a).

5. Constitutional Law § 36—

Punishment within the statutory maximum cannot be considered cruel or unusual in a constitutional sense.

APPEAL by defendant from *May, S.J.*, 2 January 1967 Criminal Session of NASH.

Criminal prosecution upon an indictment charging that defendant on 22 August 1966 while serving a sentence in North Carolina State Prison Camp No. 035 in Nash County for the crime of larceny of an automobile valued at over $200, which is a felony under the laws of the State of North Carolina, and which was imposed upon him at the October 1965 Session of the Superior Court of Johnston County, did willfully and feloniously escape from the said North Carolina Prison Camp No. 035 in Nash County.

G.S. 148-45(a) reads in part:

> "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."

When the case was called for trial, the defendant in open court swore to and subscribed an affidavit entitled "Waiver of right to have appointed counsel," stating in substance as follows: He represents to the court that he has been informed of the charges against him, the nature thereof, the statutory punishment therefor, and the right to appointment of counsel upon his representation to the court that he is an indigent, all of which he fully understands. He further stated to the court that he does not desire the appointment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.

Beneath defendant's above affidavit in the record appears a certificate signed by the trial judge, stating in substance: He certifies that defendant has been fully informed in open court of the charges against him and of his right to have counsel appointed by the court to represent him in this case; that he has elected in open court to be tried in this case without the appointment of counsel; and that he has executed the above waiver in his presence after its meaning and effect have been fully explained to him.

After defendant had waived his right to have counsel appointed for him in this trial by an affidavit in writing, he entered a plea of guilty as charged in the indictment. From a judgment imposed upon his plea of guilty that he be imprisoned in the State's prison for a term of not less than eight months nor more than twelve months, this sentence to begin at the expiration of case No. 12410 imposed in Johnston County Superior Court at the October Session 1965 for the larceny of an automobile, he appeals.

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

R. G. Shannonhouse for defendant appellant.

PER CURIAM. The record shows that defendant entered his plea of guilty and judgment was imposed upon him on 4 January 1967 during the 2 January 1967 Criminal Session of Nash. The record further shows that on 5 January 1967 the defendant wrote the trial judge a letter stating in substance that he was filing an appeal against the judgment imposed upon him in this case. Thereafter, on 18 January 1967 the court appointed R. G. Shannonhouse to perfect his appeal. On 3 February 1967 the court entered an order requiring Nash County to pay the necessary cost of obtaining a transcript of the trial proceedings and to pay the necessary cost of mimeographing the case on appeal and appellant's brief under the supervision of the Clerk of the Supreme Court of North Carolina. This is the customary procedure in this State for perfecting an appeal to the Supreme Court.

The record before us contains no assignment of error.

We have held repeatedly that an appeal is itself an exception to the judgment, presenting the face of the record proper for review, even in the absence of exceptions in the record. *S. v. Caldwell, ante* 521, 153 S.E. 2d 34; *S. v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800, and cases there cited; supplement to 1 Strong's N. C. Index, Criminal Law, § 154.

In *Johnson v. United States,* 318 F. 2d 855 (8 Cir.), cert. den. 375 U.S. 987, 11 L. Ed. 2d 474, the Court said:

> "It is equally well settled that a defendant charged with a federal crime may waive his right to representation by counsel 'if he knows what he is doing and his choice is made with eyes open.' [Citing voluminous authority.]"

We think this statement is equally true of a defendant charged with a crime in a state court.

In *S. v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667, the Court said:

> "The United States Constitution does not deny to a defendant the right to defend himself. Nor does the constitutional right to assistance of counsel justify forcing counsel upon a defendant in a criminal action who wants none. *Moore v. Michigan,* 355 U.S. 155, 2 L. Ed. 2d 167; *Carter v. Illinois,* 329 U.S. 173, 91 L. Ed. 172; *United States v. Johnson,* 6 Cir. (June 1964), 333 F. 2d 1004."

Defendant's plea of guilty in open court is a confession of crime

in the manner and form as charged in the indictment. However, defendant by his plea of guilty is not precluded from claiming that the facts alleged in the indictment do not constitute a crime under the laws of this State. *S. v. Caldwell, supra; Brisson v. Warden of Connecticut State Prison,* 25 Conn. Sup. 202, 200 A. 2d 250.

It appears positively and affirmatively and beyond a reasonable doubt from the record before us that defendant intentionally, understandingly, and voluntarily waived, relinquished, or abandoned his known right to have court-appointed counsel. *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 146 A.L.R. 357. It also appears positively and affirmatively and beyond a reasonable doubt from the record that the defendant, after having been informed in open court of the charges against him, the nature thereof, and the statutory punishment therefor, intentionally, understandingly, and voluntarily entered a plea of guilty in this case.

An examination of the record shows that the indictment accurately includes in its allegations the offense of defendant's escape from a State prison camp where he was serving a felony sentence imposed upon him for the larceny of an automobile, which is a violation of the provisions of G.S. 148-45(a) quoted above.

The punishment imposed upon defendant's plea of guilty does not exceed the limits fixed by the provisions of G.S. 148-45(a) quoted above. 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. Caldwell, supra; S. v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216, and five cases of ours to the same effect there cited. The record proper shows no error.

"The right of appeal is unlimited in the courts of North Carolina." *S. v. Darnell, supra.* The appeal in the instant case is a conspicuous illustration of the abuse of the power of appeal by an indigent defendant in a criminal case to the Supreme Court as a matter of right, and to have the taxpayers put to the expense of paying for the cost of the transcript of the trial proceedings, the cost of mimeographing the record and the brief filed for defendant, and of paying a fee to the defendant's lawyer for his services on appeal, when there is no merit at all in the appeal.

The judgment of the trial court is

Affirmed.

MICHAEL RAY PREWITT, BY HIS NEXT FRIEND, GERALD PREWITT, v. MILLARD CALVIN DOVER AND THOMAS CADILLAC, INC., A CORPORATION.

(Filed 22 March, 1967.)

Appeal and Error § 3; Pleadings § 18—

A complaint alleging that the driver of the other car involved in the collision was guilty of acts constituting actionable negligence and that the corporate defendant was liable for the individual defendant's negligence under the doctrine of *respondeat superior* and on the ground that the corporate defendant was negligent in entrusting the operation of the car to defendant driver whom it knew to be an incompetent and reckless driver, states a single cause of action, and the dual theory of the corporate defendant's liability cannot constitute a misjoinder of parties; therefore the order of the trial court overruling defendants' demurrer is not appealable, notwithstanding defendants' averment that the demurrer was for misjoinder of parties and causes of action.

APPEAL by defendants from *Riddle, Special Judge,* November 21, 1966 Regular "B" Civil Session of MECKLENBURG.

Plaintiff's action is to recover damages for personal injuries and property damage resulting from a collision in Charlotte, North Carolina, on August 18, 1965, about 9:30 p.m., between a 1955 Chevrolet, owned and operated by plaintiff, and a 1962 Cadillac, owned by the corporate defendant and operated by the individual defendant.

Plaintiff alleges the collision and his injuries and damage were proximately caused by the actionable negligence of Dover. He alleges the corporate defendant is liable for Dover's negligence, first, on the ground that Dover was its agent, acting within the scope of his agency; and second, on the ground that the corporate defendant knew, or by the exercise of due care should have known, that Dover, to whom it entrusted the operation of its car, was an incompetent and reckless driver.

A motion by defendants to strike designated allegations from the complaint was denied by Judge Froneberger and defendants excepted.

Defendants filed a *joint* demurrer entitled, "Demurrer for Misjoinder of Parties and Causes." Thereafter, subject to said demurrer, defendants filed *separate* answers.

A motion by plaintiff to strike designated portions of the answer of the corporate defendant was allowed by Judge Riddle.

After a hearing on November 23, 1966, Judge Riddle overruled defendants' said demurrer. Defendants excepted and gave notice of appeal.

A. A. Bailey and Gary A. Davis for plaintiff appellee.

John H. Small, J. Donnell Lassiter and Kennedy, Covington, Lobdell & Hickman for defendant appellants.

PER CURIAM. Under our Rule 4(a), 254 N.C. 785, this Court will not entertain an appeal (1) "(f)rom an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action," or (2) "(f)rom an order striking or denying a motion to strike allegations contained in pleadings." Defendants did not petition for *certiorari.*

Obviously, the order of Judge Froneberger denying defendants' motion to strike, and the order of Judge Riddle allowing plaintiff's motion to strike, are not appealable. Defendants, treating the order overruling their demurrer as appealable as a matter of right, attempt to bring forward, incident to such appeal, assignments of error relating to adverse rulings on the motions to strike.

Defendants assert, in their brief as in their demurrer, there is a misjoinder of parties and causes of action. However, their contention, in brief and on oral argument, is that the complaint improperly joins, without separate statement thereof, two causes of action. This contention is without merit. The complaint alleges one cause of action for all damages plaintiff sustained on account of the negligence of defendants as the result of a single automobile collision.

Under plaintiff's allegations, actionable negligence of Dover is a prerequisite to plaintiff's right to recover against the corporate defendant whether its asserted liability is based on *respondeat superior* or on negligence in entrusting the operation of its car to Dover.

Whatever the ground of the corporate defendant's liability, if any, for the actionable negligence of Dover, there is no basis whatever for contending there is a misjoinder of parties. If it were (but is not) conceded the complaint alleges two causes of action, the controversy in each would be between plaintiff on the one hand and *both* defendants on the other hand. The assertion there is a misjoinder of parties *and* causes of action is without substance. The mere fact that the demurrer is entitled, "Demurrer for Misjoinder of Parties and Causes," and contains an assertion that there is a misjoinder of parties *and* causes of action, is insufficient basis for an appeal as a matter of right from an order overruling such demurrer. Hence, defendants' purported appeal must be and is dismissed.

Appeal dismissed.

ROBERT LEONARD BLACK v. RUBY BRADLEY WILKINSON.

(Filed 22 March, 1967.)

1. Automobiles §§ 41h, 42h—

Plaintiff's evidence was to the effect that defendant, traveling in the opposite direction, turned left to enter a private driveway and stopped with her vehicle partially blocking plaintiff's lane of travel, that plaintiff, to avoid colliding with defendant's car, swerved sharply to his right, ran off the hardsurface into an accumulation of snow, lost control, swerved back onto the pavement and across the center line, and collided with vehicles standing behind defendant's vehicle. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence and does not show contributory negligence as a matter of law on the part of plaintiff confronted with a sudden emergency. G.S. 20-154(a).

2. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's own evidence discloses contributory negligence so clearly that no other reasonable conclusion may be drawn therefrom.

APPEAL by plaintiff from *Nettles, E.J.*, at the 10 October 1966 Civil Session of GASTON.

This is a suit for property damage resulting from a collision between an automobile owned and driven by the plaintiff and two other vehicles. At the close of the plaintiff's evidence, a judgment of nonsuit was entered upon the motion of the defendant.

The complaint alleges that the defendant, while driving northward, suddenly and without any signal, turned to her left and into the lane of travel of the plaintiff, who was driving southward on the same highway. It is alleged that she was negligent in that she failed to keep a proper lookout, failed to yield the right of way to the plaintiff, failed to give him one half of the main traveled portion of the roadway, and turned her automobile from a direct line without first ascertaining that such movement could be made in safety. It is alleged that these acts and omissions by the defendant were the proximate cause of collisions between the plaintiff's vehicle and two other vehicles, which were following the vehicle of the defendant, and of the damage sustained by the plaintiff therein. The defendant denies any negligent act or omission by her and alleges, as a further defense, contributory negligence by the plaintiff in that he failed to keep a proper lookout, operated at a speed greater than was reasonable under the circumstances, failed to reduce his speed when he saw or should have seen the defendant making a left turn, failed to yield the right of way to the defendant, and failed to keep his own automobile under control.

The plaintiff offered evidence tending to show:

The plaintiff was driving south on a two lane paved road at 40

to 45 miles per hour, this being within the posted speed limit. He was familiar with the road. It was after dark and all cars involved had their headlights on. The pavement of the road was clear and dry but there was snow on the shoulders. Approaching a slight hill he could observe the glow of headlights from traffic meeting him, but could not see these cars until he reached the crest of the hill. Upon reaching the crest and starting down on the other side, he observed the defendant's automobile proceeding north on her side of the road. He observed no turn signal displayed by the defendant. Other vehicles were headed north behind the defendant's car, all on their proper side of the road. When the plaintiff was about 30 feet from the defendant's car, the defendant suddenly turned to her left to enter a private driveway. The front end of the defendant's car crossed the center line into the plaintiff's half of the pavement. The defendant then stopped. To avoid the defendant's car, the plaintiff swerved sharply to his right, ran off onto the shoulder, across the driveway, into the accumulation of snow and temporarily lost control of his car. His car then went back onto the pavement, crossed the center line, sideswiped a northbound automobile, which had stopped in its lane of travel behind the defendant's car while waiting for her to complete her turn, and then went on and collided head-on with another northbound vehicle. The plaintiff brought his car to a stop following this second collision. When his car went back onto the pavement from the snow covered shoulder, it was moving at about 20 miles per hour. It stopped about 20 feet beyond the point of the second collision, this being approximately 150 feet from the crest of the hill. It was severely damaged. The plaintiff walked back to the defendant's automobile and told her she had pulled right out in front of him and stopped. Thereupon, the defendant said, "I know it. I didn't see you coming." There was no collision between the automobile of the plaintiff and the automobile of the defendant.

Daniel J. Walton for plaintiff appellant.
Hollowell, Stott & Hollowell for defendant appellee.

PER CURIAM. Taking the plaintiff's evidence as true, as we are required to do in considering the correctness of the judgment of nonsuit, it is sufficient to support a finding of negligence by the defendant, which was the proximate cause of the collisions. Driving into the plaintiff's lane of travel under such circumstances would constitute negligence by the defendant. G.S. 20-154(a); *Raper v. Byrum*, 265 N.C. 269, 144 S.E. 2d 38. *Sugg v. Baker*, 261

N.C. 579, 135 S.E. 2d 565; *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754; *Mitchell v. White,* 256 N.C. 437, 124 S.E. 2d 137.

A judgment of nonsuit may not properly be entered on the ground of contributory negligence unless the plaintiff's own evidence shows such negligence by him so clearly that no other reasonable conclusion may be drawn therefrom. *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360. If the facts were as the plaintiff testified them to be, he was faced with a sudden emergency and his action in running upon the snow covered shoulder in order to avoid colliding with the defendant's vehicle would not constitute negligence. See *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292.

Reversed.

STATE OF NORTH CAROLINA v. ZANE LOVE.

(Filed 22 March, 1967.)

1. Criminal Law § 93—

Motion to sequester the witnesses is addressed to the discretion of the trial court, and the refusal of the motion is not reviewable.

2. Criminal Law § 162—

The exclusion of evidence is not shown to be prejudicial when the record fails to disclose the excluded evidence.

APPEAL by defendant from *Froneberger, J.,* September 5, 1966 Regular Criminal Session, MECKLENBURG Superior Court.

The defendant, Zane Love, Stephen Vann Starnes, and Johnny Wayne Gurley, were indicted for the felony of robbery with firearms, and by their threatened use, the defendants did feloniously rob and forcibly take from Richard Lee Holshouser his wallet and contents of the total value of approximately $10.

The Court, upon a showing of indigency, appointed Mr. John G. Plumides attorney for the appellant. After trial, in which the defendants all testified, the jury returned verdicts finding each guilty of common law robbery. The Court imposed on each a prison sentence of 3 years. Zane Love appealed.

The State's witness, Holshouser, testified the defendants assaulted him, struck him many times, inflicting wounds which required medical treatment. By the threatened use of knives, the defendants forcibly took from the witness his billfold and contents. The appellant, as well as his two co-defendants, testified, admitted they were

out with Holshouser, but denied they took his pocketbook or any money from him. The jury returned verdicts of guilty as to all the defendants. From the sentence of 3 years, Zane Love appealed.

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

Plumides & Plumides by John G. Plumides and Jerry W. Whitley for the defendant appellant.

PER CURIAM. The appellant's first assignment of error challenges the Court's refusal to sequester the witnesses upon the appellant's motion. The refusal was in the Court's discretion and not reviewable. *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670. Another assignment involved the admissibility of evidence. Any error in this respect was cured by the failure to place in the record the excluded evidence so the Court could determine its materiality. In one instance evidence of the same import was admitted without objection.

The record does not disclose any reason why the verdict and judgment should be disturbed.

No error.

CITY OF CHARLOTTE v. CELIA D. GOTTLIEB, LOUIS A. GOTTLIEB, I. O. BRADY, TRUSTEE, DURHAM LIFE INSURANCE COMPANY AND GOTTLIEB STORES, INC.

(Filed 22 March, 1967.)

Trial § 33—

Where the inadvertence of a witness in calculating the value of land on the basis of the number of square feet is discovered and corrected before the jury while the witness is on the stand, it is not required that the trial court, *ex mero motu,* recapitulate and explain the incident.

APPEAL by defendants Celia D. Gottlieb and Louis A. Gottlieb and Gottlieb Stores, Inc. from *Hasty, J.,* December 5, 1966 Schedule D Session, MECKLENBURG Superior Court.

The City of Charlotte brought this action to acquire, for expressway purposes, the title to a specifically described lot of land in the City of Charlotte. The City filed a declaration of taking and deposited therewith the sum of $102,500 as the City's estimate of just compensation for taking the described lot and the building and

improvements thereon. The owners declined to accept the deposit on the ground that it was insufficient justly to compensate them for the taking.

All preliminary questions having been disposed of, a jury was empaneled to fix the amount of just compensation due the owners. Both parties introduced evidence of witnesses qualified to express opinion as to land values in Charlotte and particularly as to the value of the land taken. The only witness for the owners testified in his opinion the market value on the day of the taking was $190,000. One of the witnesses for the City fixed the value at $102,500; the other at $103,975. The jury answered the issue $110,000. From judgment in accordance with the verdict, the owners appealed.

Henry W. Underhill, Jr., for plaintiff appellee.

Bradley, Gebhardt, DeLaney and Millette by Ernest S. DeLaney, Jr., for defendant appellants.

PER CURIAM. The witnesses appear to have used the square foot value as the unit by which to fix the total value. Admittedly the lot was 188.36 ft. x 92 ft. One of the City's witnesses, by mistake, had calculated total value on the basis of 90 rather than 92 feet. While he was on the stand his error was discovered and corrected before the jury. However, in the Court's statement of the contention of the parties and in the recapitulation of the evidence, the Court did not specifically call attention to the fact that the witness Smith, in his direct examination, had based his estimate of value on 90 rather than 92 feet frontage. At the conclusion of the charge, the appellants failed to request the Court to make any correction or amplification, either of the evidence or the contention of the parties.

The defendants cite and rely on the cases of *Town of Davidson v. Stough,* 258 N.C. 23, 127 S.E. 2d 762 as furnishing ground for a new trial. However, the *Stough* case is not in point here. In *Stough,* the trial court, in charging the jury, had misconstrued the extent of the easement rights which the Town of Davidson had acquired in the owner's property, a material consideration in fixing just compensation. In the case at Bar, the City took the fee in the whole property, leaving the owners nothing. It is difficult to see how the jurors could have been misled or that they did not fully understand the correct measurement of the lot. In the verdict and judgment we find

No error.

STATE v. ROOSEVELT BATTS.

(Filed 22 March, 1967.)

1. Criminal Law § 101—

Evidence which raises a mere suspicion or conjecture of guilt is insufficient to be submitted to the jury.

2. Burglary and Unlawful Breakings § 4—

Evidence that tracks fitting the shoes worn by defendant at the time of the offense were discovered where the stolen goods had been abandoned in a field adjoining the prosecuting witness' yard, but that the tracks could not be traced through the grass in her yard to her house, *held* insufficient to be submitted to the jury in a prosecution for breaking and entering the prosecuting witness' house and stealing the goods therefrom.

APPEAL by defendant from *Parker, J.*, at 29 August, 1966 Criminal Term of DUPLIN Superior Court.

Defendant was charged with breaking and entering the home of one Earschell Lanier and stealing one radio and one record player. He entered a plea, through his court appointed attorney, of not guilty.

The State's evidence tended to show that the prosecuting witness left her home about 5:00 o'clock on the Sunday afternoon in question and saw the defendant about thirty minutes later. She observed his clothing and that he was wearing a pair of shoes with big heels. When she returned home at about 6:00 o'clock she discovered that a side door to her home was slightly open and that her radio and record player were missing. She testified that she found the missing articles the next morning in a corn field 100 yards from her home and 50 yards from the home of defendant's grandmother. At that time she observed shoe tracks in the corn field, whereupon she called a deputy sheriff.

A deputy sheriff testified that he made plaster imprints of the tracks found, and that the defendant put his foot in the track out in the field and other prints were made. This witness also testified that the defendant was wearing the shoes in question on the night of the alleged crime and on the morning thereafter.

An officer of the State Bureau of Investigation testified that he had studied the plaster imprints and the shoes sent to him and upon studying them it was his opinion that the print as shown on the casts were made by the shoes in question or ones identical to them.

When the State rested the defendant made a motion for judgment as of nonsuit, which was denied. The jury returned a verdict of guilty and the defendant appealed, assigning other alleged errors.

T. Wade Bruton, Attorney General, George A. Goodwyn, Assistant Attorney General for the State.

Mercer & Thigpen for defendant appellant.

PER CURIAM. Considering the State's evidence in its strongest light, it merely shows the morning following the loss of the property that shoe tracks which were made by the defendant's shoes, or ones identical to them, were found where the stolen property was discovered. These tracks started in a cornfield adjoining the prosecuting witness's yard, but could not be traced (if they were present) through the grass in her yard to her house.

This just is not enough evidence to convict the defendant of the charge. In *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, the Court approved the following statement from *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904: " '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. * * * 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."

The evidence here can only "raise a suspicion or conjecture" of the defendant's guilt. It is not sufficient to withstand a motion to dismiss.

Reversed.

STATE v. WILLIAM RICHARD SHIRLEN.

(Filed 22 March, 1967.)

Arrest and Bail § 3—

Where an officer sees a person intoxicated at a public bar, the officer may arrest such person without a warrant for violation of G.S. 14-335(10), and such person's assault upon the officer upon being merely told that he was under arrest cannot be excused on the ground that the arrest without a warrant was unlawful and that he had the right to defend himself against such arrest.

STATE *v.* SHIRLEN.

APPEAL by defendant from *McLaughlin, J.,* December 5, 1966 Conflict Criminal Session "C" of MECKLENBURG.

Defendant was first tried and convicted in the Recorder's Court of the city of Charlotte upon a warrant which charged him with assaulting J. D. Ensminger, a Charlotte policeman, with his hands and fists. From the sentence imposed, defendant appealed to the Superior Court, where he was tried *de novo.* Evidence for the State tended to show:

Officer Ensminger, while on a routine patrol, entered Bob's Pool Room on West Trade Street about 7:30 p.m. on October 25, 1966. He observed defendant, who was "pretty well drunk," drinking beer at the bar. James Shirlen asked his brother, the defendant, if that was "the g . . d . . . cop." Upon receiving an affirmative reply, James said to Ensminger, "I don't believe you have nerve enough to do it." The officer then told James that he was under arrest for disorderly conduct and started toward him. Defendant informed the officer that he could not take his brother without a "g . . d . . . warrant." Ensminger then informed defendant that he, too, was under arrest for disorderly conduct. At that time, both defendant and James grabbed the officer by his arms. Ensminger jerked away and went to the telephone. James swung at him with a pool stick, which the proprietor took from him. After winning a scuffle with James over possession of the telephone, Ensminger called a squad car. When the police arrived, both defendant and James ran out the rear door into an alley, where James was arrested after a fracas in which a policeman's arm was broken. Defendant was later arrested by another officer and taken to the police station. During the summer, defendant had threatened Ensminger. He had offered to pay anyone who would whip the officer and put him in the hospital, and he had threatened to throw acid in his eyes. No attempt had been made, however, to execute these threats.

Defendant called three witnesses, whose testimony was not included in the case on appeal, because it was "not material to explain the exceptions" upon which the assignments of error are based. The jury returned a verdict of "guilty of simple assault on an officer." From a sentence of thirty days in jail, defendant appealed.

T. W. Bruton, Attorney General, Wilson B. Partin, Jr., Staff Attorney, for the State.

James H. Morton for defendant.

PER CURIAM. Defendant brings forward only the assignment of error based upon his exceptions to the overruling of his motions for nonsuit. He contends that his conduct in the presence of the offi-

cer did not amount to a breach of the peace; that Ensminger, therefore, had no right to arrest him without a warrant; and that he had the legal right to resist arrest and defend himself. On this record, it is not necessary to decide whether defendant's conduct amounted to a breach of the peace, the question largely debated in the brief. Viewing the evidence in the light most favorable to the State, as we are required to do in passing upon a motion for nonsuit, it is sufficient to establish that defendant was drunk in a public place, a violation of G.S. 14-335(10). The officer, therefore, had the right to arrest defendant without a warrant. G.S. 15-41(1). In addition, it is noted that at the time defendant angrily grabbed Ensminger by the arm, the officer himself had not touched defendant. He had made no effort to consummate the arrest by manually seizing defendant, who had not submitted to his authority. *Stancill v. Underwood,* 188 N.C. 475, 124 S.E. 845; 6 C.J.S., Arrest § 1(b) (1937). Defendant's attack upon the officer, therefore, was offensive rather than defensive. The judgment of nonsuit was properly overruled.

No error.

STATE v. ROBERT CARTER.

(Filed 22 March, 1967.)

APPEAL by defendant from *Cohoon, J.,* 22 August 1966 Regular Criminal Session of NASH.

Defendant was tried upon bill of indictment charging felonious breaking and entering, and larceny, and a separate bill of indictment charging larceny of an automobile. After examination, the trial court found defendant to be an indigent and appointed counsel to represent him. At the trial the defendant through his counsel tendered plea of *nolo contendere* as charged in the bills of indictment of felonious breaking and entering, and larceny, and also larceny of an automobile of the value of $395. Defendant in open court, under oath, made the following answers to questions propounded by the court:

(1) Are you able to hear and understand my statements and questions?

Answer: Yes.

(2) Are you now under the influence of any alcohol, drugs, narcotics or other pills?

Answer: No.

(3) Do you understand what you are charged with in this case?

Answer: Yes.

(4) Do you understand that upon your plea of *Nolo Contendere* you would be imprisoned for as much as 10 years, each for B. E. & L. total 20 years; 10 years for L. of Auto, total of 30 years?

Answer: Yes.

(5) Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise to you to influence you to plead *Nolo Contendere* in this case?

Answer: No.

(6) Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any threat to you to influence you to plead *Nolo Contendere?*

Answer: No.

(7) Have you had time to confer and have you conferred with your lawyer about this case, and to subpœna witnesses desired by you?

Answer: Yes.

(8) Do you authorize and instruct your lawyer to enter a plea of *Nolo Contendere?*

Answer: Yes.

(9) How do you plead *Nolo Contendere* to the charge, guilty or not guilty?

Answer: Yes.

(10) Are you satisfied with the services of your attorney as rendered in your behalf?

Answer: Yes.

(11) Have these questions been read to and explained to you?

Answer: Yes.

(12) Are you in fact guilty?

Answer: Yes.

Whereupon, the court found that the defendant freely, understandingly and voluntarily made and entered his plea of *nolo contendere.*

The court imposed sentence of 47 months in State's Prison on the count of breaking and entering, 47 months in State's Prison on the count of larceny, to run concurrently with the sentence imposed for breaking and entering, and 47 months on the charge of larceny of an automobile, to run concurrently with the sentences imposed in the breaking and entering and larceny counts.

Plaintiff appealed from judgment entered. The trial judge entered an order continuing defendant's trial attorney as counsel to prepare appeal to the Supreme Court and ordered the County of Nash to furnish transcript and other records necessary to perfect the appeal.

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

T. A. Burgess for defendant.

PER CURIAM. Defendant's sole assignment of error is that the court erred in pronouncing an excessive, cruel and unreasonable punishment and the record proper does not support the judgment as set out.

Defendant's plea of *nolo contendere* to the three felony counts permitted the judge to impose sentences totaling 30 years. G.S. 14-2, G.S. 14-54, G.S. 14-70 and G.S. 14-72; *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. "When punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense." *State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570. The sentences imposed were well within the statutory limits.

The record reveals that defendant was aware of the sentences that could be imposed before his plea of guilty was entered.

We have also carefully reviewed the record proper, and can find no reversible error on the face of the record.

No error.

STATE v. WILLIE JAY GUTHRIE.

(Filed 22 March, 1967.)

APPEAL by defendant Willie Jay Guthrie from *Froneberger, J.,* December 5, 1966 Schedule "A" Criminal Session of MECKLENBURG.

Willie Jay Guthrie and William Ross Higgins, indicted jointly for the armed robbery of Betty Lil Griffith, a violation of G.S. 14-87, were tried for common law robbery.

Evidence was offered by the State and by defendant Guthrie.

The State's evidence, in brief summary, tended to show the facts narrated below.

On October 26, 1966, about 4:00 p.m., Mrs. Griffith, an employee

of Gulf Life Insurance Company, was walking in a westerly direction along the sidewalk on East Morehead Street in Charlotte, North Carolina. She was taking her employer's deposit, consisting of cash and checks she had in her pocketbook, to the Wachovia Bank and Trust Company, located about two blocks west of her employer's office and on the same side of Morehead Street. In front of the Office Supply Building, which is separated from the bank building by an alley, Guthrie and Higgins grabbed her and attempted to jerk the pocketbook from her arms. When Mrs. Griffith clutched her pocketbook and struggled with them, they threw her down into Morehead Street. There Guthrie "finally" got her pocketbook and ran across the street.

In crossing Morehead Street, Guthrie passed in front of a westbound motorist, William F. Ammons, who had observed the boys "snatching a purse from a girl who was lying prostrate." Ammons switched the ignition off, jumped from his car, pursued Guthrie and, after chasing him "for approximately four to six blocks over a rather circuitous route," came upon him and detained him until the police arrived.

Ammons did not identify defendant Higgins as a participant in the robbery and Mrs. Griffith's identification of Higgins was somewhat equivocal.

As to Higgins, the verdict was "not guilty." As to Guthrie, the jury returned a verdict of "Guilty of Common Law Robbery"; and judgment, imposing a prison sentence was pronounced. Guthrie excepted and appealed.

Attorney General Bruton and Staff Attorney Brown for the State.
E. Glenn Scott, Jr., for defendant appellant.

PER CURIAM. Appellant assigns as error (1) the denial of his motion in arrest of judgment; (2) the denial of his motion to set the verdict aside; and (3) the denial of his motion for a new trial. Obviously, the assignments of error are without merit.

The bill of indictment properly charges the felony of which defendant was convicted and there was plenary evidence to support the verdict. Appellant's counsel frankly states he "is unable to ascertain any prejudicial errors of law" in the trial and none appears in the record before us. Hence, the verdict and judgment will not be disturbed.

No error.

WACHOVIA BANK AND TRUST COMPANY, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF LEILA JOHNSTON WADDELL, v. ROBERT BRUCE JOHNSTON; ROBERT BRUCE JOHNSTON, JR., KATHRYN ELIZABETH JOHNSTON, BARBARA FORBES JOHNSTON AND WILLIAM EUGENE JOHNSTON, MINOR CHILDREN OF ROBERT BRUCE JOHNSTON; ALL UNBORN CHILDREN OF ROBERT BRUCE JOHNSTON; AND KINGSLAND VAN WINKLE, CHARLES E. WADDELL, JUNIUS G. ADAMS, JR., EDWARD L. KEMPER, BRUCE SILVIS, AND RT. REV. M. GEORGE HENRY, AS TRUSTEES OF THE DIOCESE OF WESTERN NORTH CAROLINA OF THE PROTESTANT EPISCOPAL CHURCH OF THE UNITED STATES OF AMERICA AND KATHRYN K. JOHNSTON, GUARDIAN AD LITEM OF ROBERT BRUCE JOHNSTON, JR., KATHRYN ELIZABETH JOHNSTON, BARBARA FORBES JOHNSTON AND WILLIAM EUGENE JOHNSTON.

(Filed 29 March, 1967.)

1. Trusts § 4—

Even when the trust instrument does not authorize the trustee to sell for reinvestment, a court of equity, in the exercise of its inherent supervisory jurisdiction over trusts, may order a sale for such purpose, and G.S. 41-11 is not applicable thereto, but the court will do so only when change of conditions and exigencies not anticipated by testatrix make a sale for reinvestment necessary to preserve the purpose of the trust and effectuate the intent of testatrix.

2. Same— Evidence held sufficient to support order of sale of trust property to effectuate intent of testatrix.

The evidence tended to show that the trust *res* was an old building, that rentals therefrom were decreasing and would likely continue to decrease and were insufficient to provide needed repairs, that the area had changed and had been denominated a "blighted" area, that the price offered was in excess of the highest appraised value of the property, that the reinvestment of proceeds of sale would increase the income of the life beneficiary and would enhance the value of the *corpus* for the benefit of the contingent remaindermen, and that the change in conditions amounted to an exigency not foreseen by testatrix. *Held:* The evidence supports order of sale for reinvestment to preserve the trust and carry out the purposes and intent of testatrix.

3. Same—

The rule that a trustee may not purchase the trust property at its own sale is fundamental and strengthened by statute in this State, G.S. 36-28, and the rule is subject to exception only in extraordinary cases in which a court of equity approves such sale after a full and fair disclosure of all the facts in a proceeding in which all parties are represented and it is made to appear that the sale would materially promote the best interests of the trust and its beneficiaries, and that there are no other purchasers willing to pay the same or a greater price than that proffered by the trustee. G.S. 36-42.

4. Same— Order of sale to trustee may not be entered until after public advertisement fails to disclose prospect of equally advantageous sale.

The evidence in this proceeding supported the order of the court that the trust *res* be sold for reinvestment, that the property was peculiarly valuable to the trustee, that the trustee had offered a price greater than the best valuation placed on the property, and that the sale to the trustee

would promote the best interests of the trust and its beneficiaries, but there was no evidence that there had been any advertisement to the public that the property was for sale or that the trustee had affirmatively sought other prospective purchasers. *Held:* The order approving sale to the trustee must be vacated and the cause remanded to the end that the trustee take appropriate action in endeavoring to find the most advantageous purchaser and in advertising the property for sale in order to support a finding by the court that no other equally advantageous prospect for sale of the property exists or is reasonably anticipated.

5. Same—

In those instances in which sale of the trust *res* to the trustee may be properly approved, the trustee may not receive commissions for receipt or collection of the purchase price, may not reserve prepayment privileges after the initial payment upon the purchase price, must file and obtain approval of annual accounts for the trust, must execute a first mortgage or otherwise secure the balance of the purchase price after the initial payment, must give adequate bond as required by G.S. 1-407, and must invest the proceeds of sale in real or personal property subject to the rules and laws respecting investments by trustees, all subject to order and approval of a court of equity.

APPEAL by defendants, minor remaindermen, from *Martin, S.J.*, 3 January 1967 Civil Session of BUNCOMBE.

Civil action by testamentary trustee for authority to sell real property and reinvest proceeds.

Leila Johnston Waddell died testate in 1924, leaving approximately $350,538.65 in personal property and real estate consisting of the Paragon Building in the City of Asheville. All her personal estate, except bequests amounting to $32,000, went to her husband, D. C. Waddell. Item Seven of the will provided that upon the death of her husband, the Paragon Building should go to Wachovia Bank & Trust Company as trustee, and directed the trustee to pay the net income received by it from the building to William Johnston and Robert Bruce Johnston, providing that if either William Johnston or Robert Bruce Johnston should die without issue, the income would be paid to the survivor. Upon death of the survivor, the property should be delivered to his children, *per stirpes*. In the event neither of the Johnstons left children surviving him, the trustee was directed to turn the property over to the Diocese of Western North Carolina of the Protestant Episcopal Church of the United States of America.

The will authorized the trustee to make such improvements and repairs as would produce the most income and further authorized the trustee to borrow and mortgage the property for these purposes; provided, the trustee must set up a sinking fund to repay the loan, which fund must not exceed ten percent of the net income. The percentage was increased from ten percent to twenty-five percent

by subsequent order of court. The trustee was given no power to sell the trust property.

D. C. Waddell, husband of testatrix, died in 1950. He was predeceased by William Johnston.

Since it became trustee, Wachovia Bank & Trust Company has paid and continues to pay income to Robert Bruce Johnston, who is married to Kathryn K. Johnston. Robert Bruce Johnston is the father of four minor children: Robert Bruce Johnston, Jr., Kathryn Elizabeth Johnston, Barbara Forbes Johnston, and William Eugene Johnston.

The Paragon Building is a 65-year old, 3-story frame and brick building with a full basement, and covers the entire land described in the will. The lot on which the building is located fronts 29 feet on Patton Avenue, 137.8 feet on Haywood Street, and 62 feet on College Street, all of these streets being major downtown business streets in the City of Asheville. The building is located a block from the nearest parking facility and is in a downtown area which has been certified as "blighted" by the Asheville City Planning and Zoning Commission. The report included the Paragon Building in a list of downtown buildings designated by the Commission as "dilapidated." The building proper is trapezoid in shape, has no elevator, and at the present time is in need of roof repairs at an estimated cost of $4,500. The building has a total of 5143 square feet available for rent or lease on the first floor, which is occupied by five retail businesses. Two of the first floor leases expire in 1967 and the other three expire in 1969. The second floor of the building has 4813 square feet available for office space rental, and is occupied by three tenants who rent 30% of the available space. The third floor has 5383 square feet, but is without water, heat or electricity, and is used only for storage by other tenants. Three of the second floor tenants moved out in 1965, and the remaining two tenants rent on a month-to-month basis. The following is a schedule of gross and net rental income for the period 1956-1966:

Year	*Gross Rentals*	*Net Rentals*
1956	$37,370.34	$16,198.24
1957	40,178.71	13,561.92
1958	37,529.37	17,445.63
1959	38,236.92	20,361.92
1960	40,136.63	19,547.62
1961	38,713.57	20,695.12
1962	38,313.54	20,398.45
1963	38,448.85	20,937.06
1964	39,389.77	21,336.37
1965	43,298.02	19,476.66
1966	34,064.19	18,428.03

There was evidence showing that the real estate values in the downtown area were affected because many retailers have moved to suburban shopping centers.

Two new office buildings were completed in the downtown area of Asheville in 1965. One of these, The First Union National Bank Building, has twenty-five percent, or 5400 square feet, of its rental office space still unoccupied. The other, Northwestern National Bank Building, has thirty percent, or 45,000 square feet, of its rental office space still unoccupied.

Affidavits of two vice presidents of the plaintiff bank were introduced in evidence, which are in pertinent part quoted below:

John W. Spicer, Senior Vice President: "(I)n the opinion of this deponent such a sale would be to the best interests of the trust, the lifetime beneficiary thereof and the remaindermen, in that the only possible use of the premises in their present condition is for rental to small retail stores. That the lot in question is not sufficiently large to enable a new building to be erected thereon without combining the same with additional property, and that under these circumstances it will be impossible to carry out the intentions of Leila Johnston Waddell in establishing the trust to provide for satisfactory income to the life tenant and principal to the remaindermen. . . ."

Robert L. Montague, Vice President: "That, in the opinion of this deponent, with the increasing costs for maintenance occasioned by reason of the age of the building, the fact that sales in the retail stores are on an apparent decline, it would appear that rentals will decrease, expenses will further increase, and the net return to the building will be less in the future — which in turn, when affected by any inflationary trend in the general economic situation, will result in a hardship to the lifetime beneficiary and the remaindermen of the Leila Johnston Waddell trust."

An appraisal of the property was made by a qualified real estate appraiser, who estimated the value of the property to be $315,000 as of the year 1965. There was also evidence that the value of the building and land would decline because of the size and shape of the lot, the age of the building, and because of the availability of new and more modern office space.

The plaintiff in this action prays that Wachovia Bank & Trust Company as trustee be permitted to sell the property to Wachovia Bank & Trust Company for the sum of $450,000, $130,500 to be paid at closing of transaction, and the balance in thirty semi-annual equal installments, each payment to be applied first to the interest on unpaid balance at the rate of 6% per annum, and the balance to unpaid principal; further, that it be granted power to

invest and reinvest the principal proceeds of the sale in common stock, equities and bonds.

The life beneficiary, Robert Bruce Johnston, filed an answer admitting the allegations of the complaint, joined in the prayer for relief, and further alleged that the plaintiff had notified him that it was interested in purchasing the Paragon Building property for the purpose of adding this property to land already owned by the Bank so that it might erect a modern bank building in this area, and that, being sensitive to its fiduciary duties to the defendants, plaintiff proposed to defendant that it should resign as trustee in order that no question might arise as to conflict of interests, but that the answering defendant informed the plaintiff that he wanted it to continue to act as such trustee.

This matter came on to be heard before Judge Harry C. Martin, and he found, *inter alia,* the following facts:

"24. Wachovia Bank and Trust Company's Common Trust Fund, which is a balanced type fund with an objective of stable income and safety of principal through diversification of investments, and made up of sixty percent stock equities and forty percent bonds, shows an average annual yield over the twenty-four year period (1942-1965) of 3.725 percent. If the trend over this twenty-four year period continues, and using a conservative yield of 3.5 percent on the principal as paid in under the terms of the proposed sale and purchase of the trust property, coupled with the interest payments, of the secured note, the average income to the life beneficiary Robert Bruce Johnston over the next fifteen years if invested in said fund, will be in excess of $20,000 yearly. The actual experience of the aforesaid Common Trust Fund shows an annual increase in earnings of 3.2 percent. Should this experience continue, it will increase the earnings on the investment.

"25. The total principal paid the trust for the Paragon property less the tax on same would total $419,211.58. This figure does not include any gain or loss in value of the equities over the fifteen year period. The Wachovia Bank Common Trust Fund shows an average annual appreciation of unit value for the years 1941 through 1965 of 4.2 percent. Should this average annual appreciation continue, the *corpus* of the trust would total $589,300 at the end of the fifteen year period. The remaindermen would have the $419,211.58, plus or minus any change in value, available when the trust ends at the life beneficiary's death.

"26. As of the present date no offer to purchase the Paragon property, other than that of the plaintiff, has been made to

the trustees, and they have not been approached by anyone towards negotiation for such purchase."

The judge also entered and made the following conclusions of law in the judgment:

"1. That the Trustee be, and it is hereby granted, the power of sale of the real estate and building known as the Paragon Building, the asset of the trust.

"2. The Trustee is relieved from the provisions of G.S. 36-28 with respect to the sale hereby authorized.

"3. A private sale of the real property asset of the trustee is hereby authorized to Wachovia Bank and Trust Company upon the terms and conditions set forth in the findings of fact.

"4. The Trustee is authorized to invest the proceeds of the sale of the real estate, as herein authorized, in personal property, including stocks and bonds, subject to the usual rules and laws respecting trustees and investments by trustees."

From the judgment entered on 12 January 1967, the minor defendants gave notice of appeal.

Van Winkle, Walton, Buck and Wall for plaintiff appellee.

Harold K. Bennett and Robert Bobo Long, Jr., for defendant appellants.

BRANCH, J. The appellants present these questions:

I. Did the trial court err in holding that there is sufficient evidence of the existence of an emergency, contingency or exigency which threatens to frustrate the purposes of the testamentary trust of Leila Johnston Waddell and which necessitates a sale of the trust *res?*

II. Did the trial court err in finding that there is sufficient evidence that the proposed sale will materially enhance the interests of all possible beneficiaries of the trust?

III. Did the trial court err in holding that there is sufficient evidence that the testatrix would have provided for the sale of the trust *res* had she foreseen the present circumstances and would have allowed reinvestment of proceeds in personal property?

IV. Did the trial court err in holding that there is sufficient evidence that no other prospects for sale of the trust property other than the sale for which this action was instituted now exists or is reasonably anticipated?

I.

The primary purpose of the trust was to provide income for certain life tenants and then to deliver the trust property in fee to children of certain of the life beneficiaries. To that end, the trust instrument gave the trustee power to borrow money and to mortgage the trust property. It was further provided that only a limited amount of the yearly income could be used to repay loans, which could have resulted in the property passing to the remaindermen encumbered with a long-term lien. Considering the fact that the life beneficiaries were known and loved by the testatrix, we conclude that the primary purpose of the trust was to provide income for the life beneficiaries. However, considering the rights of both the surviving life beneficiary and the apparent remaindermen, the minor children, we are confronted with the question whether such emergency, contingency or exigency exists which threatens to frustrate the purposes of the trust unless the trust *res* is sold.

At the outset we recognize the distinction between this action and an action brought under G.S. 41-11, which authorizes a sale for the purpose of reinvestment or improvement when instituted *by holders of a vested interest in the land.* The instant action is by a trustee seeking to invoke the inherent equitable jurisdiction of the court over a trust estate. *Trust Co. v. Rasberry,* 226 N.C. 586, 39 S.E. 2d 601. Therefore, the same statutory rules and limitations do not necessarily apply here as in cases brought under G.S. 41-11. Rather, in the exercise of its general, inherent, exclusive supervisory power over trusts, the court may authorize whatever is necessary to preserve and protect the trust estate, and in cases of emergency the court may authorize and direct the trustee to do acts which under the terms of the trust agreement and under ordinary circumstances the trustee would have no power to do. The prime consideration is the necessity for the preservation of the estate. *Trust Co. v. Rasberry, supra.*

Carter v. Kempton, 233 N.C. 1, 62 S.E. 2d 713, is a landmark case in North Carolina, wherein approval of a family settlement was sought to remove a proportionate part of the estate from the trust because dissension between distributee and trustees threatened to cause a family misunderstanding. The Court refused to approve the settlement and, speaking through Barnhill, J., (later C.J.), in part said:

> "(2) . . . A court of equity looks with a jealous eye on a contract that materially affects the rights of infants. Their welfare is the guiding star in determining its reasonableness and validity.

"(3). A court of equity will not modify or permit the modification of a trust on technical objections merely because its terms are objectionable to interested parties, or their welfare will be served thereby. It must be made to appear that some exigency, contingency, or emergency has arisen which makes the action of the court indispensable to the preservation of the trust and the protection of infants.

"(4). To invoke the jurisdiction of a court of equity the condition or emergency asserted must be one not contemplated by the testator and which, had it been anticipated, would undoubtedly have been provided for; and in affording relief against such exigency or emergency, the court must, as far as possible, place itself in the position of the testator and do with the trust estate what the testator would have done had he anticipated the emergency. . . . 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. . . .

"(5). The exigency, contingency, or emergency necessary to invite the intervention of the courts must relate to and grow out of the trust itself or directly affect the *corpus* thereof or the income therefrom."

The law as stated by this Court is generally recognized in other jurisdictions, as evidenced by statements contained in Bogert on Trusts, 4th Ed. § 146, p. 375, to wit:

"Sometimes a settlor gives instructions in the trust instrument with regard to the administration of the trust which turn out to be highly disadvantageous and obstruct the trustee in carrying out the purposes which the settlor expressed. These difficulties are usually due to a change in conditions regarding the trust property or parties which have occurred since the trust was established and were not anticipated by the trustor. . . .

"If the settlor or a trustee or beneficiary can prove to the court that such a situation exists, the court has power to allow the trustee to deviate from the administrative provisions laid down by the settlor, to ignore them, and to employ other methods in carrying out the trust. The clauses of the instrument relating to the benefits to be conferred on the beneficiaries are primary and fundamental and are the principal concern of the court. The terms regarding methods and means of achieving these results are of secondary importance and equity will

not permit them to interfere with the efforts of the trustee to bring to the beneficiaries the intended benefits. . . ."

The power of the court to alter private trusts was considered by this Court in *Trust Co. v. Nicholson,* 162 N.C. 257, 78 S.E. 152, where the Court held, *inter alia:*

"'We think it is well settled that a court of equity, if it has jurisdiction in a given cause, cannot be deemed lacking in power to order the sale of real estate which is the subject of a trust, on the ground, alone, that the limitations of the instrument creating the trust expressly deny the power of alienation. It is true, the exercise of that power can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject-matter of the trust, or, possibly, in case of some other necessity of the most urgent character. . . .'"

The evidence is undisputed that (1) there was a 25% decrease in gross rentals from 1965 to 1966, (2) the building on the property is 65 years old and in need of roof repairs, (3) the third floor is without electricity, water or heat, and is used only for storage by current tenants, (4) several of the tenants of long standing on the second floor moved to more modern quarters in 1965, (5) the lot is not adaptable for a modern building without additional land, (6) in the opinion of several of plaintiff's employees the rental income will gradually decrease, (7) the trust does not have sufficient income to adequately modernize the building, (8) modern office space is now available in the area, (9) the area in which the building is located has been certified a "blighted" area and the building considered as "dilapidated" by the Asheville-Buncombe Planning Board, and (10) the area in which the building is located has inadequate parking space.

These and other findings of fact by the court show changed conditions and the existence of an exigency or emergency, threatening to frustrate the purpose of the trust, and necessitating the sale of the trust *res.*

II.

Whether there be sufficient evidence to find that the proposed sale will materially enhance the interest of all possible beneficiaries has been answered, in the main, by our discussion of appellants' first question. However, there is additional evidence that the price offered for the trust property exceeds the highest appraisal of the property by $83,000, and, under the terms of the proposed sale, the life tenant would receive income of at least $20,000 per year, and,

at the end of the 15-year proposed payment period, the *corpus* would amount to $419,211.58 in principal, after taxes, plus any increase in the value of the equities. Considering this with the evidence of existing emergency or exigency discussed above, we hold that there was plenary evidence to support the trial court's finding that the proposed sale would materially enhance the interest of all possible beneficiaries of the trust.

III.

There is sufficient evidence to hold that the testatrix would have provided for the sale of the trust *res* and would have allowed the reinvestment of the proceeds in personal property had she foreseen the present circumstances. We do not believe that the testatrix could have foreseen the development of suburban shopping centers that offer modern office building space, nor could she have imagined the tremendous use of and dependence on the automobile by modern people, which in turn demands adequate parking facilities. She could not have foreseen the affluence of modern society which allows the ordinary business man renting office space to consider the elevator, central heat, air conditioning, nearby auto parking and functional beauty necessities rather than luxuries. She thus would not have known of the coming of tremendous office buildings which offer all of these luxuries in competition with the now outmoded trust *res*.

In the case of *In re Kenan*, 262 N.C. 627, 138 S.E. 2d 547, the Court approved the modifications of a trust where the settlor later became incompetent, and authorized the trustees to make certain specific gifts from the income and principal upon approval of the trial judge's finding of fact that the incompetent, if of sound mind, would probably have made the gifts in the manner proposed. The testatrix in the instant case was certainly not averse to investments in personal property. The record shows that at the time of her death she owned approximately $281,000 worth of stocks and bonds and only one piece of realty. It was testatrix' intent in creating the trust agreement to provide income for certain persons. It naturally follows that had testatrix known that the real property would no longer satisfy the purpose of the trust, she would have provided for the sale of the property and reinvestment in income-producing personal property.

Although not raised by either party, this record presents the serious question of the propriety and legality of the trustee purchasing trust property from itself.

One hundred and seventeen years ago this Court, in the case of *Brothers v. Brothers*, 42 N.C. 150, stated: "It is an inflexible rule,

that when a trustee buys at his own sale, even if he gives a fair price, the *cestui que trust* has his election to treat that sale as a nullity, not because *there is* but because there *may be* fraud."

In the case of *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615, the Court held: "The law is well settled that in certain known and definite 'fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act *unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted.'* " (Emphasis ours) Accord: *Willetts v. Willetts,* 254 N.C. 136, 118 S.E. 2d 548.

It is universally recognized that one of the most fundamental duties of the trustee throughout the trust relationship is to maintain complete loyalty to the interests of his *cestui que trust.* This concept was forcefully expressed in the case of *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545, by Cardozo, C.J., as follows:

> "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions, . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

In this jurisdiction there have been few inroads on the rule regarding the duty of loyalty by the trustee to the interests of the *cestuis que trust.* The first apparent deviation in the rule appears in the case of *Bolton v. Harrison,* 250 N.C. 290, 108 S.E. 2d 666, where there was a foreclosure of a mortgage by action in which the executor and heirs were made parties. After settlement of the estate, the executors purchased at the sale which *was confirmed by the court.* After other foreclosures, *mesne* conveyances, and lapse of about twenty-eight years, the remaindermen under the original will sought to have a trust declared in their favor. They failed to allege or prove a defense to the action of foreclosure or introduce any evidence of fraud. The Court, holding that nonsuit was proper, said:

> " 'Without regard to the act of 1903, the court has the power to order the sale of real estate limited to a tenant for life, with

remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not *in esse,* when one of the class being first in remainder after the expiration of the life estate is *in esse* and a party to the proceeding to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in posse.' Lumber Co. v. Herrington,* 183 N.C. 85, 110 S.E. 656.

"Necessarily, purchasers of property, especially land, must have faith in and place reliance on the validity of judicial proceedings."

The Court again considered the fiduciary relation in the case of *Miller v. Bank,* 234 N.C. 309, 67 S.E. 2d 362, wherein the bank sold stock which it held in trust for minor beneficiaries to a corporation having interlocking directorate with the bank. One of the minor beneficiaries sought to recover for loss alleged to have been sustained. Plaintiff set out in his complaint that a judgment of the superior court was rendered approving the sale of the shares of stock now complained of, the present plaintiff and all interested persons being parties to the proceeding. The Court stated:

"Plaintiff's allegation that the sale of the shares of stock complained of was approved by a judgment of the Superior Court in an adversary action in which the plaintiff here was party defendant and appeared by a guardian *ad litem* and answered, nothing else appearing, would raise a complete defense to his complaint on that ground, and his allegations of negligence and mismanagement in respect to the sale of this stock would not avail against a valid judgment rendered by a court having jurisdiction of the parties and of the subject matter."

Citing *Bolton v. Harrison, supra,* Moore, J., speaking for the Court in *Morehead v. Harris,* 262 N.C. 330, 137 S.E. 2d 174, said:

"If the sale is affirmatively sanctioned and ratified by the heirs or beneficiaries, it will be declared valid. *Gurganus v. McLawhorn,* 212 N.C. 397, 193 S.E. 844; *Froneberger v. Lewis, supra.* If property is sold at a judicial sale made pursuant to an action to foreclose a mortgage, in which action all interested persons are parties, the fiduciary may purchase with leave of court and obtain a good title if full value is paid and the transaction is free of fraud."

Other jurisdictions allow trustees to purchase trust property under certain circumstances. See *Anderson v. Butler,* 31 S.C. 194, where the Court held:

". . . It is a well established principle, that a trustee cannot buy at his own sale. He cannot be vendor and vendee at the same time of trust property; . . . (W)hile this doctrine obtains, and will be uniformly enforced when the trustee is both vendor and vendee, as said above, yet we fail to see its applicability to all judicial sales, where a trustee may happen to become the purchaser of the property sold. We see no reason why, in every such sale, the rigid doctrine above should be applied, and that a trustee should be precluded from purchasing the same as if he were the vendor. In sales ordered by the court of trust property, and conducted by the officers of the court, there is no necessary conflict of interests in the mind of the trustee, like that which would exist when he is both vendor and vendee."

The general rule was adhered to by the Virginia Court in *Swineford v. Trust Co.*, 154 Va. 751, with the addition of the following exception: "Such purchases are not allowed, except with the express consent or under special permission given by a court of competent jurisdiction."

The case of *Honeywell, et al, v. Dominick, et al,* ..... S.C. ....., 76 S.E. 2d 59, presented a question of the validity of conveyance to herself individually of property of an estate and trust by the executrix and trustee under her husband's will. The Court, in confirming the sale, said:

" 'It is a stern rule of equity that a trustee * * * cannot be both vendor and purchaser', *Imboden v. Hunter,* 23 Ark. 622, 79 Am. Dec. 116, but, without whittling the rule away, there may be justifiable exceptions under extraordinary facts which are found by a court of competent jurisdiction upon careful investigation and full representation of the *cestuis* or beneficiaries; and all of these conditions have been satisfactorily met in the case at bar. 'The rule against the purchase of trust property by the trustee will not apply, according to the holding of many cases, where, under the particular circumstances of the case, the reason for the rule does not exist, as, for example, where there is no possibility of advantage to the trustee or prejudice to the trust estate from the transaction in question.' 54 Am. Jur. 362, Trusts, sec. 456."

Bogert, Trusts and Trustees, 2d Ed., § 543, p. 476, states:

"In most cases it is unnecessary for the trustee to act in two capacities, in order to advance trust administration, and in permitting self-dealing to enter the trustee is gratuitously

exposing the beneficiaries to a risk. If peculiar circumstances make it necessary to allow the trustee to act for himself as well as for the beneficiaries with regard to a particular transaction, relief can be had by an application to the court."

Scott on Trusts, 2d Ed., Vol. II, § 170.7, p. 1209, states: "We have seen that a trustee cannot properly purchase trust property for himself individually, even though he acts in good faith and pays a fair consideration for it. The circumstances may be such, however, that it would be advantageous to the trust estate for the trustee to purchase the property."

The North Carolina General Assembly enacted Chapter 36, Article V, the Uniform Trust Act, in 1939. G.S. 36-28 is as follows:

"Trustee buying from or selling to self. — No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate."

The purpose of this section is to clarify and strengthen rules regarding loyalty by a trustee to the interests of his *cestuis que trust.*

G.S. 36-42, under Article V, is as follows:

"Power of the court. — A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this article, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this article."

This section, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by Article V, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trustee.

Restatement of the Law, 2d, Trusts, Second, § 170, states:

"(1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."

Comment (f) on Subsection (1) is as follows:

"*Purchase by trustee with approval of court.* The trustee can properly purchase trust property for himself with the approval of the court. The court will permit a trustee to purchase

> trust property only if in its opinion such purchase is for the best interest of the beneficiary. Ordinarily the court will not permit a trustee to purchase trust property if there are other available purchasers willing to pay the same price that the trustee is willing to pay."

The reasons for the loyalty rule are evident. A man cannot serve two masters. He cannot fairly act for his interest and the interest of others in the same transaction. Consciously or unconsciously, he will favor one side or the other, and where placed in this position of temptation, there is always the danger that he will yield to the call of self-interest.

The trustee, because of his fiduciary relationship, is skating on the thin and slippery ice of presumed fraud, which he must rebut by proof that no fraud was committed and no undue influence or moral duress exerted.

There is plenary evidence in this case to rebut the presumption of fraud, undue influence and moral duress, in that: (1) The trustee has made a full and fair disclosure of all facts, (2) the trustee has offered to resign as trustee and now remains in fiduciary capacity at the insistence of the life beneficiary, (3) the trustee has offered far more than the appraised price for the *res* property, (4) the trustee is apparently in the peculiar position of finding the *res* property particularly valuable to its needs, and (5) the trustee has made a strong showing of exigency, emergency and changed conditions which justify a deviation of the trust.

Recognizing and reaffirming the stern rule of equity that a trustee cannot be both vendor and vendee, we hold that there are rare and justifiable exceptions when the court, in the exercise of its inherent equitable powers, may authorize a purchase of trust property by the trustee, upon full findings of fact that (1) complete disclosure of all facts was made by the trustee, (2) the sale would materially promote the best interests of the trust and its beneficiaries, and (3) there are no other purchasers willing to pay the same or a greater price than offered by the trustee.

IV.

However, we must still consider whether the court erred in holding there is sufficient evidence to support the holding that no other prospect for sale of the trust property exists or is reasonably anticipated. There was no advertisement to advise the general public that the property was for sale. The record is barren of evidence that the trustee affirmatively or by any overt act sought other prospective

purchasers. In fact, the record reveals that only the trustee and the life beneficiary possessed this information.

". . . The trustees owed to their *cestuis que trust* the duty to bestir themselves, and to put forth real and good faith endeavors to find the most advantageous purchaser; and they cannot be allowed to postpone such action until after they acquired the entire title to the property, when they would be the sole beneficiaries of the fruits of their efforts to find an advantageous purchaser." *Clay v. Thomas,* 178 Ky. 199, 198 S.W. 762.

The fact that no other offers had been made, together with the fact that the trustee might put the *res* property to better economic use because it owns adjoining property, is not enough to support the trial court's finding. The trustee must show that there was adequate advertisement to advise the general public that the property was for sale, so that all possible bidders would be fully advised; the trustee must show that it affirmatively put forth real and good faith endeavors to find the most advantageous purchaser and that there are no other available purchasers willing to pay the same price the trustee is willing to pay. This precaution must be taken, not because there is fraud but because the record must show there is no appearance of or opportunity for fraud.

We hold that the trial court erred in holding that no prospect for sale of the trust property other than the sale for which this action was instituted exists or is reasonably anticipated.

It is noted that the will did not give the trustee powers of investment and re-investment, and the trustee, therefore, must be governed by the laws and rules relating to trustees and their investments.

While the instant case does not create cause for great concern as to the rights of the *cestuis que trust,* the court must erect adequate safeguards so as to prevent derogation of the rules so meticulously established and jealously guarded by our Court.

The judgment entered herein by the trial court is vacated and this cause is remanded to Buncombe County Superior Court for further finding of facts and to the end that the trustee may take appropriate action to enable the trial judge to include in his findings of fact that the trustee advertised the *res* property for sale in a newspaper having general circulation in Buncombe County once a week for not less than eight weeks, said notice of sale to be on terms substantially as proposed by the trustee and modified by this decision; and that no offer to purchase was received that would equal or better the offer proposed by the trustee. After such action is taken, the trustee may apply to the Judge of Superior Court for entry of judgment in accordance with this decision, which judg-

ment should contain minimum safeguards as follows: (a) The trustee shall receive no commissions or fees for receipt or collection of purchase price for *res* property, (b) the trustee shall have no prepayment privileges after the initial payment of 29% of the purchase price, (c) the trustee shall file and obtain approval of annual accounts for the trust as long as the bank remains indebted to the trust, (d) the trustee shall either execute a first mortgage to secure the balance of the purchase price after the initial payment or shall furnish such other security as the court may require and approve, (e) the trustee shall post adequate bond as required by provisions of G.S. 1-407, and (f) the trustee shall invest proceeds from the sale of real property in real or personal property, including stocks and bonds, subject to the rules and laws respecting trustees and investments by trustees, all subject to the order and approval of the proper court.

Error and remanded.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION, v. CAROLINA COACH COMPANY, CAROLINA SCENIC STAGES, GREYHOUND LINES, INC., QUEEN CITY COACH COMPANY, SEASHORE TRANSPORTATION COMPANY, INC., SMOKY MOUNTAIN STAGES, INC., CAROLINA DELIVERY SERVICE COMPANY, INC., OVERNITE TRANSPORTATION COMPANY, AND THURSTON MOTOR LINES, INC.

(Filed 29 March, 1967.)

1. Utilities Commission § 7—

In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, evidence establishing ample financial responsibility and operating experience of the proposed purchaser negates that such transfer would be contrary to the public interest, and the fact that the franchise carrier might thereafter undertake to exercise its franchise rights on a much larger and more varied scale which would adversely affect the business of the competing protestants does not give them ground for complaint, the extent and scope of the franchise rights not being affected by the transfer of the capital stock.

2. Same—

In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings supported by evidence that the franchise carrier was conducting active operations under the franchise and that its ability to render service to the public within the limits of its franchise rights would not be adversely affected by the proposed transfer of its stock, support conclusions that the proposed sale of its stock is justified

by the public convenience and necessity within the meaning of G.S. 62-111(a), and G.S. 62-262(e)(1) is not applicable to the approval of such stock transfer.

3. Same—

In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings of the Commission supported by substantial evidence to the effect that the franchise carrier did not in fact obtain its franchise for the purpose of transferring it to another obviates the proscription of G.S. 62-111(d).

4. Utilities Commission § 9—

The findings of fact of the Utilities Commission are conclusive and binding when supported by competent, material and substantial evidence in view of the entire record. G.S. 62-94(b)(5).

5. Same—

In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, the Commission's decision limiting its order to approval of the transfer of the stock does not involve questions as to the extent and scope of the franchise holder's presently subsisting franchise rights or the rights of the transferee to merge the franchise holder into its corporate structure, even though a future intent to merge is adumbrated by its evidence, and the questions of the extent of the franchise rights and the right to merge is to be determined *de novo* when properly raised in subsequent proceedings.

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

APPEAL by protestants from *Morris, J.*, May 9, 1966 Non-Jury Session of WAKE, docketed and argued as No. 547 at Fall Term 1966.

On May 13, 1965, Leaseway Transportation Corp. (Leaseway), a Delaware corporation, as transferor, and United Parcel Service, Inc. (United), an Ohio corporation, as transferee, filed an application with the North Carolina Utilities Commission (Commission) for authority "to change control, through stock transfer and merger," of Contract Carrier Permit No. P-168. The application states: "United Parcel Service, Inc., proposes to purchase from Leaseway Transportation Corp., the present owner, all of the outstanding shares of the capital stock of Caro-Line Transportation, Inc., the holder of the said permit, and thereafter cause Caro-Line Transportation, Inc., to merge into United Parcel Service, Inc."

Protests to said application were filed by Carolina Coach Company, Carolina Scenic Stages, Greyhound Lines, Inc., Southern Greyhound Lines Division, Queen City Coach Company, Seashore Transportation Company, Inc., Smoky Mountain Stages, Inc., and Southern Coach Company, common carriers of passengers by motor

vehicle; by Carolina Delivery Service, Inc., Overnite Transportation Company and Thurston Motor Lines, common carriers of property by motor vehicle; and by Carolina-Virginia Couriers, Inc., a specialized contract carrier.

A hearing was held by the Commission in August, 1965. At the outset thereof, the applicants, through their counsel, stated they were seeking in this proceeding the approval of the purchase by United of all of the outstanding stock of Caro-Line from Leaseway, and were *not* seeking authority to merge Caro-Line into United "at this time."

On November 24, 1965, the Commission, in opinion by Commissioner Worthington, after reviewing the prior proceedings and the evidence offered at the hearing, set forth its findings of fact and conclusions of law and "ORDERED that the application in this matter be, and the same is hereby, approved to the end that Leaseway Transportation Corp. be, and it is hereby authorized to sell and transfer to United Parcel Service, Inc., all of the capital stock of Caro-Line Transportation, Inc." A concurring opinion was filed by Commissioner Peters. A dissenting opinion was filed by Commissioner Eller.

When used hereafter, the words "protestants" and "appellants" refer to all of said original protestants except Southern Coach Company and Carolina-Virginia Couriers, Inc., which did not except to or appeal from the Commission's order.

Protestants, based on thirty-four specific exceptions, appealed from the Commission's order to the superior court.

After hearing in the superior court, Judge Morris overruled all of appellants' exceptions to the Commission's order of November 24, 1965, and affirmed in all respects the Commission's said order. Protestants excepted and appealed. They assign as error the overruling of each of their exceptions to the Commission's order and the court's decision and judgment.

Edward B. Hipp for North Carolina Utilities Commission, appellee.

Boyce, Lake & Burns and Schnader, Harrison, Segal & Lewis for Leaseway Transportation Corp. and United Parcel Service, Inc., applicants, appellees.

Allen, Steed & Pullen; Joyner & Howison; Newsom, Graham, Strayhorn & Hedrick; Ward & Tucker; McCleneghan, Miller & Creasy; Bunn, Hatch, Little & Bunn and Thomas W. Steed, Jr., for protestants, appellants.

BOBBITT, J. Caro-Line, a North Carolina corporation, was

chartered on July 8, 1964. It was authorized by its charter to engage in, among other things, the transportation of freight, and to purchase, acquire, hold and sell property. The one hundred shares of stock authorized by its charter were issued to and are now owned by Leaseway.

The Commission by order of September 18, 1964, authorized the sale and transfer by Ed J. Thomas, d/b/a AAA Delivery Service of Greensboro, N. C., of his intrastate operating rights under Permit No. P-168 to Caro-Line. Exhibit A, attached to said order, defined "Contract Carrier Authority" under Permit No. P-168 as follows: "Transportation under individual bilateral contract with particular shippers of Group 1, general commodities, and Group 15, retail store delivery service, also manufactured furniture between factories within the State and stores and warehouses of Sears, Roebuck and Company within the State, over irregular routes, between all points and places in the State of North Carolina."

On May 10, 1965, Leaseway agreed to sell, and United agreed to buy (upon certain conditions), said one hundred shares (all) of the capital stock of Caro-Line.

G.S. 62-111(a) provides: "No franchise now existing or hereafter issued under the provisions of this chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, *nor shall control thereof be changed through stock transfer or otherwise,* or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, *which approval shall be given if justified by the public convenience and necessity.* Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets." (Our italics.)

Protestants assign as error the failure to find that the sale and transfer by Leaseway to United of the stock of Caro-Line (1) is contrary to the public interest and (2) is not justified by the public convenience and necessity.

Under the proposed sale and transfer, United does not acquire, in its own name and right, the title to Permit No. P-168. Upon consummation thereof, United, as sole stockholder, acquires corporate control of Caro-Line and its assets, including its presently existing franchise rights under Permit No. P-168. The extent and scope of Caro-Line's franchise rights are not affected by the fact that United rather than Leaseway is the owner of the stock of Caro-Line.

The balance sheet of United, as of December 31, 1964, shows assets of $29,321,918.00; liabilities of $17,504,993.00; capital stock and surplus of $11,816,925.00. It is wholly owned by United Parcel

Service of America, Inc., a Delaware corporation which is the parent of subsidiaries operating in various states from coast to coast. There is evidence that Leaseway, a holding company, has large transportation interests and "at the present time probably will have a gross of 165 million or something like that."

Unquestionably, the responsibility of Caro-Line, financially and otherwise, and Caro-Line's ability to exercise its franchise rights will not be adversely affected by the fact that United rather than Leaseway is the owner of its stock. The apprehension of protestants is that Caro-Line will undertake to exercise its franchise rights on a much larger and more varied scale, and in so doing act in competition with protestants and adversely affect their business. The record fails to show that operations by Caro-Line on a larger and more varied scale would be contrary to *the public interest* as distinguished from the interests of protestants.

Protestants contend the applicants (Leaseway and United) were required to show, and that they failed to show, that the proposed sale and transfer of Caro-Line's stock was justified by the public convenience and necessity. They call attention to the fact that the Public Utilities Act of 1963 (Session Laws of 1963, Chapter 1165) enacted G.S. 62-111(a) as quoted above; and that the corresponding provision (formerly codified as G.S. 62-121.26) of the Truck Act of 1947 (Session Laws of 1947, Chapter 1008) did not provide that the transfer of a "certificate or permit" be justified by the public convenience and necessity. In their brief, protestants contend in substance that G.S. 62-111(a) "required the Commission to consider similar elements upon a transfer of franchise authority as upon the granting of an application for *new* authority," (our italics) including "public need for the service, the service already provided by existing carriers, and the effect of the service provided by the transferee on the operations of existing carriers."

G.S. 62-262(e) provides: "If the application is for a certificate, the burden of proof shall be upon the applicant to show to the satisfaction of the Commission: (1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and (2) (t)hat the applicant is fit, willing and able to properly perform the proposed service, and (3) (t)hat the applicant is solvent and financially able to furnish adequate service on a continuing basis." Protestants contend in substance that G.S. 62-262(e)(1) is applicable to the present factual situation. Careful consideration impels a different conclusion.

Under G.S. 62-262(e)(1), an applicant for *new* authority must show to the satisfaction of the Commission "(t)hat public convenience and necessity require the proposed service in addition to ex-

isting authorized transportation service." Factors for consideration by the Commission when passing upon such application include the service already provided by existing carriers and the effect of the *new* service on the operations of existing carriers. Here applicants did not seek and have not obtained any additional authority. The proposed transfer of Caro-Line's stock does not affect the extent of its presently existing franchise rights under Permit No. P-168. We are of opinion, and so decide, that G.S. 62-262(e)(1) is not applicable to the present factual situation. The Commission, based on substantial evidence, has made findings to the effect that Caro-Line, exercising franchise rights under Permit No. P-168, is now conducting an active operation, and that its ability to render service to the public within the limits of its franchise rights will not be adversely affected by the proposed transfer of its stock. In our opinion, and we so hold, the Commission's factual findings support its conclusion that the proposed sale and transfer of stock is justified by the "public convenience and necessity" within the meaning of this phrase as used in G.S. 62-111(a).

Protestants assign as error the failure to find that Caro-Line obtained Permit No. P-168 "for the purpose of transferring the same to another." G.S. 62-111(d) provides: "No person shall obtain a franchise for the purpose of transferring the same to another, and an offer of such transfer within one (1) year after the same was obtained shall be *prima facie* evidence that such certificate or permit was obtained for the purpose of sale."

Does G.S. 62-111(d) relate solely to the transfer of a franchise by the party to whom it is issued by the Commissioner? If not, is it applicable to a transfer of corporate stock effecting a change of control of a corporate holder of a franchise? Disposition of this appeal does not require determination of either of these questions. Assuming, without deciding, that G.S. 62-111(d) is applicable, protestants' said assignment of error is without merit. Findings of the Commission to the effect that Caro-Line did not in fact obtain said permit "for the purpose of transferring the same to another" is supported by substantial evidence.

It is well established that the Commission's findings of fact are conclusive and binding when supported by competent, material and substantial evidence in view of the entire record as submitted. G.S. 62-94(b)(5); *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 454, 130 S.E. 2d 890, 894, and cases cited.

Protestants assign as error the failure to find that the franchise rights contained in Caro-Line's Permit No. P-168 "to the extent, if any, that such rights authorize the transportation of general commodities under contract to or from shippers other than Sears, Roe-

buck and Company are dormant." There is evidence the right exercised by Thomas under said permit consisted of operations under contract with Sears, Roebuck and Company. Thomas was authorized to transfer *his* rights under Permit No. P-168 to Caro-Line. There is evidence that, after said transfer, Caro-Line acquired additional equipment and that the rights exercised by Caro-Line under said permit consisted of operations under contracts with Sears, Roebuck and Company and General Tire Service. The Commission's decision involves only the sale and transfer of the stock of Caro-Line. Questions as to the extent and scope of Caro-Line's presently subsisting franchise rights under Permit No. P-168 were not presented and are not affected by the Commission's order.

As set forth in our preliminary statement, the application states United proposes to purchase from Leaseway all the capital stock of Caro-Line, the holder of the permit, "and thereafter cause Caro-Line Transportation, Inc., to merge into United Parcel Service, Inc." Exhibits relevant to consideration of such merger are attached to the application. Exhibit F is a nine-page statement entitled "Transferee's Experience in Transportation, and Nature of Service to be Provided," which states that United plans to provide specialized parcel delivery service "limited to packages weighing not in excess of 50 pounds each, and measuring not more than 108 inches in length and girth combined." Mr. Nesholm, its vice-president, testified United anticipated "entering contracts with between 500 and 1500 shippers." There is substance in protestants' contention that United, if it were to operate directly or indirectly in the manner and on the scale set forth in Exhibit F and in Mr. Nesholm's testimony, would take from protestants revenues they now derive from the transportation of such parcels.

The record does not show the application was amended by striking therefrom the reference to merger and exhibits pertinent thereto. Moreover, much of the evidence relates to the nature and scope of United's operations elsewhere and its intentions with reference to operations in North Carolina. Hence, the views expressed by Commissioner Eller to the effect the entire proposal set forth *in the application* should have been determined are understandable. However, at the hearing, the only question presented to and decided by the Commission was whether the proposed sale and transfer of Caro-Line's stock should be authorized.

At the outset of the hearing applicants, through their counsel, stated they were not seeking authority to merge Caro-Line into United "at this time." Commissioner Worthington, speaking for the Commission, states: "Accordingly, this matter has been heard and determined on the one question of whether approval should be given

as provided by G.S. 62-111, reading in part, 'nor shall control thereof be changed through stock transfer or otherwise,' to the transfer and sale of the stock of Caro-Line by Leaseway to United." The order of the Commission simply authorizes Leaseway to sell the capital stock of Caro-Line to United. Appellees (applicants), in their brief, state: "Simply stated, this case involved only an application for approval of the sale of the capital stock of Caro-Line, a corporation which holds a contract carrier permit issued by the North Carolina Utilities Commission." Again: "The Commission correctly held that the nature of the operations to be conducted by Caro-Line after the stock sale is not relevant in a proceeding requesting approval for the sale of the stock."

Since the Commission, at the request of appellees, restricted consideration and determination to one question, namely, whether such sale of corporate stock should be authorized, we treat as surplusage the portion of the application and exhibits relevant to a merger of Caro-Line with United. The Commission expressed no opinion, nor does this Court, as to the extent of Caro-Line's presently existing franchise rights under Permit No. P-168, or as to any merger that may be hereafter presented for consideration. Questions relating thereto, if raised in subsequent proceedings, will be considered *de novo* and without prejudice on account of the decision in the present proceeding.

All of protestants' assignments of error have been considered. In the main, they relate to matters considered and discussed in this opinion. None discloses prejudicial error.

With the foregoing explanation as to the sole question considered and determined by the Commission, by Judge Morris and by this Court, the *order* of Judge Morris, which affirmed the *order* of the Commission, is affirmed by this Court.

Affirmed.

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

STATE OF NORTH CAROLINA v. CURTIS PEARSON, JR., (CASE No. 47-034)
AND
STATE OF NORTH CAROLINA v. THURLOW BELK, (CASE No. 47-035)

(Filed 29 March, 1967.)

1. Criminal Law § 87—

Denial of motions of defendants for separate trials under an indictment jointly charging them with the commission of a single offense, will not be held for error when at the time there is no reason to anticipate that the State would offer the admission of either defendant which might prejudice the others.

2. Searches and Seizures § 1; Arrest and Bail § 3—

Where the victim of a robbery gives a detailed description of his assailants and the vehicle used by them, and officers shortly thereafter apprehend a car and occupants fitting the descriptions, the circumstances furnish ample evidence of probable cause authorizing one of the officers in arresting defendants, and as an incident to the arrest, to make a search.

3. Criminal Law § 74—

The fact that during the progress of the trial one of defendants jointly indicted changes his plea from not guilty to guilty, does not require a new trial as to the other defendants when the court is careful to remove any prejudicial effect by charging the jury that the circumstance should not be considered against the co-defendants, that the fact that they were jointly indicted did not mean that defendants must all fail or succeed together, and that the State was not relieved of its burden of proving each individual defendant guilty by the evidence and beyond a reasonable doubt.

APPEAL by defendants from *Froneberger, J.*, December 5, 1966 Regular Criminal Session, MECKLENBURG Superior Court.

The defendants, Curtis Pearson, Jr. and Thurlow Belk, together with one Fred Berry, Jr., were indicted by the Grand Jury at the May 9, 1966 Criminal Session, Mecklenburg Superior Court. The indictment charged the three above named with the felony of common law robbery, by which the defendants forcibly took from one Albert William Jarrett the sum of $198.50 in money, his wallet, knife, glasses and identification card. The offense is alleged to have occurred on the outskirts of the City of Charlotte about midnight on April 10, 1966. The defendants were tried at the May 23, 1966 Session. From verdicts of guilty and prison sentences of 9 to 10 years, the defendants appealed. The case was heard in this Court at the Fall Term. New trials were ordered for error in the charge. The case is reported in 268 N.C. 320.

The defendants were again arraigned at the December 5 Criminal Session where they again entered pleas of not guilty. At or near the beginning of the State's evidence the defendant Berry, through

counsel, withdrew his original plea and entered a plea of guilty. The remaining defendants moved for a mistrial on the ground they were prejudiced by Berry's change of plea. The Court denied the motions. The defendants called and examined witnesses, but neither defendant testified in his own defense. The jury returned verdicts of guilty as to both defendants. From sentences of imprisonment of not less than 4 but not more than 8 years, each appealed.

T. W. Bruton, Attorney General, George A. Goodwyn, Assistant Attorney General, for the State.

Charles B. Merryman, Jr., for appellant Belk.

James J. Caldwell for appellant Pearson.

HIGGINS, J. The three defendants were arrested and charged in separate warrants with the common law robbery of Albert William Jarrett. However, they were jointly indicted in a single bill. The evidence, much of which is discussed in the former opinion of this Court, disclosed the following. About midnight the victim Jarrett informed a police officer that he had just been assaulted and robbed. His face was bloody and there was a knot on his head. He described his three assailants, one of whom had a white hat. They left the scene of the robbery in a white Buick automobile. An alarm was sent out over radio and three men, one with a white hat, in a white Buick which fitted the description, were halted by officers. As the officers sought to interrogate them, one attempted to hide a paper bag under the seat. The driver of the vehicle, Berry, consented for the officers to search the vehicle. The officers found, in addition to money on the person of the men, a knife, pocketbook, glasses and an identification card which Jarrett later identified as the items taken from him; some of these articles were in the paper bag.

At the first trial, upon arraignment, the defendants attempted to obtain separate trials by filing objections to the consolidation. Inasmuch as the three men were jointly charged in a single bill, we are treating the motions as requests for severance rather than objections to the joinder for trial. At the time the Court considered the motions for severance, the defendants were unable to show any reason in fact or law why there should be two or three trials for one offense alleged to have been committed by the three acting in concert. Neither of the accused made any incriminating admissions; hence, there was no reason to anticipate the State would offer the admission of either which might prejudice the others who were not parties to the admission. Such prejudicial admission is usually as-

signed as the ground for severance. The reason is altogether absent here.

When the arresting officer, a State's witness, sought to identify the articles found in the white Buick, the defendants objected on the ground the officer did not have a search warrant. A few minutes before, and a short distance away, the victim, his face bloody, complained to the officers of the robbery. He gave a detailed description of the men and the vehicle. After midnight, officers saw and stopped a white Buick with three men and a white hat riding in it. One of the men attempted to secrete a paper bag. These facts and circumstances furnished ample evidence of probable cause, authorizing the officers to make the arrest. As an incident to the arrest, the articles were obtained. *State v. Grant,* 248 N.C. 341, 103 S.E. 2d 339. In addition to the above, Berry, the driver of the vehicle, consented to the search.

Whether at the beginning, or at an early stage in the presentation of the State's evidence (the record does not disclose with certainty) the defendant Fred Berry, Jr., "requested the court to withdraw his plea of not guilty which he had previously entered and entered a plea of guilty of common law robbery. The State accepted the plea in open court in front of the jury. Subsequently the defendants Pearson and Belk moved the court . . . to declare a mistrial because of acceptance of such a plea in front of the jury. Motions overruled, and the defendants excepted." The defendants, by Assignment of Error No. 6, based on Exception No. 34, challenge as error the Court's failure to grant the motions for mistrial.

The defendant Berry, at the time he changed his plea, was represented by counsel. He and the appellants had been tried together, had been convicted at a prior term, and sentenced to 9 to 10 years in prison. This Court awarded a new trial for a narrow and technical but sound legal reason based on the condition of the record. The appellants do not suggest that the co-defendant Berry quit the contest for reason other than his realization that success was not in prospect. Berry's change of plea, of course, did not improve appellants' chances of acquittal. However, the Judge, careful to remove any prejudicial effect on the cause of the remaining defendants, charged the jury:

> "Another defendant, Fred Berry, Jr., was also indicted under the same bill of indictment but during the course of his trial and in the presence of the court he withdrew his plea of not guilty and entered a plea of guilty. This circumstance, ladies and gentlemen of the jury, you will in no wise hold against the defendants, Curtis Pearson, Jr., and Thurlow Belk, because the State is required to prove each individual guilty by the evi-

dence and beyond a reasonable doubt, irrespective of the fact that they may be charged in the same bill of indictment. It does not mean that they all rise and fall because they are charged the same in the same bill of indictment. That does not relieve the State of its burden of proving each individual guilty by the evidence and beyond a reasonable doubt."

The appellants cited as authority for a new trial the Court's opinion in *State v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876. In *Kerley,* a co-defendant, during the trial, withdrew his plea of not guilty and entered a plea of *nolo contendere.* The Court awarded a new trial not because of the plea but because of the prejudicial use the solicitor made of the plea in his argument to the jury. The solicitor argued that Kerley's friend and companion, Powell, by his plea of *nolo contendere,* had admitted participation in the crime. Kerley's counsel objected to the argument, the Court overruled the objection, and the solicitor amplified his argument. This Court stated: "* * * the withdrawal by Powell of his plea of not guilty and the tender and acceptance of a plea of *nolo contendere,* under the circumstances stated, would not of itself, standing alone, constitute prejudicial error as to Kerley." *State v. Kerley, supra; State v. Bryant,* 236 N.C. 745, 73 S.E. 2d 791; *State v. Hunter,* 94 N.C. 829.

In view of the Court's instruction, which we must assume the jury followed, the change of plea entered by Berry and the other matters which are the subjects of exceptive assignments, do not disclose any reason in law why the verdicts and judgments should be disturbed.

No error.

ANNIE E. BOYD, ADMINISTRATRIX OF THE ESTATE OF JAMES M. BOYD, DECEASED, V. JAMES T. WILSON.

(Filed 29 March, 1967.)

1. Negligence § 25—

In determining whether the evidence warrants the submission of the issue of contributory negligence to the jury, the evidence must be taken in the light most favorable to defendant and the evidence favorable to plaintiff disregarded, but if different inferences may be drawn from the evidence on the issue of contributory negligence, the issue should be submitted to the jury.

2. Automobiles § 49— Evidence of contributory negligence of passenger in continuing to ride with drunk driver held for jury.

Evidence tending to show that intestate engaged in a tour of night spots with defendant and others for a number of hours, during which

defendant drank a variety of intoxicants, that prior to the fatal accident in suit defendant drove the right wheels of the automobile off the hard-surface on several occasions, that defendant's passengers, including intestate, requested defendant to slow down, that one of the occupants, even though intoxicated, was aware defendant had been drinking by the way he drove and reacted, and that intestate on at least two occasions had opportunity to leave the vehicle without danger or even inconvenience, *held* sufficient to warrant the submission of the issue of intestate's contributory negligence in continuing to ride with an intoxicated and reckless driver.

APPEAL by plaintiff from *Fountain, J.*, October 1966 Civil Session of NEW HANOVER.

Civil action by plaintiff administratrix to recover for the wrongful death of her son, James Melvin Boyd. The deceased, a guest passenger in an automobile owned and operated by defendant, was crushed underneath the automobile when it left the right side of the road, rolled over, and threw deceased from his seat in the automobile. Defendant by his answer denies he was negligent and asserts in one of his further answers that he was so incapacitated by intoxication and lack of sleep that plaintiff's intestate was contributorily negligent in riding with him when he knew, or should have known, it was dangerous to do so, and that plaintiff's intestate should have left the automobile when he had opportunity to do so on at least two occasions.

Plaintiff's only witness concerning the accident and the preceding events was James Junior Miller, who testified substantially as follows: He and defendant worked at the same place, and on the evening of 4 October 1963 they got off work around 11 o'clock and went to the 602 Club. From there they proceeded to Highland Park, a colored amusement center, where they purchased and drank one-half pint of "white" whiskey. They then continued to Little Paradise Grill, where he and defendant purchased and consumed a quart of beer between them. Departing from Little Paradise Grill, they encountered Harlee Johnson, and the three of them went to Love Grove Tavern, where they had a drink of whiskey. "When we left Love Grove place, I think we came back down Nixon Street. I think that is where we got up with Julius Joe, if I am not mistaken. . . . I guess then it was one o'clock or after. . . . I don't guess by then I care what time it was." All of them continued to Mrs. Shavers' place, where one Leo Williams and plaintiff's intestate joined the group. From there they all proceeded to Malloy's Place. While at Malloy's Place, witness Miller proposed going to East Arcadia to see some girls, and they then traveled to the Dixie Vim Service Station, where Miller and Wilson furnished money to buy gas. When they left the service station for East Arcadia, de-

fendant Wilson was driving the automobile, and Boyd, Miller and three others were in the automobile. "After we left the station, we were on the other side of Riegel when I first dozed off. I know because I was awoke when we passed Riegel. James drove good when we were leaving Wilmington. He was a good driver then. The fastest speed he got to was, I guess, doing 70, at least 70 or over, I guess. That was after he passed Riegel. He drove good before he got to Riegel. . . . I did not see Boyd drink nor Leo nor Julius Joe. . . . I knew that Wilson had been drinking and I told them in court that I knew that. I told them in court that I could tell it by the way he acted, drove, and reacted. That is true."

The witness further testified that the right wheels of the automobile left the road on several occasions. Wilson was asked by his passengers, including Boyd, to slow down, to which he replied, "Cool it." Shortly thereafter, the wreck occurred and Boyd died before the ambulance arrived.

On cross-examination, the witness admitted he signed a statement which tended to contradict his testimony, but denied he said or authorized the contradictory matter set out in the statement.

Defendant offered no evidence. Issues of negligence, contributory negligence and damages were submitted to the jury. The jury answered the issue of contributory negligence in favor of defendant, and from judgment on the verdict plaintiff appealed.

Burney & Burney and Rountree & Clark for plaintiff.
W. G. Smith for defendant.

BRANCH, J. The sole question presented by this appeal is whether there was sufficient evidence to warrant the submission of the issue of contributory negligence to the jury. "In passing on the question, we must take the evidence in the light most favorable to the defendant, disregarding that which is favorable to the plaintiff. 'If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to plaintiff and others to the defendant, it is a case for the jury to determine.'" *Wilson v. Camp*, 249 N.C. 754, 107 S.E. 2d 743. "'The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court.'" *Absher v. Raleigh*, 211 N.C. 567, 190 S.E. 897.

In the case of *Beam v. Parham*, 263 N.C. 417, 139 S.E. 2d 712, the evidence tended to show that when an automobile operated by the defendant was about five miles from the home of plaintiff's intestate, the owner of the car insisted that he drive and changed seats for that purpose; all persons in the car had drunk beer in the af-

ternoon before going to a dance. The evidence tended to show that plaintiff's intestate did not know the owner had drunk more beer at the dance hall, and although she knew he had been drinking, the defendant did not appear to be intoxicated. Plaintiff's intestate and other occupants of the car repeatedly remonstrated with the owner concerning the manner in which he operated the car and asked him to stop and let them get out. The question presented was whether plaintiff's intestate, a 40-year old woman, was guilty of contributory negligence in remaining in the automobile rather than facing the possibility of being left late at night on a rural road when the defendant took over the driving. Holding that this was a question for the jury, the Court stated:

> "When a gratuitous passenger becomes aware that the automobile in which he is riding is being persistently driven in a reckless and dangerous manner, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded, to request that the automobile be stopped and he be permitted to leave the car. He may not acquiesce in a continued course of negligent conduct on the part of the driver and then collect damages from him for injury proximately resulting therefrom. . . . This duty is not absolute but is dependent upon circumstances. Where conflicting inferences may be drawn from the circumstances, whether the failure of the passenger to avail himself of opportunity for affirmative action for his own safety should constitute contributory negligence is a matter for the jury. It is not the duty of a guest, under all circumstances of negligent or reckless driving, to ask to be allowed to leave the vehicle. A guest who feels endangered by the manner in which a car is operated cannot ordinarily be expected to leap therefrom while it is in motion. A passenger is required to use that care for his own safety that a reasonably prudent person would employ under the same or similar circumstances. Whether he has measured up to this standard is ordinarily a question for the jury. . . ."

Another leading case in North Carolina on this point is *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543, where the evidence tends to show that three teen-age boys at about 3:30 A.M. agreed to ride with defendant, a man 29 years of age, with the understanding that one of the boys would drive. En route, defendant objected to the slow speed and took over the operation of the car. There was no evidence that the boys cautioned, warned or objected to the manner in which he operated the car. The court recognized that the boys could have remained in a country churchyard at 4:00 o'clock

A.M., but suggested that the matter should be considered as to how things reasonably appeared to the boys when they were in the churchyard. Holding that the evidence did not show contributory negligence as a matter of law, but did require submission of the issue of contributory negligence to the jury, the Court, in part, said:

> " 'The passenger is required to use that care for his own safety that a reasonably prudent person would employ under same or similar circumstances. Whether he has measured up to this standard is ordinarily a question for the jury.' . . . In 5 Am. Jur., Automobiles § 712, it is stated: 'The duty of an invited passenger in an automobile is so dependent upon special circumstances, and upon such varied and conflicting notions of the propriety of interference in the management of the automobile, that in cases of accident the courts are loath to hold such a passenger guilty of contributory negligence as a matter of law. Ordinarily, the question of the contributory negligence of a guest in an automobile involved in a collision, is for the jury to decide in the light of all the surrounding facts and circumstances.' "

The rules recognized by this Court for determining whether a guest passenger who voluntarily enters or remains in an automobile operated by a driver he knows to have been drinking intoxicants, or who has been driving in a reckless manner, are clearly set out in many applicable cases reviewed by Parker, J. (now C.J.) in *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33.

In the instant case the evidence discloses that plaintiff's intestate was engaged in a tour of night spots with defendant and others for several hours. The only witness who had been "sharing the cups" with plaintiff's intestate was in such a state that he "didn't care what time it was" and in his condition was able to form an opinion that Wilson had been drinking by "the way he acted, drove, and reacted." The evidence does not reveal that Boyd had been drinking. Certainly he was in better position to observe and know Wilson's condition than witness Miller. The evidence reveals that Boyd had at least two opportunities to leave the automobile which defendant was operating without danger or even inconvenience.

Applying the rules of evidence recognized and enunciated by this Court, there is ample evidence to require the submission of the question of plaintiff intestate's contributory negligence to the jury.

The finding of negligence against the defendant and contributory negligence against plaintiff, under a proper charge by the trial judge, settled this controversy. We find

No error.

STATE v. AZOR BUTLER.

(Filed 29 March, 1967.)

1. Conspiracy § 3—

Criminal conspiracy is the unlawful agreement of two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and the agreement and not the consummation of the agreement is the offense.

2. Conspiracy § 5—

In a prosecution for criminal conspiracy the acts and declarations of each conspirator in furtherance of the common design are competent against all.

3. Conspiracy § 6—

A conspiracy may be proven by circumstantial evidence.

4. Social Security and Public Welfare— Evidence of conspiracy to defraud Welfare Department held sufficient to be submitted to jury.

Evidence that a welfare recipient was advised that it was his responsibility to inform the Department of any change of address, that while he was living with relatives he was imprisoned, that during imprisonment he advised one of his relatives to continue cashing his welfare checks and to spend some of the money for designated purposes and save the rest for the recipient, that upon the visit of a welfare agent to the recipient's home the wife of the recipient's cousin advised the agent that the recipient was on a visit, and that pursuant to the recipient's instructions, recipient's cousin cashed the checks, *is held* sufficient to be submitted to the jury in a prosecution of recipient and his relatives for conspiracy to defraud the Welfare Department. G.S. 108-73.2(d).

5. Criminal Law § 162—

Defendant's objection to testimony of a witness which included a conclusion of the witness was sustained by the court as to the conclusion. *Held:* Since the conclusion related to a subordinate matter and the objection thereto was sustained, there was no substantial prejudice to defendant.

6. Criminal Law § 107—

The act of the court in reading the statute upon which the indictment was based and pointing out the material parts which applied to the charge against the defendants cannot be held erroneous as amounting to a peremptory instruction of guilt, since such instruction constituted a mere discharge of the court's duty to declare and explain the law of the case. G.S. 1-180.

7. Criminal Law § 112—

A misstatement of the contentions of the parties must be brought to the court's attention in apt time in order for an exception to be considered.

APPEAL by defendant from *Parker, J.*, at October 1966 Term of SAMPSON County Superior Court.

Azor Butler, Lugenia Butler and Carl Butler were charged in the following bill of indictment with conspiring to defraud the Welfare Department of Sampson County in violation of G.S. 108-73.12d:

"The jurors for the State upon their oath present, That Azor Butler, Lugenia Butler and Carl Butler, late of the County of Sampson beginning on the 1st day of February, 1965, in the year of our Lord one thousand nine hundred and sixty-five, through May, 1966, with force and arms, at and in the County aforesaid, that Azor Butler has been a welfare recipient from the Welfare Department of Sampson County since October, 1954; that during the year 1957, Azor Butler started residing in the home of Paul and Lugenia Butler and their son, Carl Butler, and continued to receive welfare assistance monthly from the Welfare Department of Sampson County; that at the January term, 1965, of the Superior Court of Sampson County, the said Azor Butler was sentenced to prison; that the Sampson County Welfare Department had no notice or knowledge that Azor Butler was no longer residing in the home of Paul and Lugenia Butler, and had been sentenced to prison; that during the time the said Azor Butler was serving his prison term, the Sampson County Welfare Department continued to mail checks monthly to Azor Butler which said checks went to the home of Paul and Lugenia Butler; that Azor Butler did unlawfully and wilfully fail to inform the Sampson County Welfare Department that he was no longer residing in the home of Paul and Lugenia Butler, but was serving his prison sentence; that the said Azor Butler had been advised by employees of the Sampson County Welfare Department that any time his address changed or he moved from Sampson County, that it was his responsibility to notify the said Welfare Department of such change; that the said Azor Butler, Lugenia Butler and Carl Butler did unlawfully, wilfully and fraudulently plan, conspire and confederate, each with the other, to cheat and defraud the Sampson County Welfare Department by failing to notify said Welfare Department that Azor Butler was no longer in Sampson County, and was serving a prison term, and did unlawfully, wilfully and fraudulently receive and accept the monthly checks mailed to Azor Butler for welfare assistance, they knowing at the time that the said Azor Butler was not entitled to receive said welfare funds, and did unlawfully, wilfully and fraudulently in furtherance of said conspiracy endorse the name of Azor Butler and cash the said monthly checks in the amount of $40.00 each payable to Azor Butler, beginning with the February, 1965, check and each monthly check thereafter through and including the May, 1966, check, all of said checks being in the sum of $40.00 each, with the

fraudulent intent to cheat and defraud the Sampson County Welfare Department, and did unlawfully, wilfully and fraudulently cheat and defraud the said Sampson County Welfare Department out of the sum of $40.00 per month beginning with the month of February, 1965, and continuing through the month of May, 1966, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The State offered through three employees with the Welfare Department evidence that Azor had been told that he should notify the department of any change in his address; that he failed to do so, and that they had no knowledge of his imprisonment until after his release. The checks were mailed to him monthly and were endorsed and cashed; that Carl Butler in the presence of Azor Butler admitted that he had cashed fourteen of the checks of $40 each; and that his father, Paul Butler, who was dead at the time Carl made this statement, had cashed one of them. In June 1965, while Azor Butler was in prison, Miss Carol Reaves of the Welfare Department went to the home of Lugenia Butler in connection with the payments to Azor Butler. She asked Lugenia Butler if Azor Butler was residing in the home, or where he was at this time. The reply was: "Well, he is in Fuquay Springs visiting relatives and has been there a week." Azor Butler had been living for many years at the home of Paul Butler, who was his first cousin. Lugenia Butler was Paul's wife, and they were the parents of Carl Butler. Carl testified that when the first check came in after Azor Butler had gone to prison he and his father went to the prison to see Azor. They took the check with them and told Azor it had come and asked him if it were still supposed to come while he was in prison. He said that Azor told them to cash the check and save the money, and when he (Azor) would need some, to send it to him when he asked for it. Azor Butler told Paul to cash the first check and leave some money in the office for him. He said Azor told him to cash the other checks, which he did, and would mail money to Azor from time to time while he was in prison. Carl Butler further testified that after his father had been sick about two months he went to see Azor Butler again and told him about his father's condition, and that Azor said: "Your father helped me along when I was sick, so when he is sick use some of the money to help his medical bills and doctor's bills"; that when his father died in December, 1965, Azor Butler got out of prison and came to the funeral, at which time Carl gave him some money. He said when the warrant was taken out he had $200 of Azor's money on hand. He said he did not know it was wrong to cash the checks and did not find it out until

the warrant was issued. He said his mother did not cash any of the checks or get any of the money.

Azor Butler testified that he did not understand that the checks were supposed to stop when he went to prison, and that this had not been explained to him; that he went only to the second grade, and cannot read or write; that if he had known he would have notified the Welfare Department. He corroborated Carl's evidence to the effect that he had told Carl to cash the checks and save the money for him; and that he had told Carl to use some of the money for Paul Butler's medicine and doctor; that he told him if he needed it to just use it and replace it back whenever he got straightened out. He further said he told the Welfare authorities that he had had Carl Butler to cash the checks and save the money for him.

Lugenia Butler testified that she had nothing to do with cashing the checks or any knowledge that the checks were being cashed; that she heard Carl say that Azor Butler had told him to cash the checks and to use some of it if needed; and that Azor had said to use some of the money to help pay her husband's expenses.

The jury returned a verdict of guilty as to all three defendants upon the charge of conspiracy as contained in the bill of indictment. The court imposed suspended sentences as to Carl and Lugenia Butler, who did not appeal. Azor Butler was given an active sentence of two years, and from it he appealed to this Court.

Attorney General T. W. Bruton, Staff Attorney Wilson B. Partin for the State.

Clifton W. Paderick for defendant appellant.

PLESS, J. G.S. 108-73.12d provides, in pertinent part, "Whoever knowingly obtains * * * continuation of assistance * * * when such person is ineligible and not entitled to such assistance * * * by means of failing to disclose a material fact * * * or whoever * * * aids and abets any person to * * * a continuation of assistance * * * when such person is ineligible and not entitled to such assistance * * * by failing to disclose a material fact or by any fraudulent scheme, plan, device, or impersonation shall be guilty of a misdemeanor * * *."

The defendants were charged with conspiring to violate this statute.

In *S. v. Shipman*, 202 N.C. 518, 163 S.E. 657, the Court succinctly states the law of conspiracy: "The gist of a criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme — the agreement to do an unlawful act or to do a

lawful act in an unlawful way or by unlawful means — and it is said that the crime is complete without any overt act having been done to carry out the agreement * * * the consummation of the agreement without any overt act constitutes or may constitute the agreement: If two or more persons conspire to do a wrong, this conspiracy is an act 'rendering the transaction a crime,' without any step taken in pursuance of the conspiracy. * * * One who enters into a criminal conspiracy, like one who participates in a lynching, or joins a mob to accomplish some unlawful purpose, forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. 'Every one who enters 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.' * * * But to make the acts and declarations of one person those of another, or to allow them to operate against another or others, it must appear that there was a common interest or purpose between them and that said acts were done, or said declarations uttered, in furtherance of the common design, or in execution of the conspiracy."

A conspiracy may be proven by circumstantial evidence. "The existence of the unlawful agreement need not be proven by direct testimony. It may be inferred from other facts, and the conditions and circumstances surrounding. 11 Am. Jur. 548, 570. 'The results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists.'" *S. v. Andrews,* 216 N.C. 574, at 577, 6 S.E. 2d 35.

Considering the State's evidence in the strongest light, it shows that Azor Butler had been told by Mrs. Grace Vann of the Sampson County Welfare Department that: "If there was a change at all in his situation that he was to report it; that is, if he moved his domicile anywhere that was to be reported." While we are considering only the case as to Azor Butler, since Lugenia and Carl Butler did not appeal, the evidence shows a guilty knowledge on the part of Lugenia in that while Azor was in prison she told Miss Carol Reaves

in response to her question as to whether Azor was residing in the home, or where he was, "He is in Fuquay Springs visiting relatives, and has been for a week."

Carl Butler said that when the first check came after Azor had gone to prison, Lugenia Butler and his father had gone to see Azor and asked him if the money was still supposed to come; that Azor said to cash the checks, save the money, and send it to him (Azor) when he asked for it. Later, when Carl's father had become ill, Carl again went to see Azor who told him to use some of the money to help pay his father's bills for his sickness. Azor, himself, corroborated Carl in the above statements.

While all the defendants denied knowing that it was wrong to cash the checks, the evidence quoted above is ample to be submitted to the jury and to permit a finding by the jury that the three knew that cashing the checks and using the money was a violation.

Several of the exceptions noted by the defendant are more applicable to the defendants who did not appeal than to Azor. Those that justified consideration on behalf of Azor are as follows: Mrs. Roy Gunter of the Welfare Department testified that after she had learned that the checks had been cashed while Azor was in prison, "I came back to my office and went over the record carefully, etc., and got our manual out and reviewed the policy with regard to recipient fraud. We have a policy in the public assistance manual which refers to what we call recipient fraud. And I reviewed the record carefully and it seemed to me there had been some evidence of violation." Upon objection by the defendant, the Court sustained it "as to any conclusions". We are of the opinion that the subject of these exceptions constituted no substantial prejudice as to the defendant, and they are not sustained.

In the charge the Judge read the statute upon which the indictment was based and then pointed out the material parts which applied to the charge against the defendants. The defendant contends that this amounted to a peremptory instruction of guilt as to at least one of the defendants and constituted error. This instruction was in keeping with the requirements of G.S. 1-180 which makes it the duty of the Judge to declare and explain the law of the case.

The defendant further excepts to the failure of the Court to refer to Azor Butler's illiteracy in his charge; to the Court's failure to define "concealment", and to the statement of contentions on behalf of the State. However, none of these matters were called to the attention of the Court at the time and the defendant did not request additional contentions or statements of the law. "If the defendants desired fuller or more specific instructions than those given in the

general charge, they should have asked for them, and not waited until the verdict had gone against them. *Simmons v. Davenport,* 140 N.C. 407, and if their contentions were not properly stated, the defendants should have called the attention of the court to any omissions or errors, so that they could have been supplied or corrected. *Mfg. Co. v. Building Co.,* 177 N.C. 103." *Sherrill v. Hood, Comr. of Banks,* 208 N.C. 472, 181 S.E. 330.

A careful perusal of the charge discloses that the evidence and contentions of the defendant were fairly and sufficiently stated and we find no part which constitutes error.

Upon consideration of all exceptions and authorities cited on behalf of the defendant, we are of the opinion that the evidence of his guilt supports the verdict, and that he has had a fair trial in which there was

No error.

STATE v. BOBBY ROSS.

(Filed 29 March, 1967.)

1. Constitutional Law § 29; Jury § 3—

The burden is upon defendant upon his challenge to the array and motion to dismiss the special venire to prove his ground of objection that there had been racial discrimination in the exclusion of Negroes from the jury list.

2. Same—

Where, upon defendant's challenge to the array and motion to dismiss on the ground of racial discrimination in the exclusion of Negroes from the jury list, defendant's evidence tends to show that the jury list was selected from the names appearing on the county tax lists, without discrimination as to race, and further, that the county officials sought to obtain the names of Negro residents of the county, not included in the tax books, to place them on the jury list, defendant's evidence fails to show racial discrimination in the selection of the jury. Fourteenth Amendment to the Constitution of the United States.

3. Searches and Seizures § 1; Constitutional Law § 33—

Where, upon arrest of defendant in his home, defendant selects and puts on a particular pair of trousers, it is not error, nothing else appearing, to admit the trousers in evidence together with testimony as to the condition or contents of the garment, there being no element of unlawful search or seizure.

4. Criminal Law § 71—

Upon defendant's objection to a question in regard to an incriminating statement made by defendant while under arrest, the court should, upon

a *voir dire* hearing, ascertain whether the incriminating statement was voluntarily made after defendant had been apprized of his constitutional rights, and the admission of the statement in evidence without any hearing must be held for prejudicial error.

APPEAL by defendant from *Houk, J.,* at the July 1966 Session of CLEVELAND.

The defendant was indicted upon two counts, the first charging first degree burglary at the dwelling house of Oscar Patterson, Sr., in Shelby, and the second charging assault upon Oscar Patterson, Sr., with a deadly weapon with intent to kill, inflicting serious bodily injuries, not resulting in death. The jury returned a verdict of guilty on both counts, with a recommendation of life imprisonment upon the burglary charge. He appeals from a judgment sentencing him to imprisonment for life upon the charge of burglary, and imprisonment for 10 years upon the assault charge, the second sentence to begin at the expiration of the first.

The defendant contends that he should be granted a new trial on three grounds: (1) The denial of his motion to dismiss the special venire summoned after nine jurors had been selected from the regular jury panel, and the overruling of his challenge to the array; (2) the admission in evidence, over his objection, of a pair of trousers which he contends was taken from him in the course of an illegal search and seizure; and (3) the admission in evidence, over his objection, of testimony by a police officer as to a statement made by the defendant during police interrogation following his arrest.

The defendant alleged as the basis for his motion to dismiss the special venire and his challenge to the array that members of the Negro race, of which he is a member, were systematically excluded from jury service. The only evidence offered by him upon this question consisted of his examination of certain county officials. Their testimony was to the effect that the jury list, from which the names of the special venire were taken, included the names of all persons shown upon the tax lists of the county, without regard to race, plus additional names obtained by the use of telephone directories and inquiries to Negro school principals and Negro police officers. The testimony was that no person, whomsoever, was eliminated from the jury list by reason of race. The record does not indicate the racial composition of the jury by which the defendant was tried.

Testimony offered by the State was to the following effect:

Oscar Patterson, Sr., age 77, was awakened by a noise in his home at approximately 1:30 a.m. Going to investigate, he found in one of the rooms a Negro man who had broken into and entered the house. A scuffle ensued in which the intruder, armed with a knife,

cut Mr. Patterson severely about the face and other parts of the body. The intruder then fled, leaving upon the floor of the Patterson home a hat, which had fallen from his head during the scuffle. At the same time, two police officers were patrolling the area in a police car. They observed the defendant, who was well known to them, running rapidly not far from the Patterson residence. The officers gave chase but the defendant eluded them, crawling through a hole beneath a fence. The next day a blood stained knife was found beside this hole under the fence. Police officers went to the residence of the defendant's mother, with whom he lived, arriving there about 15 minutes after the defendant eluded them at the fence. They knocked on the door, identified themselves as police officers, stated that they wanted to see the defendant, and were invited to enter by the defendant's mother. They had no search warrant. They observed the defendant lying on a couch, apparently asleep. They shook him and told him he was under investigation and instructed him to get dressed. He selected and put on the trousers which were lying beside him and otherwise dressed himself. He accompanied the officers to the City Hall and was there placed under arrest. The following morning, they took these trousers from him, having obtained from his residence other clothing which they gave him to wear.

The hat found in the Patterson residence and the knife found beside the hole under the fence were placed in evidence without objection. The trousers were placed in evidence over objection. An expert witness testified that stains upon the knife and in one pocket of the trousers were made by human blood. Over objection, a police officer was permitted to testify that while the defendant was in custody, following his arrest, he showed the hat to the defendant and the defendant stated it was his hat. There was no evidence that, prior to this statement, the defendant had been warned of his right to remain silent and make no statement to the officers.

Subsequent to the defendant's arrest, Mr. Patterson picked him out of a lineup at the police station and identified him as the intruder. He also so identified the defendant in the courtroom.

The defendant did not testify but his mother testified in his behalf, stating that he was asleep in her home at the time the alleged offenses occurred.

Attorney General Bruton and Staff Attorney Vanore for the State.

C. B. Cash, Jr., for defendant appellant.

LAKE, J. There was no error in the denial of the defendant's

challenge to the array and motion to dismiss the special venire. The burden was upon the defendant to show the discriminatory exclusion of Negroes from the jury list, which he alleges as the basis for his motion and challenge. *State v. Corl*, 250 N.C. 258, 108 S.E. 2d 615. This he failed to do. On the contrary, his evidence is to the effect that there was no such discrimination. The Supreme Court of the United States has held that to select a jury panel from a list composed of persons whose names appear on the county tax lists, without discrimination as to race, does not violate the Fourteenth Amendment to the Constitution of the United States. *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. ed. 469. In addition, the evidence offered by the defendant shows that the county officials, by inquiries to school principals and police officers, and by use of telephone and city directories, sought to obtain the names of Negro residents of the county whose names were not included upon the tax books. Furthermore, the record does not disclose the racial composition of the jury by which the defendant was tried.

There was no error in overruling the defendant's objection to the introduction in evidence of the trousers taken from the defendant while he was in custody. These trousers were not obtained by a search of his mother's residence. They were selected and put on by the defendant when the officers aroused him from the couch and told him to get dressed. After he was placed under arrest and given other clothes to wear, these trousers were taken and examined for blood stains. It is not an unlawful search or seizure for officers to take from the person under arrest and to examine an article of clothing worn by him. See: 47 Am. Jur., Searches and Seizures, § 53; 5 Am. Jur. 2d, Arrest, § 73; 6 C.J.S., Arrest, § 18. It is not error, nothing else appearing, to admit in evidence, over objection, testimony as to the condition or contents of such garments discovered by such examination or to admit in evidence the garment itself.

The defendant is, however, entitled to a new trial because of the admission in evidence, over his objection, of testimony by the police officer concerning the alleged statement by the defendant as to his ownership of the hat found on the floor of the Patterson residence following the flight of the intruder. The testimony that the defendant, upon being shown the hat, stated it was his was obviously prejudicial since it tended to identify the defendant with the intruder and thus to incriminate him.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694, the Supreme Court of the United States said:

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against

self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. *But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.*" (Emphasis added.)

The record does not disclose that prior to the making of this incriminating statement the defendant was advised of his right to remain silent. In *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1, we said:

"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. [Citations omitted.] The trial judge should make findings of fact with reference to this question and incorporate those findings in the record."

The record discloses that when the officer-witness was asked by the solicitor what statement, if any, the defendant made to him with reference to the hat, the defendant objected and requested to be heard. The objection was overruled without any hearing of the defendant or any inquiry into the voluntariness of the confession or into the advice, if any, given him concerning his right to remain silent.

New trial.

JUDY SMITH CARSON, PETITIONER, v. A. PILSTON GODWIN, JR., COMMISSIONER OF NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES, RESPONDENT.

(Filed 29 March, 1967.)

1. Automobiles § 2— Licensee continuing to drive after receipt of notice of suspension of license may not object to statutory penalties.

Where the licensee admits she received notification of suspension of her license on the ground of want of liability insurance on her vehicle, and relies on her insurance agent to correct his error in failing to furnish the Commissioner with notice of the actual existence of liability insurance on her car, and the licensee's license is again successively suspended for subsequent moving violations of the motor vehicle statutes, *held*, the suspensions of license were lawful, even though the suspensions would not have been entered had the Commissioner been properly advised of the existence of liability insurance on the vehicle, since licensee, with notice of suspension, continued to drive, and the failure of proof of insurance was the dereliction of her own agent.

2. Same—

A motor vehicle operator's license may be suspended or revoked only in accordance with statutory provisions, and it is better practice to advise the licensee of suspension or revocation of license by registered letter with request for return receipt in order to insure compliance with the constitutional requirement of notice.

APPEAL by Petitioner from *Anglin, J.*, May 9, 1966 Non-Jury Civil Session, GASTON Superior Court.

The Petitioner, Judy Smith Carson, instituted this proceeding on March 10, 1966, praying that the Court review the orders of Respondent, A. Pilston Godwin, Commissioner of Motor Vehicles, suspending as of May 21, 1965, September 28, 1965 and September 28, 1966 Petitioner's driver's license, upon the ground the suspension orders were contrary to law.

The Commissioner filed answer alleging the suspension orders were lawful and required by the statutory provisions applicable to the facts before the Commissioner.

The proceeding came on for hearing before Judge Anglin upon the stipulations and evidence offered by the parties. From the stipulations and the evidence the Court found these pertinent facts: Prior to May 21, 1965 Petitioner had a valid North Carolina driver's license. She owned a 1955 Buick automobile upon which she had obtained liability insurance, however, the insurance policy, for some reason, perhaps error of the insuring agency, was issued in the name of Petitioner's mother, Helen Fisher Smith. On February 21, 1965 Petitioner, while operating the Buick on the streets of Charlotte, was involved in an accident. The damage she caused was approximately $125.00. The Commissioner did not receive a report

of the accident. Effective May 21, 1965 the Commissioner, as provided in G.S. 20-279.5(b), suspended Petitioner's driver's license. The notice of suspension was by letter directed to Judy Carson Smith at her Gaston County address as shown by the Commissioner's records. On September 26, 1965 the Petitioner was convicted in the Charlotte City Court on a charge of speeding 50 miles per hour in a 40 mile per hour zone. Effective September 28, 1965 the Commissioner revoked for one year Petitioner's driver's license as required by G.S. 20-28.1. On November 6, 1965 the Petitioner was again convicted in Charlotte of reckless driving. The Commissioner revoked the license for an additional year. The Petitioner instituted this proceeding seeking relief from the orders of suspension, contending she had a valid insurance policy on the Buick at the time of the accident on February 21, 1965 and she made out a report of the accident which she mailed to the Department. She went to Florida immediately after the accident and did not return until the last of May, 1965, at which time she found the suspension order. Immediately she called her insurance agent, advising him of the suspension order for failing to show financial responsibility. The agent advised her he had failed to mail the form showing such responsibility but would do so immediately and straighten out the controversy with the Commissioner. The agent, Mr. Cannon, testified, corroborating the Petitioner's statement. He further testified that at the time of the accident the Buick was covered by valid insurance. He also testified that he had made the report to the Commissioner showing the insurance but that he had neglected to mail it and the oversight was caused by the fact that it was by mistake returned to his file.

At the conclusion of the hearing, Judge Anglin found facts to be as above summarized, adjudged the suspension orders to be valid, and refused to vacate them. The Petitioner excepted and appealed.

Joseph B. Roberts, III, for petitioner appellant.

T. W. Bruton, Attorney General, Wilson B. Partin, Jr., Staff Attorney for respondent appellee.

HIGGINS, J. Apparently the original suspension order for failure to show financial responsibility for the damage caused by the accident which occurred in Charlotte on February 21, 1965 would not have been entered had the Commissioner known of the insurance coverage. It was the fault of the Petitioner or her insurance agent that fact of coverage was not made known to the Commissioner. Thereafter the subsequent suspensions were entered for mov-

ing violations committed during the period of suspension. *Robinson v. Casualty Co.*, 260 N.C. 284, 132 S.E. 2d 629.

The Petitioner admitted on direct examination that she received the notice of the Department's first order of revocation when she returned from Florida the last of May, 1965. After receiving this notice she got in touch with her insurance agent who had promised to furnish the Commissioner with the proper evidence of insurance coverage. She relied on this promise, assuming that the revocation would be lifted. Had she been correct in these assumptions and the showing of financial responsibility, the subsequent suspension orders would not have been entered.

The Respondent's evidence and record of notice to the Petitioner prior to the first suspension order are not very satisfactory. An open letter to a former address may or may not be delivered, especially if there is a change of address. If the mails are to be employed for the transmission of notice, it would seem that a registered letter and a return receipt showing delivery would be a more complete compliance with the requirements of notice — essential of due process. "A license to operate a motor vehicle on the public highways of North Carolina is a personal privilege and a property right which may not be denied a citizen of this State who is qualified therefor. . . ." It may be suspended or revoked only in accordance with the statutory provisions. *In Re Donnelly*, 260 N.C. 375, 132 S.E. 2d 904; *Beaver v. Scheidt*, 251 N.C. 671, 111 S.E. 2d 881. In the instant case, however, the Petitioner admitted she received the revocation notice when she returned from Florida the last of May. She made the mistake of relying on her insurance agent to transmit the required report showing the Buick was covered by valid insurance. The agent's failure to transmit the report does not restore the right to operate a motor vehicle upon the public highway. The subsequent moving violations during the period of the first suspension made revocation for an additional period mandatory under G.S. 20-28.1.

In this case the evidence is sufficient to support the facts found by Judge Anglin and they in turn sustain the conclusions of law and the judgment entered in the Superior Court. The judgment is

Affirmed.

STATE v. ZEB VANCE CAUSBY.

(Filed 29 March, 1967.)

Criminal Law § 136—

Even though the solicitor takes a *nolle prosequi* on the charge of unlawful possession of intoxicating liquor and the jury acquits defendant of the charge of possessing intoxicating liquor for the purpose of sale, the court, upon supporting evidence at a *de novo* hearing, may find on substantially the same evidence that defendant had in his possession intoxicating liquor in violation of the terms of suspension of a prior judgment, the adjudication that defendant's possession was not unlawful not being inconsistent with a finding that defendant had possession of intoxicating beverages in violation of the terms of suspension. G.S. 18-11, G.S. 18-32(2).

APPEAL by defendant from *Clarkson, J.*, November 1966 Session of BURKE.

At the February 1966 Session of the Superior Court of Burke County, defendant was convicted of the illegal possession of intoxicating liquors for the purpose of sale. The judgment of the court was that he be imprisoned for fifteen months. By and with the consent of defendant and his counsel — and at their request —, the prison sentence was suspended for five years from February 18, 1966, upon the conditions that defendant not violate any of the laws of the State, especially the prohibition laws; that he not have any whiskey, beer, wine, or other alcoholic beverages on his premises *for any purpose whatever;* and that he pay a fine of $500.00.

At the November 1966 Session of the Superior Court, defendant was tried upon a bill of indictment which charged, in two counts, that on October 1, 1966, he unlawfully had in his possession intoxicating liquors for the purpose of sale and unlawfully possessed intoxicating liquors for beverage purposes. At the conclusion of the State's evidence, the solicitor took a *nolle prosequi* on the count charging unlawful possession of intoxicating liquors. The jury acquitted defendant of the charge of possessing intoxicating liquors for the purpose of sale.

The record before us does not contain evidence produced at this trial. On November 22, 1966, the day the verdict was returned, the solicitor served written notice upon defendant (as required by G.S. 15-200.1) that he would move the court to revoke the suspension of the prison sentence imposed upon him at the February Session. The reason assigned was that, on October 1, 1966, defendant had in his possession on his premises intoxicating liquors and beer in violation of the conditions of suspension.

When the solicitor's motion came on for hearing, defendant objected to the introduction of evidence that defendant possessed alcoholic beverages on October 1, 1966, upon the ground that, on the

preceding day, the jury had acquitted defendant of a charge of possessing intoxicants for the purpose of sale, and the solicitor had *nolle prossed* a charge of illegal possession of alcoholic beverages. The court overruled this objection, and the State offered evidence which tended to show:

Under the authority of a duly issued search warrant, two police officers of the City of Morganton and an officer of the Alcoholic Beverage Control Board searched defendant's premises for beer and intoxicating liquors on October 1, 1966. They found 60 sixteen-ounce cans of beer in an outhouse to which defendant had the key. In his living room, behind four men who were sitting on the couch, they found four fifths of taxpaid whiskey. These bottles were unopened. There was also a fifth from which one-third of the content was gone, and some glasses with a strong odor of alcohol in them. Five or six men and a woman were in the house. Defendant told one of the officers that he had bought the liquor at the ABC store earlier the same day. The stamp on the bottles showed the date of purchase to be October 1, 1966.

Defendant offered no evidence.

At the conclusion of the hearing, the judge found that defendant, on October 1, 1966, had violated the terms upon which the sentence imposed upon him at the February Session had been suspended, by having in his possession on the premises where he and his wife lived, 60 king-size cans of beer; 4 bottles, each containing a fifth of whiskey; and a fifth bottle from which one-third of the content was missing. He concluded that defendant had wilfully violated the terms of the suspended sentence, revoked the suspension, and ordered that defendant be confined in the county jail of Burke County for a period of fifteen months to be assigned to work under the supervision of the State Prison Department, as provided by law. Defendant, contending that the court had erred in revoking a suspended sentence upon "the same evidence on which defendant had been acquitted on the charge of possession of intoxicating liquors for the purpose of sale," and on which the solicitor had taken a *nolle prosequi* "on the charge of possession of intoxicating liquors for beverage purposes," appealed.

T. Wade Bruton, Attorney General; Harry W. McGalliard, Deputy Attorney General; and Ralph A. White, Jr., Staff Attorney, for the State.

John H. McMurray for defendant.

SHARP, J. Defendant asserts in his brief that the judge activated his suspended sentence on the same evidence upon which the

jury had acquitted him on the preceding day and upon which the solicitor had entered a *nolle prosequi*. We assume the correctness of this statement although the evidence does not affirmatively disclose that the same whiskey and beer were involved. Decision, however, does not turn on this point.

When a jury or other tribunal having jurisdiction acquits a defendant of a criminal charge, it is clear that the same charge may not be the basis for invoking a previously suspended sentence. Likewise, a revocation of suspension cannot be bottomed solely upon a pending criminal charge; a conviction or a plea of guilty is required. *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; *State v. Guffey,* 253 N.C. 43, 116 S.E. 2d 148; *State v. Hardin,* 183 N.C. 815, 112 S.E. 593. In this case, however, the judge did not activate defendant's suspended sentence because he had been charged with violating the prohibition law but because he had breached the condition that he not have *any* alcoholic beverages on his premises during the period of suspension.

The law permits an individual to possess in his home an unlimited quantity of tax-paid intoxicating liquor for his own use and that of his bona fide guests, but the possession of more than one gallon is *prima facie* evidence that such liquor is kept for the purpose of sale. G.S. 18-11; G.S. 18-32(2); *D. & W., Inc., v. Charlotte,* 268 N.C. 577, 151 S.E. 2d 241. Thus, without the restriction that defendant have no alcoholic beverages whatever on his premises during the five years his sentence was suspended, if he sold liquor but limited his inventory to not more than one gallon, the police (deprived of the *prima facie* case created by G.S. 18-32(2)) might be hard put to prove his possession for the purpose of sale. *State v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623. See *State v. Hill,* 236 N.C. 704, 73 S.E. 2d 894. This condition — to which defendant had expressly consented — bore an obvious relation to the offense for which he had been convicted and was entirely reasonable. See *State v. Smith,* 233 N.C. 68, 62 S.E. 2d 495.

Before activating defendant's suspended sentence, Judge Clarkson conducted a hearing *de novo* on the day following the jury trial and found facts which conclusively established a violation of the condition that defendant possess no alcoholic beverages on his premises. The judge was not precluded from revoking the suspension because he acted on the same evidence upon which defendant had been acquitted of the criminal charges involved. There is no inconsistency in the jury's verdict, the solicitor's *nolle prosequi,* and the judge's order. Defendant could well be guilty of violating the terms of his suspended sentence — as the judge found — and not guilty of violating any criminal law — as the jury and the solicitor con-

cluded. *State v. Coffey, supra.* The evidence was that he had whiskey on his premises but not more than one gallon. Defendant's possession of more than 5 gallons of beer (60 king-size cans is 7½ gallons) constituted *prima facie* evidence that he had it for the purpose of sale. G.S. 18-32(4). Notwithstanding, *for his own use,* any individual may possess beer as defined by G.S. 18-64 "without restriction or regulation." G.S. 18-66.

Judge Clarkson's findings and order are fully supported by the evidence and the law. The judgment of the court below is

Affirmed.

STATE v. NORWOOD G. MAREADY.

(Filed 29 March, 1967.)

Criminal Law § 108—

In a prosecution for driving while under the influence of intoxicating liquor, an instruction to the jury that the police officer who apprehended defendant had no personal interest in the case or bias toward defendant and that the officer's only interest was in seeing that the law was complied with and in protecting innocent people operating their automobiles on the highway, *is held* a prohibited expression of opinion by the court, even though the instruction was given in stating a legitimate contention of the solicitor in his argument to the jury.

APPEAL by defendant from *Parker, J.,* at November 1966 Criminal Term, of DUPLIN Superior Court.

In the General County Court of Duplin the defendant was convicted of operating a motor vehicle upon the public highways of the State while under the influence of intoxicants. He appealed to the Superior Court, where he was again convicted and judgment imposed. He then appealed to this Court.

The evidence for the State tended to show that on Sunday morning, 22 May, 1966, a police officer of the Town of Wallace, Tom Rich, saw the defendant leaving his home in his car. He took off, spinning the wheels, and ran through two stop signs, crossing the center line back and forth, and zigzagging for a block and a half on Orange and Main Streets. The officer stopped him, and when the defendant got out of his car he was staggery, had a very strong odor of alcoholic beverage about him, and had a number of cans of beer in his car. In the officer's opinion he "was very intoxicated".

The defendant testified that he had had two or three swallows of whiskey that morning, but that he was not under its influence at the time in question.

The defendant assigns a number of errors, primarily directed to the charge of the court.

T. W. Bruton, Attorney General, and William W. Melvin, Assistant Attorney General for the State.
B. R. Batts for defendant appellant.

PLESS, J. We have fully considered all of the defendant's assignments of error, and find them to be without substantial merit, with one exception. In the charge, the court stated a contention by the State which was probably argued to the jury by the Solicitor. It is that the State says and contends that the defendant was under the influence, and that Officer Rich has no particular interest or bias towards him, that he is a police officer for the Town of Wallace and it is his duty to see that the law is complied with as near as he can, "and that his only interest is in seeing that the law is complied with and to protect innocent people operating their automobiles, to keep people off the highways when they are driving so that they won't run into and tear up and kill and injure people who are abiding by the law".

While an argument of this general nature by the Solicitor would be permissible, we feel that its repetition by the Judge, even though stated as a contention, gave it an emphasis that would weigh too heavily upon the defendant.

The following quotation from *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263 is applicable here:

> "Certainly the able and conscientious judge who tried this case below did not intend to do anything to prejudice the rights of the defendant, but it is the probable effect or influence upon the jury as a result of what a judge does, and not his motive, that determines whether the right of defendant to a fair trial has been impaired to such an extent as to entitle him to a new trial."

It is said in *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568:

> "The judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other, or, again, the same result may follow the use of language or form of expression calculated to impair the credit

which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176; *S. v. Dancy,* 78 N.C. 437; *S. v. Jones,* 67 N.C. 285.

"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."

Other exceptions need not be discussed, since we hold the quoted section of the charge to be prejudicial.

We are constrained to hold that the defendant is entitled to a New trial.

STATE v. AMY HUGGINS.

(Filed 29 March, 1967.)

1. Criminal Law § 108—

The use of the phrase "the State has presented evidence in this case which tends to show" in recapitulating the State's evidence, the same phrase being used in the recapitulation of defendant's evidence, *is held* not to constitute an expression of opinion by the court on the evidence. G.S. 1-180.

2. Assault and Battery § 15—

The court's instruction in this case *held* to have adequately presented to the jury defendant's contention of self-defense.

APPEAL by defendant from *Peel, J.,* October 1966 Session of LENOIR.

Criminal prosecution on an indictment charging defendant on 5 October 1965 with feloniously assaulting Geraldine Hill with a deadly weapon, to wit, a rifle, and inflicting upon her serious injury not resulting in death, a violation of G.S. 14-32.

Plea: Not guilty. Verdict: Guilty of an assault with a deadly weapon.

From a judgment of imprisonment for 12 months, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Turner & Harrison by Fred W. Harrison for defendant appellant.

PER CURIAM. The State's evidence, in brief summary, tends to show the following facts: Geraldine Hill and the defendant Amy Huggins had been having trouble for some time as the result of defendant's dating Geraldine Hill's husband. On 5 October 1965 Geraldine Hill and her husband were not living together. On 5 October 1965 defendant was a widow. Between 9:30 and 10 p.m. on 5 October 1965 Geraldine Hill went to defendant's home in an automobile driven by her sister, Paulette White. Geraldine got out of the automobile, went up on the porch of defendant's home, and knocked at the door. Defendant inside of the house lifted the shade at the window, saw it was Geraldine, and pulled the shade down. She saw her husband run across the floor inside the house, because the shade was flopping where defendant had "slammed it down." Defendant said, "It's your g - - d - - - - wife." After that Geraldine's husband came to the door, opened it, and they were standing in the door talking. Defendant walked up to the door, stuck a rifle in Geraldine's ribs and pulled the trigger, saying, "I told you I would shoot your g - - d - - - - wife." Defendant slammed the door, and Geraldine fell on the porch. Before she was shot, Geraldine and defendant did not speak to each other. Geraldine's husband and her sister got her in her sister's automobile, which was driven to the hospital. Geraldine was unconscious when she was carried into the hospital. The bullet from the rifle passed through her body. She was in the hospital eleven days.

The State's evidence further tends to show that about four years before 5 October 1965 defendant came to Geraldine Hill's home and said to Geraldine, "I will kill you before I let you tell my husband what I am doing." That was when defendant's second husband was living.

Paulette White, Geraldine's sister, testified in substance: Geraldine's husband came out on the porch, took Geraldine's arm, and said, "Let's go." Geraldine said: "I want that . . . . . to tell me now that she is not going with my husband." We have omitted the vile name that Geraldine called defendant.

Defendant's evidence tended to show the following facts: She and Geraldine Hill were raised near each other, and they had known each other all their lives. They had always disliked each other. She had not dated Geraldine's husband over a half a dozen times. When Amy Huggins came home the night of 5 October 1965, Geraldine's

husband and one Mary Jennings were there. She went into the bathroom and took a bath. After that she was watching television. About 9 p.m. Geraldine Hill came to her house and was knocking at the door. She went to the door, pulled the curtain back, and saw Geraldine standing on the porch. She went to her bedroom to telephone the police department, because she had a warrant out for Geraldine's arrest. About a month before, Geraldine had trespassed upon her property, and committed property damage. Before she was able to get the police over the telephone, Geraldine came into her house. Geraldine got half way through her living room, screaming at her, pointing her finger at her, and calling her a "black-headed b - - - -." Geraldine was coming at her just as fast as she could, and she had no place to go. She grabbed her rifle and shot her. She did not mean to shoot her; she meant to get Geraldine and her husband out of her house. She wanted Geraldine and her husband to leave, and she was screaming, "Get out, get out," and they were not trying to get out, and the rifle went off. Geraldine fell to the floor. Geraldine had got within a few feet of her in a threatening attitude, and was still coming at her when the rifle fired. She did not mean to shoot; the gun went off. She testified: "I had the gun and the gun went off. Yes, a gun goes off as a result of pulling the trigger, and I suppose I pulled the trigger. The gun was in my hand, and the gun went off. . . . Evidently, I did pull the trigger, Yes, I pulled the trigger. . . . I just had the gun in my hand when it went off. I didn't mean to pull the trigger, but it went off, anyway. . . . The shooting was an accident."

Defendant also offered evidence tending to show the following facts: On Labor Day week end in September 1965, Geraldine Hill, in a conversation with people at the beach at Morehead City, was talking about her husband and defendant. Geraldine would curse her husband and then she would say, "One of these days, I am going to kill both of them." Alpheus White, who is the present husband of defendant, told defendant of this threat made by Geraldine.

The State called in rebuttal Geraldine's husband, Jerry Hill, who is still married to Geraldine. His testimony tends to show that Geraldine was standing on the porch when defendant shot her. He has heard his wife say she was going to beat defendant. He does know that his wife has threatened him.

Defendant assigns as error that the court in its charge used the words, "The State has presented evidence in this case which tends to show," in arraying the evidence offered by the State. She contends that in using these words the court expressed an opinion upon the weight of the evidence, in violation of G.S. 1-180. The same expression was used by the court in its charge in reciting defendant's

evidence. This assignment of error is overruled upon the authority of *S. v. Jackson*, 228 N.C. 656, 46 S.E. 2d 858.

Defendant assigns as error that the court failed to comply with the requirements of G.S. 1-180, in that it failed to charge the jury as to the law arising upon the evidence as it related to defendant's legal right to defend her home and to evict trespassers therefrom. Reading the charge of the court in its entirety, it appears that while the judge's charge on the point raised by defendant's assignment of error was not as full and comprehensive as it might have been, yet the charge was adequate under our decisions, and prejudicial error is not shown.

All the other assignments of error have been carefully considered, and are overruled, for the reason that nothing is shown that would justify disturbing the verdict and judgment below. The case presents in essence issues of fact determinable alone by the jury. The verdict and judgment will be upheld.

No error.

BROWNIE OUTLAW v. LESTER GURLEY AND LEONARD OUTLAW.

(Filed 29 March, 1967.)

1. Appeal and Error § 24—

In a passenger's action against the drivers of the vehicles involved in the collision causing the injury, the failure of the court in a single instance to charge that the negligence of a defendant would be actionable if one of the proximate causes of the injury will not be held for prejudicial error when the court repeatedly instructed the jury that the negligence of a defendant would be actionable if the proximate cause or one of the proximate causes thereof.

2. Trial § 37—

Ordinarily, a factual inadvertence in stating the evidence will not be held for prejudicial error when the misstatement is not called to the court's attention in apt time.

3. Appeal and Error § 20—

Plaintiff has no ground for complaint that the court did not submit the issue of plaintiff's contributory negligence to the jury, even though the court had theretofore intimated that such issue would be submitted and the argument of counsel to the jury was predicated upon the inclusion of such issue with the others submitted, the court having offered counsel additional time to explain the matter to the jury.

APPEAL by plaintiff from *Peel, J.*, September 1966 Civil Session of LENOIR.

Action *ex delicto* to recover damages for personal injuries sustained about 3:30 p.m. on 16 February 1962 in a collision in the intersection of Memorial Drive (N. C. Highway #50) and Hill Street in the town of Warsaw between an automobile owned and driven by defendant Outlaw and an automobile owned and driven by defendant Gurley. Memorial Drive is the dominant street and Hill Street is the servient street. A stop sign was placed on Hill Street requiring traffic going easterly on Hill Street to stop before entering Memorial Drive. This stop sign was erected prior to 16 February 1962 by the North Carolina Department of Highways. Plaintiff was a passenger in the automobile driven by defendant Outlaw, her husband.

Plaintiff alleged and offered evidence tending to show that her husband, defendant Outlaw, was operating his automobile in a southerly direction on Memorial Drive; that an automobile operated by defendant Gurley, traveling in an easterly direction on Hill Street at a speed of about 45 miles an hour, did not stop at the stop sign, drove into the intersection, and collided with the automobile being operated by her husband. In the collision plaintiff sustained personal injuries.

Defendant Gurley alleged and offered evidence tending to show that he was driving his automobile in a northerly direction on Memorial Drive about 40 miles an hour; that when he entered the intersection the Outlaw automobile, traveling in an easterly direction on Hill Street, pulled into the intersection of the streets just in front of him, and the automobiles collided.

Defendant Gurley offered evidence. Defendant Outlaw offered no evidence. Defendant Outlaw was called as an adverse witness by plaintiff.

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

"1. Was the plaintiff, Brownie Outlaw, injured by the negligence of the defendant, Lester Gurley, as alleged in the Complaint?

"Answer: No.

"2. Was the plaintiff, Brownie Outlaw, injured by the negligence of the defendant, Leonard Outlaw, as alleged in the Complaint?

"Answer: No.

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

"Answer: ....."

From a judgment that plaintiff have and recover nothing from the defendants, she appeals.

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

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

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

PER CURIAM. Plaintiff assigns as error this part of the charge: "However, I have also told you that negligence alone is not sufficient grounds for recovery of damages, but before it becomes actionable negligence IT MUST BE THE PROXIMATE CAUSE OF THE INJURY AND DAMAGE." Reading the charge in its entirety, it appears that seven times before the challenged part of the charge, and then immediately after the challenged part of the charge, the judge, in applying the law to the facts and in stating the contentions of the parties, stated in substance that in order for plaintiff to recover she must not only show negligence but that such negligence was the proximate cause or one of the proximate causes of her injuries. It is unreasonable to believe that after having charged eight times correctly in respect to proximate cause the jury could have been confused or misled in the single instance challenged by plaintiff, or that she could have been prejudiced thereby. This assignment of error is overruled.

Plaintiff's assignments of error as to the exclusion of evidence are without merit, and are overruled.

Plaintiff assigns as error the following statement in the charge of the court: ". . . and the defendant, Outlaw, further contends that the evidence favorable to him tends to show that instead of operating his car or being on Memorial Drive, that instead he was on Hill Street, and that therefore you should answer this second issue 'no.'" The complaint alleges and plaintiff's evidence tends to show that defendant Outlaw was driving south on Memorial Drive. When examined adversely as a witness for the plaintiff, defendant Outlaw testified that he was driving south on Memorial Drive. It appears from the record before us that this inadvertence of Judge Peel in stating the contention of defendant Outlaw was not brought to the attention of the trial court in apt time so that the judge could be afforded an opporunity to correct it before the case was given to the jury. Plaintiff contends that this is another example of the continuous confusion in the judge's charge. Plaintiff has not shown that this misstatement of defendant Outlaw's contentions has prejudiced her to the extent that she is entitled to a new trial. This assignment of error is overruled.

All the evidence in this case was completed on Thursday afternoon, 22 September 1966. At that time the presiding judge told the

attorneys in the case that he had tentatively decided to submit four issues to the jury, one of which was an issue of plaintiff's contributory negligence. All the attorneys completed the arguments to the jury on Thursday afternoon, and in their speeches referred to the four issues that the judge said he had tentatively decided to submit to the jury. On Friday morning the judge decided not to submit to the jury the issue of plaintiff's contributory negligence. He told all the lawyers he would allow them additional time to explain to the jury anything they felt necessary to explain by reason of his not submitting to the jury the issue of contributory negligence. The record does not show whether counsel availed themselves of the judge's offer to speak further Friday morning. The judge in the beginning of his charge Friday morning stated in substance that Thursday afternoon the lawyers argued the case to them with the understanding that the court was going to submit four issues to them, but he had decided not to submit to them the fourth issue. The third issue was an issue of plaintiff's contributory negligence, and the fourth issue was the damage issue. In his charge to the jury, the judge submitted the three issues as set forth above, read the three issues to the jury, and charged at length as to each of the three issues. The decision not to submit an issue of plaintiff's contributory negligence, which was undoubtedly correct, was favorable to plaintiff and in no way prejudicial to her. Plaintiff assigns as error that the judge committed prejudicial error in withdrawing the fourth issue from his charge without properly naming and explaining this issue to the jury. Under the circumstances we can see no prejudicial error on the part of the court by a mere slip of the tongue, and this assignment of error is overruled.

The evidence in this case was in sharp conflict. The case presents in essence issues of fact determinable alone by the jury. The jury resolved the issues of fact against plaintiff. The court's rulings and charge are in substantial accordance with established law in this jurisdiction. No prejudicial error has been made to appear. All plaintiff's assignments of error are overruled. The verdict and judgment will be upheld.

No error.

N. HERMAN COTTON AND WIFE, IRENE EVANS COTTON AND DENVER LEE COTTON AND WIFE, MARION JACKSON COTTON, PETITIONERS, v. JAMES ROBIE COTTON AND WIFE, CAROLYN COTTON, ANNETTE COTTON PATE AND HUSBAND, EARL E. PATE, AND CAROLYN FAYE COTTON FLOWERS AND HUSBAND, JOEL P. FLOWERS, RESPONDENTS.

(Filed 29 March, 1967.)

1. Partition § 6; Appeal and Error § 49—

On appeal from the clerk's order for actual partition, the technical rules governing the admissibility of evidence will not be strictly enforced, since it will be presumed that the court will disregard inadmissible testimony in making its findings, and the court's findings, when supported by competent evidence, are conclusive even though some incompetent evidence may have been heard.

2. Partition § 6—

The court's finding that the tract of farm land, with tobacco, corn and wheat allotments, could not be actually partitioned without injury to some of the parties, *held* supported by the evidence in view of the impact on value of the small amount of allotment for each parcel and the lack of balance between wood, farm and pasture land, and the suitability of the soil for the production of crops not subject to crop regulations.

APPEAL by Petitioners from *Peel, J.*, September, 1966 Civil Session, WAYNE Superior Court.

The Petitioners filed before the Clerk of the Superior Court of Wayne County a proper pleading alleging that N. Herman Cotton and wife, Irene Evans Cotton and Denver Lee Cotton and wife, Marion Jackson Cotton together own a 5/6 interest and Respondents James Robie Cotton, Carolyn Faye Cotton Flowers and Annette Cotton Pate each own a 1/18 interest as tenants in common in a described tract of farm land containing 169.59 acres located in Wayne County. The Petitioners allege they desire to hold their interest in severalty, that the tract of land can be and should be partitioned in kind, and that actual partition can be made without injury to any of the parties.

The Respondents filed answer admitting the ownership as tenants in common according to the interest set out in the petition. However, they deny that the land is so situated as to permit of actual partition without injury to some of the parties and allege that it is of such character that injury to some or all the parties will result from an actual partition. The whole tract carries a tobacco allotment of 3.25 acres; a corn allotment of 24 acres and a wheat allotment of 7 acres; and actual partition will result in a 25 to 30% decrease in the value of the Respondents' interest. They allege that an offer of $40,000 for the entire tract has been made. The Re-

spondents request the Court to order a sale for partition and the proceeds distributed according to the several interests of the parties.

The Clerk of the Superior Court, on a basis apparently of the verified pleadings, ordered an actual partition and appointed commissioners to divide the land and assign to each tenant in common his share. The Respondents appealed.

At the hearing Judge Peel heard many witnesses for each side. The Judge made findings of fact, and based thereon concluded that actual partition could not be made without injury to some of the tenants and ordered a sale of the whole tract and the division of the proceeds according to the respective interests of the parties. The Petitioners appealed to the Supreme Court.

Robert H. Futrelle for Petitioner appellants.

Braswell & Strickland by Roland C. Braswell for Respondent appellees.

PER CURIAM. The principal objections raised to the findings and conclusions entered by Judge Peel involve the admissibility of evidence. This type of hearing is different and is governed by rules of evidence different from those followed in jury trials. The Judge's experience and learning enabled him to weigh and to evaluate the testimony and to disregard that which under strict rules would be inadmissible in a jury trial.

In this case the evidence of injury to some of the parties is amply sufficient to support Judge Peel's findings and conclusions. For example, each of the Respondents would be entitled to a 1/18 interest in the tobacco allotment of 3.26 acres, 1/18 of 24 acres allotted to corn and 1/18 of 7 acres allotted to wheat. Lack of balance between wood, farm, and pasture has great weight in determining the value of farm lands. Large acreage and crop allotments enable the owner to purchase machinery and to devote time to crop production in proportion to the crop allotment, and the suitability of the soil for the production of crops not subject to allotment regulation.

The record fails to disclose any error of law. The judgment is

Affirmed.

STATE v. HORACE LEWIS WHALEY.

(Filed 29 March, 1967.)

Indictment and Warrant § 14; Criminal Law § 121—

By pleading not guilty to warrants in a court having jurisdiction of the offense charged, without any motion addressed to the validity of the warrants, defendant waives defects, if any, incident to the authority of the person who issued the warrants, both in regard to a motion to quash and in regard to a motion in arrest of judgment.

APPEAL by defendant from *Peel, J.*, 31 October 1966 Session of LENOIR.

Defendant was charged in a warrant with unlawfully and wilfully operating an automobile upon the public highway while under the influence of intoxicating liquor, and was originally tried in the Kinston-Lenoir County Recorder's Court upon a plea of "not guilty." From a judgment of "guilty," defendant appealed to the Superior Court.

Prior to entering a plea in Superior Court, defendant moved the court to quash the warrant, which motion was denied. Defendant then pleaded not guilty and the case came on for trial. The jury returned a verdict of "Guilty of operating an automobile under the influence of intoxicating liquor," and judgment was entered thereon. Prior to sentencing, defendant moved the court that judgment be arrested for the reason that the warrant under which defendant was tried was not signed by a judicial officer, as required by law, but was signed by an executive officer. This motion was denied, and defendant appealed to the Supreme Court

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

Turner & Harrison for defendant.

PER CURIAM. Defendant assigns as error the denial of his motion to quash the warrant and his motion made in arrest of judgment.

This case is controlled by *State v. Wiggs,* 269 N.C. 507, 153 S.E. 2d 84, wherein Bobbitt, J., stated:

> ". . . Having pleaded not guilty to said warrants in the City Court of Raleigh, a court having jurisdiction of all offenses charged in said warrants, defendant waived defects, if any, incident to the authority of the person who issued the warrant. 'Decisions of this Court are uniform in holding that a motion to quash the warrant or bill of indictment, if made af-

ter plea of not guilty is entered, is addressed to the discretion of the trial court. The exercise of such discretion is not reviewable on appeal.' *S. v. St. Clair*, 246 N.C. 183, 186, 97 S.E. 2d 840, 842, and cases cited. See also *S. v. Furmage*, 250 N.C. 616, 620, 109 S.E. 2d 563, 566. Too, in respect of defendant's motions in arrest of judgment, such pleas waived defects, if any, incident to the authority of the person(s) who issued the warrants. *S. v. Doughtie*, 238 N.C. 228, 77 S.E. 2d 642."

The Kinston-Lenoir County Recorder's Court had jurisdiction of the offenses charged in the warrant. The defendant pleaded not guilty to said warrant in that court without any motion addressed to the validity of the warrant. Therefore, the defendant waived defects, if any, incident to the authority of the person who issued the warrant. The court's actions in refusing the motion in arrest of judgment and to quash were correct. The judgment of the lower court is

Affirmed.

STATE v. JIMMY HICKS.

(Filed 29 March, 1967.)

1. Criminal Law § 5—

Every man is presumed sane, and the burden is upon defendant to prove his defense of mental irresponsibility, which burden of proof is not satisfied by a contention that if defendant were normal he would not have attempted the escape for which he was prosecuted.

2. Criminal Law § 25—

The fact that the court pronounces judgment after defendant's plea of *nolo contendere* constitutes an acceptance of the plea, and no formal record of the acceptance is required.

APPEAL by defendant from *Martin, S.J.*, at January 1967 Term of WATAUGA Superior Court.

While serving sentences for two felonies the defendant was charged with escape. He waived the appointment of counsel and signed the required waiver. He then entered a plea of *nolo contendere* and was sentenced to serve an additional 12 months. He appealed, and counsel was appointed to represent him. His only exception is to the judgment.

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

John H. Bingham for defendant appellant.

PER CURIAM. At his trial the defendant interposed no defense, but now claims his mental disability is shown by his escape — that if he were normal mentally he would have known better. The plea is novel and interesting, and has many implications and possibilities.

Unfortunately for the defendant, however, that is not the law. "Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proven." *S. v. Cureton,* 218 N.C. 491, 11 S.E. 2d 469. And the burden is on the defendant to prove his irresponsibility. *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348.

The defendant also contends that the sentence is invalid because the record does not show that his plea of *nolo contendere* was accepted by the court. He quotes from *S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525, "The plea of *nolo contendere* cannot be entered by a defendant as a matter of right, but is pleadable only by leave of the court and its acceptance by the court is entirely a matter of grace." The same case quotes other authorities and says: "A plea of *nolo contendere* is equivalent to a plea of guilty insofar as it gives the court power to punish." In *S. v. McIntyre,* 238 N.C. 305, 77 S.E. 2d 698, which cites and approves the *Thomas* case, the trial court did not accept the defendant's plea, but proceeded to hear evidence and to pass upon the question of his guilt or innocence. The court said that "the defendant's plea of *nolo contendere* constitutes a formal declaration on his part that he did not contend with the State in respect to the charge and was tantamount to a plea of guilty * * * The presiding Judge acquired full power to pronounce judgment against the defendant for the crime charged in the indictment * * * when he allowed the Solicitor to accept the plea tendered by the defendant."

The very fact that the Judge pronounced a judgment after the plea of *nolo contendere* is entered constitutes acceptance of the plea, and no formal record thereof is required.

No error.

APPENDIX

AMENDMENT TO RULES OF PRACTICE IN THE SUPREME COURT.

Rule 19(4). *Evidence To Be Stated in Narrative Form.*

Pursuant to authority granted in G.S. 7A-285 relating to procedure in appeals from appellate judgments of superior courts, Rule 19(4) is hereby amended by changing the period (.) at the end of the last sentence to a colon (:) and adding the following proviso:

> "Provided, however, that in appeals from appellate judgments of the superior court in cases originating in the district court it shall be permissible and optional with counsel to narrate the evidence or to include it in question and answer form in the case on appeal."

This 2nd day of March, 1967.

BRANCH, J.
For the Court.

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§ 4. Procedure to Raise Question of Pendency of Prior Action.

Where it does not appear from the pleadings that another prior action for substantially the same cause of action was then pending, the pendency of a prior action may not be raised by demurrer. *Ayers v. Ayers*, 443.

ACTIONS.

§ 8. Distinction Between Action on Contract and in Tort.

Where a party has his election to sue on contract or in tort, and the allegations, construed in the light most favorable to plaintiff, are sufficient to allege an action for conversion by the seller of property which the seller had sold plaintiff, the court will respect plaintiff's election for the purpose of sustaining jurisdiction. *Coble v. Reap*, 229.

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§ 2. Exclusiveness of Statutory Remedy.

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§ 2. Liability of Owner or Keeper for Injuries Inflicted by Animals.

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§ 3. Injuries and Damages Caused by Animals Roaming at Large.

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§ 4. Payment of Damages out of Dog License Tax.

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Injury inflicted by a dog, whether caused by a playful or angry animal, may be made the basis of a claim under G.S. 67-13. *Ibid.*

APPEAL AND ERROR.

§ 2. Supervisory Jurisdiction of Supreme Court.

The Supreme Court, in the exercise of its supervisory jurisdiction, may determine the sufficiency of the amended complaint, including matters stricken therefrom in the lower court, as though a demurrer *ore tenus* to the amended complaint in its entirety had been lodged in the Supreme Court, and its ruling that the pleading, thus considered, is insufficient to state a cause of action necessarily includes an affirmance of the order of the lower court sustaining the demurrer *ore tenus* to the amended complaint exclusive of the portions previously stricken therefrom. *Philbrook v. Housing Authority*, 598.

§ 3. Judgments Appealable.

Judgment sustaining a demurrer and dismissing the action is immediately appealable. *Coble v. Reap*, 229.

An appeal lies immediately from an order sustaining a demurrer, G.S. 1-277, and likewise from an order striking an entire further defense from the answer, since such order amounts to an order sustaining a demurrer. *Quick v. Memorial Hospital*, 450.

Where demurrer relates solely to parties, order overruling demurrer is not appealable notwithstanding demurrer states it is for misjoinder of parties and causes. *Prewitt v. Dover*, 687.

§ 7. Demurrers and Motions in the Supreme Court.

The Supreme Court on appeal may allow a party to amend so as to make his pleadings conform to the stipulations of the parties and the theory upon which the case was tried in the lower court, G.S. 7-13, Rule of Practice in the Supreme Court 20(4), but the Supreme Court will not allow an amendment which would not make the record conform to the facts developed on the trial but would present matter relating to a theory different from that upon which the trial court proceeded. *Kayler v. Gallimore*, 405.

§ 13. Supersedeas.

Upon the refusal of the last and highest bidder at a judicial sale to comply with his bid, the court may properly order him to file a *supersedeas* bond on his appeal from the court's order of resale and order that he be held liable for costs of resale and any amount by which the final sale price is less than his bid. *Walton v. Cagle*, 177.

§ 19. Form of, and Necessity for, Objections, Exceptions and Assignments of Error in General.

An assignment of error not supported by an exception duly taken and preserved will not be considered. *King v. Snyder*, 148.

In a trial by the court under agreement of the parties, assignments of error to the court's conclusions of law and its judgment, which assignments are specific and definite and point out the alleged errors relied upon, may be taken as a sufficient compliance with the Rules of Court, even though they are not technically in strict compliance therewith. *Gardner v. Reidsville*, 581.

§ 20. Parties Entitled to Object and Take Exception.

A defendant may not complain of a correct statement of law in regard to sudden emergency when the instruction is favorable to him in that his evidence does not even present this defense. *Murchison v. Powell*, 656.

Plaintiff has no ground for complaint that the court did not submit the issue of plaintiff's contributory negligence to the jury, even though the court had theretofore intimated that such issue would be submitted and the argu-

ment of counsel to the jury was predicated upon the inclusion of such issue with the others submitted, the court having offered counsel additional time to explain the matter to the jury. *Outlaw v. Gurley*, 755.

§ 21. Exception and Assignment of Error to Judgment or to Signing of Judgment.

A general exception to an order does not present for review the admissibility or the sufficiency of the evidence to support the findings upon which the order is based. *King v. Snyder*, 148.

§ 22. Exceptions and Assignments of Error to Findings.

An assignment of error that the court erred in its findings of fact is a broadside assignment and ineffectual to challenge the competency or sufficiency of the evidence. *King v. Snyder*, 148.

§ 23. Objections, Exceptions and Assignments of Error to Evidence.

Rules of practice in the Supreme Court are mandatory, and an assignment of error to the admission of evidence which fails to disclose the evidence admitted over objection so that the question sought to be presented is disclosed within the assignment of error itself, is ineffectual. *Williams v. Boulerice*, 499.

§ 24. Exceptions and Assignments of Error to Charge.

An assignment of error that the court failed to declare the law arising on the evidence as required by G.S. 1-180, is a broadside exception and ineffectual. *Chalmers v. Womack*, 433.

In a passenger's action against the drivers of the vehicles involved in the collision causing the injury, the failure of the court in a single instance to charge that the negligence of a defendant would be actionable if one of the proximate causes of the injury will not be held for prejudicial error when the court repeatedly instructed the jury that the negligence of a defendant would be actionable if the proximate cause or one of the proximate causes thereof. *Outlaw v. Gurley*, 755.

§ 38. Abandonment of Exceptions by Failure to Discuss in the Brief.

Exceptions not discussed in the brief are deemed abandoned. *Pendergrass v. Massengill*, 364; *Chalmers v. Womack*, 433.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of testimony cannot be prejudicial when the same witness has just testified to facts with substantially the same meaning. *Terrell v. Ins. Co.*, 259; *Dolan v. Simpson*, 438.

It is a matter of common knowledge that an experienced driver is more competent than an inexperienced one, and the admission of testimony of a defendant at a former trial to the effect that he would not have the competence as a new driver as he would as an old driver, even if incompetent, cannot be prejudicial. *Williams v. Boulerice*, 499.

§ 46. Review of Discretionary Matters.

While the exercise of a discretionary power is not reviewable in the absence of a showing of abuse of discretion, the refusal to entertain a motion on the ground that the court is without discretionary power to do so is reviewable. *Highway Comm. v. Hemphill*, 535.

APPEAL AND ERROR—*Continued.*

§ 49. Review of Findings or Judgments on Findings.

The correctness of findings of fact to which no exception is entered is not presented for review. *Brown v. Board of Education*, 667.

Findings of fact supported by competent evidence are conclusive on appeal. *Ibid.*

Findings which present mixed questions of law and fact are reviewable. *Ibid.*

Findings of fact supported by competent evidence are conclusive on appeal. *Pendergrass v. Massingill*, 364.

Where there is sufficient competent evidence to support a finding of fact by the court, it will be presumed that the court disregarded incompetent evidence tending to support the same finding. *Ibid.*

On appeal from the clerk's order for actual partition, the technical rules governing the admissibility of evidence will not be strictly enforced, since it will be presumed that the court will disregard inadmissible testimony in making its findings, and the court's findings, when supported by competent evidence, are conclusive even though some incompetent evidence may have been heard. *Cotton v. Cotton*, 759.

§ 54. New Trial and Partial New Trial.

Where the court instructs the jury to answer a subsequent issue in the negative if it answers a prior issue in the negative, and error is found in the trial of the prior issue, a new trial must be awarded on the second issue also in order that there may be a proper determination of the second issue by the jury upon the applicable law in accordance with instructions of the court. *Wilcox v. Motors Co.*, 473.

§ 55. Remand.

Where an order is issued under a misapprehension of the applicable law, the cause must be remanded. *Davis v. Davis*, 120.

§ 60. Law of the Case.

Decision on appeal becomes the law of the case, controlling in all subsequent proceedings, and when such decision holds that only one defense was available to defendants, the decision is the law of the case as then constituted by the pleadings; however, if defendants, after the decision, are allowed to amend their answer, and such amendment states another affirmative defense, the former decision does not preclude such further defense. *Wilson v. McClenny*, 399.

§ 61. Stare Decisis.

Our courts faithfully observe the doctrine of *stare decisis*, and especially in matters involving title to property, changes in the law may be made only by the General Assembly; nevertheless, the doctrine of *stare decisis* will not be applied to perpetuate a court-made rule which is palpably in error. *Rabon v. Hospital*, 1.

ARREST AND BAIL.

§ 3. Right of Officer to Arrest Without Warrant.

A patrolman apprehending a person driving on a public highway while under the influence of intoxicating liquor may arrest such person without a warrant. *S. v. Broom*, 661.

ARREST AND BAIL—*Continued.*

Officer apprehending person intoxicated at public place may arrest without a warrant. *S. v. Shirlen*, 695.

Officer seeing car and occupant fitting description shortly theretofore given by robbery victim may arrest without warrant. *S. v. Pearson*, 725.

§ 6. Resisting Arrest.

A warrant charging that defendant did unlawfully resist a named police officer while the officer was making a lawful arrest at a designated place, by fighting the officer with his hands and kicking him, is sufficient, and defendant's motion in arrest of judgment is properly denied. *S. v. Wiggs*, 507.

ASSAULT AND BATTERY.

§ 8. Self-Defense and Defense of Home.

While a person is entitled to defend his home against forcible entry by an intruder, he may not shoot even a trespasser until the trespasser attempts to force an entry in a manner sufficient to lead a reasonably prudent person to believe that the trespasser intends to commit a felony or to inflict some serious injury. *Edwards v. Johnson*, 30.

§ 11. Indictment and Warrant.

In a prosecution for assault with a deadly weapon the indictment or warrant must name a weapon constituting a deadly weapon *ex vi termini*, or describe the weapon and the circumstances of its use so as to show its character as a deadly weapon. *S. v. Wood*, 507.

An indictment sufficiently charging defendant with assault with a deadly weapon, to wit, a pistol, with intent to kill and inflicting serious injury not resulting in death, G.S. 14-32, includes the offense of assault with a deadly weapon. *S. v. Caldwell*, 521.

§ 15. Instructions Generally.

The court's instruction in this case *held* to have adequately presented to the jury defendant's contention of self-defense. *S. v. Huggins*, 752.

§ 17. Verdict and Punishment.

A warrant charging assault by threatening to hit the arresting officer with a "gallon glass jar" is insufficient to charge an assault with a deadly weapon, and a verdict of guilty as charged supports judgment for a simple assault only. *S. v. Wiggs*, 507.

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, a verdict of guilty of "assault with intent to harm but not to kill" is a complete and sensible verdict, and supports judgment for a simple assault, the words "without intent to kill but with intent to harm" being treated as surplusage. *S. v. Sumner*, 555.

Where the jury in a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, returns a verdict of guilty of "assault with intent to harm but not to kill", it is error for the court to again charge on the permissible verdicts and require the jury to redeliberate, and judgment entered upon the jury's later verdict of assault with a deadly weapon must be vacated and the cause remanded for judgment on the verdict first tendered by the jury. *Ibid.*

ATTORNEY AND CLIENT.

§ 9. Disbarment Proceedings.

N. C. State Bar has jurisdiction to institute proceedings against attorney for unethical conduct *ex mero motu;* respondent has no right to inspect minutes in regard to actions taken by Bar in other cases in order to support his assertion of racial discrimination in disciplinary action; evidence of unethical conduct held sufficient to support order of suspension of license. *State Bar v. Frazier*, 625.

AUTOMOBILES.

§ 2. Grounds and Procedure for Suspension or Revocation of Drivers' Licenses.

Where the licensee admits she received notification of suspension of her license on the ground of want of liability insurance on her vehicle, and relies on her insurance agent to correct his error in failing to furnish the Commissioner with notice of the actual existence of liability insurance on her car, and the licensee's license is again successively suspended for subsequent moving violations of the motor vehicle statutes, *held*, the suspensions of license were lawful, even though the suspensions would not have been entered had the Commissioner been properly advised of the existence of liability insurance on the vehicle, since licensee, with notice of suspension, continued to drive, and the failure of proof of insurance was the dereliction of her own agent. *Carson v. Godwin*, 744.

A motor vehicle operator's license may be suspended or revoked only in accordance with statutory provisions, and it is better practice to advise the licensee of suspension or revocation of license by registered letter with request for return receipt in order to insure compliance with the constitutional requirement of notice. *Ibid.*

§ 8. Turning and Turn Signals.

A motorist is not precluded from making a turn unless such movement is absolutely free from danger, and whether a motorist making a right turn from a highway into a private driveway could reasonably assume he could make such movement in safety, after having given proper signal of his intention to turn, is ordinarily a question for the jury in an action involving collision between the turning vehicle and a following car. *Kidd v. Burton*, 267.

§ 10. Following and Colliding with Preceding Vehicle.

If a motorist is exceeding the speed limit, his inability to stop within the range of his lights is negligence *per se*. *Griffin v. Watkins*, 650.

§ 14. Passing Vehicles Traveling in Same Direction.

The two foot clearance required by G.S. 20-149 applies to the overtaking and passing of another vehicle, not a horse subject to fright by a sudden noise. *Murchison v. Powell*, 656.

§ 17. Intersections.

The courts will take judicial notice that when a duly installed automobile traffic control signal shows red it means stop, and when it shows green it means go. *Wells v. Johnson*, 192.

§ 21. Brakes and Defects in Vehicles.

The requirement of G.S. 20-124 that a vehicle operated upon a public highway should be equipped with adequate brakes applies to both the owner and

AUTOMOBILES—*Continued.*

the driver of the vehicle, but the statute does not constitute either an insurer, and before either may be held liable for a collision resulting from defective brakes the plaintiff must introduce evidence that the owner or driver knew of such defect or was negligent in failing to discover it, and when plaintiff introduces no evidence of knowledge, express or implied, the issue of negligence in this regard need not be submitted to the jury. *Wilcox v. Motors Co.*, 472.

§ 33. Pedestrians.

A pedestrian, even though he starts to cross an intersection with a favorable traffic light, remains under duty to exercise ordinary care and caution for his own safety; nevertheless he is entitled to assume, and act on the assumption, that a motorist approaching the intersection facing the red traffic signal will obey the law, and is not required to anticipate that a motorist will not comply with the traffic signal. *Wells v. Johnson*, 192.

§ 35. Pleadings, Cross-Actions and Res Judicata.

A driver of a vehicle seeking to recover for personal injuries in an action against the driver of the other vehicle involved in the collision may not assert that the adjudication of the issues of negligence and contributory negligence in favor of the owner in a prior action by the owner against the same defendant, was conclusive, leaving only the issue of damages to be determined, since plaintiff driver was not a party to the prior action and, not being estopped by the judgment, cannot assert it as an estoppel against defendant. *Kayler v. Gallimore*, 405.

§ 38. Opinion Evidence as to Speed.

Persons having sufficient opportunity to observe a vehicle and form an opinion as to its speed are competent to give their opinion based upon their observation, and the fact that two of the witnesses are young boys who had never driven an automobile goes to the weight of their testimony but not its competency. *Murchison v. Powell*, 656.

§ 41f. Sufficiency of Evidence of Negligence in Following too Closely and in Hitting Preceding Vehicle.

Plaintiff's evidence to the effect that her car was being driven at a speed of about 10 miles per hour, that the driver gave the signal for a right turn for some 125 feet before attempting to make a right turn into a driveway, and that defendant, operating a following automobile, struck the right side and rear of plaintiff's car, *held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Kidd v. Burton*, 267.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Plaintiff's evidence was to the effect that defendant, traveling in the opposite direction, turned left to enter a private driveway and stopped with her vehicle partially blocking plaintiff's lane of travel, that plaintiff, to avoid colliding with defendant's car, swerved sharply to his right, ran off the hard-surface into an accumulation of snow, lost control, swerved back onto the pavement and across the center line, and collided with vehicles standing behind defendant's vehicle. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence. *Black v. Wilkinson*, 689.

§ 41n. Sufficiency of Evidence of Negligence in Striking Animal.

Evidence sufficient to support a finding that defendant motorist saw two boys riding their horses on a narrow and confined shoulder of the road and, at a speed in excess of that permitted by statute, undertook to pass so close

to the horse ridden by one of the boys that the motorist should have reasonably foreseen that the sound of his vehicle would frighten the horse, with evidence that the vehicle struck the horse while the horse was on the shoulder of the road, resulting in the death of the horse and injury to the rider, *is held* sufficient to overrule defendant's motion to nonsuit. *Murchison v. Powell*, 656.

§ 42h. Nonsuit for Contributory Negligence in Making Turn or Hitting *Turning* Vehicles.

Plaintiff's evidence to the effect that the driver of her car made a right turn from the highway into a private driveway and that her vehicle was struck by defendant's following car, without evidence that the driver of her car failed to make such turn from the righthand side of the highway, G.S. 20-153, and that the driver of her car looked to his rear and gave the statutory signal before making the turn, *is held* not to disclose contributory negligence as a matter of law on the part of plaintiff's driver, plaintiff's driver not having crossed the line of travel of a vehicle either meeting or overtaking him, and whether he could reasonably assume he could make the turn in safety being a question for the jury under the circumstances disclosed by plaintiff's evidence. *Kidd v. Burton*, 267.

Evidence held not to show contributory negligence as matter of law on part of motorist losing control in attempting to avoid vehicle making left turn and stopping partially blocking lane of travel. *Black v. Wilkinson*, 689.

§ 42k. Contributory Negligence of Pedestrians.

The evidence favorable to plaintiff tended to show that plaintiff, a pedestrian, started across an intersection with the green light of the traffic control signal, that when he got some six feet into the street he saw defendant's car approaching some 45 miles per hour a half a block away, that when he saw the car was not going to stop for the traffic light, he "froze" and did not move from the time he saw defendant's car until the time he was hit, *is held* not to disclose contributory negligence as a matter of law on the part of plaintiff but merely to raise the issue of contributory negligence for the determination of the jury. *Wells v. Johnson*, 192.

§ 43. Sufficiency of Evidence of Concurring Negligence.

Evidence held sufficient to raise issue of negligence of defendant driver in entering intersection as a proximate cause of collision notwithstanding evidence of negligence on part of driver of car in which plaintiff was riding as passenger. *Todd v. Watts*, 417.

Evidence held to disclose that negligence of the driver of the car in which plaintiff was riding, in turning left across path of approaching vehicle, was sole proximate cause of collision, and nonsuit in favor of other driver was proper. *Dolan v. Simpson*, 438.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

Riding a trotting horse upon a shoulder of a highway is not negligence *per se*, and where there is no evidence that the rider did or failed to do anything which caused the horse to move off the shoulder of the road or that he knew of any propensity of the horse to shy at the approach of motor vehicles, it is not error to refuse to submit the issue of the contributory negligence of the rider in causing a collision occurring with a motor vehicle when the driver attempted to overtake and pass the animal at excessive speed, the natural reaction of the horse to the noise of the overtaking vehicle being foreseeable and therefore not an intervening cause. *Murchison v. Powell*, 656.

AUTOMOBILES—*Continued.*

§ 46. Instructions in Automobile Accident Cases.

Where one view of the evidence tends to show that defendant ran through a red traffic signal at an intersection, it is proper for the court to instruct the jury upon the law applicable to such phase of the evidence. *Wells v. Johnson*, 192.

Where the evidence is insufficient to present the question of a defendant's careless and reckless driving within the purview of G.S. 20-140, it is error for the court to submit the question of careless and reckless driving in violation of the statute in the court's instruction upon the issue of such driver's negligence. *Williams v. Boulerice*, 499.

Court must charge as to what specific acts or omissions presented by evidence would constitute negligence or contributory negligence, and mere instruction that if defendant failed to exercise due care and that if such failure was proximate cause of injury, to answer issue of contributory negligence in affirmative is error. *Griffin v. Watkins*, 652.

Party is entitled to have court submit, in substance at least, request for special instructions presented by evidence. *Ibid.*

§ 48. Right of Passenger to Sue Jointly or Severally Tort-Feasors Causing Injury.

Passenger in one car is entitled to recover from driver of other car involved in collision if such driver was guilty of negligence constituting a proximate cause of collision, notwithstanding evidence of negligence on part of driver of car in which passenger was riding. *Todd v. Watts*, 417.

Left turn at intersection across path of approaching vehicle held sole proximate cause of collision, and passenger in first car is not entitled to recover from driver of second car. *Dolan v. Simpson*, 438.

§ 49. Contributory Negligence of Guest or Passenger.

Evidence of contributory negligence of passenger in continuing to ride with drunk driver, after opportunity on at least two occasions to leave vehicle without danger or inconvenience, held for jury. *Boyd v. Wilson*, 728.

§ 52. Liability of Owner for Damages Inflicted While Car is Being Driven by Another in General.

The relationship between a prospective purchaser and the dealer is that of bailor and bailee. *Wilcox v. Motors Co.*, 473.

Liability of the owner of an automobile in knowingly permitting a person to drive the vehicle upon the highway with defective brakes, which proximately causes injury, attaches independently of agency. *Ibid.*

§ 54a. Who Are Employees or Agents Within Scope of Respondeat Superior.

A person authorized by the owner to drive a vehicle does not have authority to permit another to drive the vehicle in the absence of express or implied authority by the owner. *Torres v. Smith*, 546.

§ 54f. Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.

Admission of ownership of the vehicle involved in the collision requires the submission to the jury of the question of liability under the doctrine of *respondeat superior*, but where all of the evidence discloses that the driver was a prospective purchaser from an automobile dealer and that he was driving the vehicle without any representative of the motor company with him,

AUTOMOBILES—*Continued.*

the court may give peremptory instructions that the jury answer the issue of agency in the negative if they found the facts to be as all of the evidence tended to show, otherwise to answer the issue in the affirmative. *Wilcox v. Motors Co.*, 473.

Evidence held to require peremptory instruction to answer issue of agency in the negative. *Torres v. Smith*, 546.

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

The evidence tended to show that defendant and deceased were traveling west in the right lane of a four-lane highway, that defendant attempted to pass at a point where the exit to the right permitted a traveler to leave the four-lane highway and enter another highway, that deceased intended to turn off to his right, and that the right front of defendant's car struck the left rear of deceased's car, resulting in fatal injury. There was no evidence that deceased gave any signal of his intent to turn or slow down, and no sufficient evidence to show that defendant was exceeding the maximum speed limit or that he was intoxicated. *Held:* The evidence is insufficient to sustain a verdict of manslaughter. *S. v. Reddish*, 246.

§ 65. Reckless Driving.

Evidence that a driver, traveling east at a lawful speed, was confronted with a sudden emergency when a driver entered the street from an intersection so that she was forced to drive partially on the right shoulder to avoid collision with the other car, that she was then confronted with a fire hydrant on her right side of the road, and, to avoid it, cut to her left, lost control, traversed the street and went into the ditch on her left, while sufficient to present the question of negligence, does not disclose careless and reckless driving within the purview of G.S. 20-140. *Williams v. Boulerice*, 499.

§ 72. Sufficiency of Evidence of Intoxication of Driver.

Where there is evidence that defendant remained some 40 minutes at the scene of the accident before he was taken to the hospital, with no evidence from any member of the crowd that gathered that defendant was intoxicated or even had the odor of alcohol about him, testimony by a patrolman that some hour and fifty minutes after the accident he smelled the odor of alcohol on defendant while defendant was in the hospital, is insufficient to permit an inference that defendant was under the influence of intoxicants at the time of the accident. *S. v. Reddish*, 246.

The evidence in this case *held* amply sufficient to sustain defendant's conviction of driving a motor vehicle on a public highway while under the influence of intoxicating liquor. *S. v. Broome*, 661.

BAILMENT.

§ 1. The Relationship.

When a dealer permits a prospective purchaser to take a car and drive it for the purpose of trying it out to determine whether he wishes to buy it, no representative of the dealer accompanying the driver, the relationship between the dealer and the prospective purchaser is that of a bailor and bailee for the mutual benefit of the parties. *Wilcox v. Motors Co.*, 473.

BASTARDS.

§ 3. Limitations on Prosecutions for Wilful Refusal to Support.

Where the paternity of the child is not adjudicated within three years of its birth the State must show, in a prosecution begun after the three year

BASTARDS—*Continued.*

period, that defendant made payments for the child's support within three years after its birth, and that warrant was issued within three years of the date of the last payment. *S. v. McKee*, 280.

§ 8. Issues and Verdict in Prosecutions for Wilful Refusal to Support.

In prosecution under G.S. 49-2 it is the accepted practice to submit issues to the jury, treated as a special verdict, but the issues submitted must necessarily present to the jury inquiries as to all the facts necessary to determine defendant's guilt, and also, if challenged by defendant, the fact that the prosecution was commenced within the time limited. *S. v. McKee*, 280.

In a prosecution under G.S. 49-2 begun more than three years after the child's birth, without any judicial determination of paternity, the issues submitted to the jury must include predicate for a finding that defendant made payments for support of the child within three years of its birth, as well as a finding that defendant made such payments within three years prior to the issuance of the warrant, and when the issues fail to present one of these essentials they are insufficient to support conviction. *Ibid.*

BILL OF DISCOVERY.

§ 1. Examination of Adverse Party in General.

Where the application for the adverse examination of defendants in an action to recover for negligence in the treatment of a hospital patient is too sweeping in not confining the request to the examination of defendants in regard to their diagnosis, treatment and procedures in the care of the particular patient and the hospital records relating thereto, the order for the examination is properly vacated, but plaintiff is properly given an opportunity to file an amended petition for an examination of the defendants within proper limits. *Brown v. Hospital*, 253.

BILLS AND NOTES.

§ 16. Parties and Pleadings.

Complaint held to state single cause of action to recover on note secured by deed of trust, and upon refusal of one payee to join as plaintiff, she was properly joined as defendant, since all joint payees are necessary parties. *Underwood v. Otwell*, 571.

BREACH OF PROMISE OF MARRIAGE.

A promise of marriage by a man already married will not support an action for breach of promise of marriage, but promise made subsequent to his divorce may be made the basis of such an action. *Hutchins v. Day*, 607.

It is not required that a promise of marriage embrace a definite date, it being sufficient if the evidence justifies a finding by the jury of the existence of an engagement, but the marriage of one of the parties to another person is a definite breach of promise. *Ibid.*

Plaintiff's evidence *held* sufficient to show a valid contract of marriage entered into by the parties in this State and a breach of the contract in this State, precluding nonsuit, notwithstanding evidence that would also permit a finding that the promise of marriage was made in another state which does not recognize such cause of action. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS.

§ 4. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence held sufficient on question of defendant's guilt of felonious entry into dwelling. *S. v. Arsad*, 184.

Evidence that tracks fitting the shoes worn by defendant at the time of the offense were discovered where the stolen goods had been abandoned in a field adjoining the prosecuting witness' yard, but that the tracks could not be traced through the grass in her yard to her house, *held* insufficient to be submitted to the jury in a prosecution for breaking and entering the prosecuting witness' house and stealing the goods therefrom. *S. v. Batts*, 694.

§ 6. Verdict.

Where the indictment and the evidence relate to burglary in the first degree and the court instructs the jury that defendant is on trial for the capital crime of first degree burglary, clearly defines burglary in the first degree, and correctly charges the jury as to the permissible verdicts upon the evidence, *held* the verdict of guilty returned by the jury, with no recommendation of mercy, necessarily imports a finding of guilty of burglary in the first degree. *S. v. Childs*, 307.

§ 8. Elements of Offense of Possession of Implements of Housebreaking.

A pistol is not an "implement of housebreaking" within the purview of G.S. 14-55. *S. v. Godwin*, 263.

§ 9. Prosecutions for Possession of Implements of Housebreaking.

The burden is upon the State to show that defendant had in his possession an implement or implements of housebreaking enumerated in the statute or coming within the term "implements of housebreaking" within the meaning of the statute, and that such possession was without lawful excuse, in order to sustain a conviction of defendant for that offense. G.S. 14-55. *S. v. Godwin*, 263.

Evidence tending to show that defendant was a passenger in a car in which implements of housebreaking were found without any evidence that defendant had any control whatsoever over either the automobile or the implements of housebreaking found therein, and no evidence in respect to when, where, or under what circumstances defendant entered the automobile, or disclosing his relationship or association with the driver thereof, *is held* insufficient to be submitted to the jury in prosecution of defendant for possession of implements of housebreaking without lawful excuse. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 4. Cancellation and Rescission for Mutual Mistake.

The owner, due to mistake, conveyed lot 13 to a purchaser instead of conveying intended lot 15. The purchaser executed a deed of trust. In proceedings to rectify the error the deed of trust was foreclosed and the land bid in by the original owner and the deed of trust discharged out of the proceeds of sale. *Held:* The *cestui*, having been reimbursed only for monies advanced by it, may not be held liable to the original owner for any payment made by him in his endeavor to rectify the error. The same result follows as to the trustee in a second deed of trust, executed by the grantee to the original owner, which was wiped out by the foreclosure. *Pendergrass v. Massengill*, 364.

The owner, due to mistake, conveyed lot 13 to a purchaser instead of conveying intended lot 15. The purchaser executed a deed of trust. Pursuant to

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

an agreement to rectify the mistake, the purchaser allowed the deed of trust to become in default and to be foreclosed, but, contrary to the agreement, the original owner bid in the property. Upon discovering that the original owner had bid in the property, the attorney for the grantee registered the deed to lot 15 which had been executed by the original owner pursuant to the agreement to rectify the mistake. *Held:* Judgment in the owner's suit decreeing the cancellation of the deed to lot 15 correctly awarded the grantee an equitable lien in the amount of that part of the purchase price paid by the grantee, together with the amount which the improvements made on the land by the grantee had enhanced its value, and the original owner, having brought about the collapse of the plan to rectify the error, is not entitled to credit on the equitable lien for the rental value during the occupancy of the grantee. *Ibid.*

CEMETERIES.

§ 3. Desecration of Graves or Monuments.

The heirs of a decedent at whose grave a monument has been erected may maintain an action for damages for the removal of the monument, even though they are not owners of the fee, but their pleading should allege their relationship to the decedent so as to disclose that they are heirs entitled to maintain the action, and mere allegation that they were heirs of the decedent is insufficient, and demurrer *ore tenus* to their pleading in the lower court and written demurrer filed in the Supreme Court must be sustained. *Rodman v. Mish*, 613.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 17. Sales.

Provision in a conditional sales contract for private sale of the chattel after default and repossession, is not contrary to statute or public policy of this State, and is valid; nevertheless, the seller or his assignee must act promptly and in good faith and use every reasonable means to obtain the full value of the property. *Financial Services Corp. v. Welborn*, 563; *Credit Corp. v. Mason*, 567.

§ 18. Deficiency and Personal Liability.

In this action by the assignee of a conditional sales agreement to recover a deficiency judgment, the complaint alleged that plaintiff repossessed the property under the terms of the agreement and at the request of the purchaser, and deficiency after credit for all payments and set-offs. Plaintiff attached to the complaint the agreement which provided for repossession upon default and for public or private sale, and an account showing the value assigned the property by plaintiff at the time of repossession, with adjustments for gain and loss on the resale of the property. *Held:* The complaint does not admit that plaintiff, upon repossessing the property, exercised dominion as owner, and is sufficient, as against demurrer, to state a cause of action for a deficiency judgment. *Financial Services Corp. v. Welborn*, 563.

In an action by the mortgagee or his assignee to obtain deficiency judgment after repossession and private sale of the property pursuant to the terms of the agreement, the sale not being to the mortgagee or one in privity with him, the burden rests upon the mortgagor to prove as matters of defense his allegations that the property was not sold for its fair market value, that the property was returned to the mortgagee in full satisfaction of the debt, or that the value of the chattel then exceeded the debt, and plaintiff may not be nonsuited on such affirmative defenses. *Credit Corp. v. Mason*, 567.

CONCEALED WEAPONS.

§ 2. Prosecutions.

An information charging that defendant, on a specified date, unlawfully and wilfully carried a concealed weapon, to wit, a pistol, about his person, the defendant, not being at the time on his own premises, is an accurate and sufficient charge of violating G.S. 14-269. *S. v. Caldwell*, 522.

CONSPIRACY.

§ 3. Nature and Elements of Criminal Conspiracy.

Criminal conspiracy is the unlawful agreement of two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and the agreement and not the consummation of the agreement is the offense. *S. v. Butler*, 733.

§ 5. Relevancy and Competency of Evidence.

In a prosecution for criminal conspiracy the acts and declarations of each conspirator in furtherance of the common design are competent against all. *S. v. Butler*, 733.

§ 6. Sufficiency of Evidence and Nonsuit.

A conspiracy may be proven by circumstantial evidence. *S. v. Butler*, 733.

CONSTITUTIONAL LAW.

§ 6. Legislative Powers in General.

While the General Assembly has no power to deprive the judicial department of jurisdiction rightfully pertaining to it as a coordinate department of the State government, the General Assembly has the power to regulate procedure in all courts below the Supreme Court. Constitution of North Carolina, Article IV, § 12. *Highway Comm. v. Hemphill*, 535.

§ 10. Judicial Powers in General.

The courts have the power to declare a statute unconstitutional, but every presumption will be indulged in favor of constitutionality and a statute will not be declared unconstitutional unless it is clearly so. *Gardner v. Reidsville*, 581.

§ 19. Monopolies and Exclusive Emoluments.

Article I, § 7, of the State Constitution does not preclude the granting of an exclusive emolument upon a particular group or person in the furtherance of the public interest or convenience, but merely precludes the granting of such exclusive emoluments to a group or to a person for the peculiar benefit of such group or person. *S. v. Knight*, 100.

§ 20. Racial Discrimination.

A lawyer of the Negro race against whom disbarment proceedings have been instituted is not entitled to inspect all disciplinary proceedings by the State Bar to support his contention of racial discrimination in the proceedings against him, since the inquiry is whether respondent is guilty of unethical conduct, and the guilt of others is not germane to that question. *State Bar v. Frazier*, 625.

§ 22. Religious Freedom.

Religious freedoms protected from congressional action by the First Amend-

ment of the Federal Constitution are protected against State action by the Fourteenth Amendment; however, religious freedoms are equally protected by the provisions of Article I, § 26, of the Constitution of this State. *In re Williams*, 68.

Religious freedoms protected by constitutional provisions are not limited to ministers or members of organized religious bodies but extend to all citizens. *Ibid.*

The constitutional protection of religious freedom is not absolute but must give way to the interest of the State in the exercise of constitutional regulations necessitated by compelling State interests. *Ibid.*

The State has a compelling interest that a person called as a witness should be sworn and should testify in the administration of justice between the State and one charged with a serious offense, and therefore a minister called as a witness in such prosecution may be held in contempt of court upon his refusal to be sworn as a witness, notwithstanding he asserts that his refusal is a matter of religious conscience. *Ibid.*

§ 27. Burdens on Interstate Commerce.

A sales tax on an interstate transaction is a burden on interstate commerce prohibited by the Commerce Clause of the Federal Constitution, but a tax on a sale completed in this State does not constitute a burden on interstate commerce merely because the buyer and the seller intend the goods sold should be used outside the State. *Excel Co. v. Clayton*, 127.

§ 28. Necessity for and Sufficiency of Indictment.

A defendant may not be lawfully convicted of an offense which is not included within the offense charged in the bill of indictment, regardless of the evidence introduced against him. *S. v. Overman*, 453.

§ 29. Right to Trial by Duly Constituted Jury.

Statutory exemptions of designated classes from jury duty does not deprive defendant of right to trial by jury drawn impartially from cross section of the community. *S. v. Knight*, 100.

The burden is upon defendant upon his challenge to the array and motion to dismiss the special venire to prove his ground of objection that there had been racial discrimination in the exclusion of Negroes from the jury list and where defendant's evidence tends to show that the jury list was selected from the names appearing on the county tax lists, without discrimination as to race, and further, that the county officials sought to obtain the names of Negro residents of the county, not included in the tax books, to place them on the jury list, defendant's evidence fails to show racial discrimination in the selection of the jury. Fourteenth Amendment to the Constitution of the United States. *S. v. Ross*, 739.

§ 31. Right of Confrontation.

Where the court excludes the testimony of defendant's witness tending to show that the prosecuting witness was biased or prejudiced against him, the fact that the court thereafter has the court reporter read the testimony to the jury does not cure the error, since defendant is entitled to have the jury hear the testimony of his witness and observe her demeanor. *S. v. Wilson*, 298.

The denial of a defendant's motion that he be furnished, at public expense, with a transcript of a former prosecution of such defendant for the purpose of preparing for trial on a third indictment not involved in the present prosecution, is not error. *S. v. Overman*, 453.

CONSTITUTIONAL LAW—*Continued.*

Petitioner and another were jointly charged with murder. Petitioner was not tried until some ten months after his arrest, and was represented by counsel employed by his family at the preliminary hearing and at the trial. At no time did petitioner's attorney request a conference with petitioner's codefendant or a conference between the codefendants. *Held:* The record does not sustain petitioner's contention that he was denied the right to confer with his codefendant in private. *Branch v. State*, 642.

§ 32. Right to Counsel.

A defendant has the right to waive counsel and elect to appear *in propria persona*, and when the trial judge informs defendant in open court of the charges against him and of his right to have counsel appointed for him, and defendant then intentionally, understandingly and voluntarily waives his right to have court appointed counsel, his waiver is effective. *S. v. Elliott*, 683.

§ 33. Right of Accused Not to Incriminate Self.

In a prosecution for rape, it is not error for the solicitor to comment upon the relative size of one of defendants as compared with that of the girl, even though such defendant does not testify as a witness, he being present in the courtroom throughout the trial. *S. v. Overman*, 453.

Since an accused's fingerprints may be taken, notwithstanding objection on his part and notwithstanding advice of counsel, there can be no violation of defendant's constitutional rights in taking his fingerprints prior to the employment of counsel by him and prior to any advice to him concerning his constitutional rights. *Branch v. State*, 642.

Article of clothing worn by defendant at time of arrest is competent in evidence. *S. v. Ross*, 739.

§ 36. Cruel and Unusual Punishment.

The imposition of sentences which do not exceed the maximum fixed by the applicable statutes cannot be considered cruel and unusual punishment in the constitutional sense. *S. v. Caldwell*, 522; *S. v. Elliott*, 683.

CONTEMPT OF COURT.

§ 2. Direct or Criminal Contempt.

Punishment for direct contempt does not contemplate jury trial and court may correctly punish minister who refuses to be sworn in as witness. *In re Williams*, 68.

§ 7. Punishment for Contempt.

The maximum punishment for direct contempt in refusing to be sworn as a witness is a fine not to exceed $250 or imprisonment not to exceed 30 days, or both, in the discretion of the court. *In re Williams*, 68.

CONTRACTS.

§ 7. Contracts in Restraint of Trade.

Provision of a written contract for agency for the rental of "U-Haul" trailers and trucks that, after termination of the agency, the agent would not, within the county, represent or render any service for others engaged in the trailer rental service for a period of one year after the expiration of the then current telephone listing, *held* valid and injunction would lie to restrain a breach by the agent. *U-Haul Co. v. Jones*, 284.

CONTRACTS—*Continued.*

§ 33. Construction and Operation of Construction Contracts.

In this action by subcontractor against prime contractor, allegations of prime contractor held insufficient to state cross-action against owner. *Connolly v. Contracting Co.*, 423.

CONTROVERSY WITHOUT ACTION.

§ 2. Statement of Facts, Hearings and Judgment.

The contention that the court was without power to find facts in addition to those agreed upon by the parties and submitted to the court, is immaterial when some of the findings by the court are conclusions of law and the other findings by the court are not material to the determination of the controversy. *Shaw v. Asheville*, 90.

CONVICTS AND PRISONERS.

§ 3. Negligent Injury to Convicts and Prisoners.

Plaintiff alleged that he was a prisoner assigned by the superintendent of prison farms to work, over his protest, on a garbage truck while plaintiff's arm was in a cast so that his capacity to hold on to the sides of the truck and protect his own safety was impaired, and that the driver of the truck drove same into a hole or depression, causing plaintiff to be thrown off the bed of the truck onto the ground, resulting in serious injury. *Held:* The complaint alleges a cause of action for negligence against the driver of the truck, and therefore the joint demurrer of the driver, the superintendent of prison farms, and the surety on their bonds should have been overruled. *West v. Ingle*, 447.

CORPORATIONS.

§ 3. Election, Qualification and Tenure of Officers and Directors.

Alcoholism and mismanagement of corporate funds are separate defenses excusing breach of agreement to elect plaintiff president of corporation for five year term. *Wilson v. McClenny*, 399.

COUNTIES.

§ 2.1. Zoning Regulations.

A landowner may not enjoin a county from enforcing its zoning regulations until after he has applied for and been denied a special permit for a hardship case, and thus exhausted his administrative remedies. *Michael v. Guilford County*, 515.

COURTS.

§ 4. Minimum Amount Within Original Jurisdiction of Superior Court.

Plaintiff's allegations were to the effect that he purchased specified items of personalty from defendant and made a partial payment under agreement that he would pay the balance of the purchase price when he picked up the articles, that defendant thereafter sold the personalty to a third party, to plaintiff's actual damage in the amount of $70. *Held:* The complaint was sufficient to allege a cause of action in tort for conversion, and defendant's demurrer to the jurisdiction on the ground that the action was *ex contractu* and

COURTS—*Continued.*

within the exclusive original jurisdiction of a justice of the peace, should have been overruled. *Coble v. Reap*, 229.

§ 6. Appeals from Clerk to Superior Court.

Construing G.S. 1-276 and G.S. 1-272 *in pari materia*, it *is held* that the Superior Court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. *Gravel Co. v. Taylor*, 617.

§ 20. Conflict of Laws — Laws of This and Other States.

The validity and construction of a contract are to be determined by the law of the state where executed; where the contract provides for performance in another state, the law of the place of performance governs generally or as to matters relating to performance, but when the duty of performance exists regardless of the residence of the parties, the *lex loci* controls. *Davis v. Davis*, 120.

Under comity, an instrument executed in accordance with the *lex loci* and there valid, will generally be regarded as valid under the *lex fori* unless contrary to the settled public policy of the forum. *Ibid.*

The rule that an instrument executed in another state will not be given effect in the state of the forum if such instrument is contrary to the settled public policy of the forum, relates to substance and not form, and if the subject matter of the contract, executed in another state in conformity with its laws, is not contrary to public policy in this State, it will not be declared invalid here merely because of the failure to comply with our statutory requirements governing the execution of such contracts. *Ibid.*

Separation agreement executed in another state will be upheld here provided it is not injurious to the wife under the then existing conditions of the parties. *Ibid.*

Where the promise of marriage is made in a state not recognizing a cause of action for breach of promise, a plaintiff may not maintain a cause of action here for breach of promise of marriage, and therefore defendant's allegations that the promises of marriage were made exclusively in such other state sets up a valid defense and motions to strike such allegations are properly denied. *Hutchins v. Day*, 607.

CRIMINAL LAW.

§ 5. Mental Capacity in General.

Every man is presumed sane, and the burden is upon defendant to prove his defense of mental irresponsibility, which burden of proof is not satisfied by a contention that if defendant were normal he would not have attempted the escape for which he was prosecuted. *S. v. Hicks*, 762.

§ 9. Aiders and Abettors.

Persons who are present, aiding and abetting each other in the perpetration of an offense, are equally guilty with the actual perpetrator of the crime. *S. v. Overman*, 453.

§ 15. Venue.

Motion for change of venue on the ground of unfavorable publicity in the county is addressed to the sound discretion of the trial court, and no abuse of discretion in the denial of the motion is shown when the court makes inquiry in regard to the matter, concludes from the inquiry that no reason appears

CRIMINAL LAW—*Continued.*

why a fair jury could not be selected in the county, instructs the jury not to read or hear accounts of the trial, and defendant does not exhaust his peremptory challenges or challenges for cause. *S. v. McKethan*, 81.

Where, on the hearing of defendant's motion for change of venue on the ground that defendant could not obtain a fair trial by a jury drawn from the counties within the district because of unfavorable publicity, the court enters an order that a venire be drawn from a county in an adjoining district, the order for a special venire is tantamount to a denial of the motion to remove, and the court's order for the special venire is entered by virtue of the discretionary authority vested in the court by G.S. 1-86, and is not reviewable in the absence of manifest abuse of discretion. *S. v. Childs*, 307.

A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that defendant could not obtain a fair trial because of widespread and unfavorable publicity, is addressed to the discretion of the trial court, and where the record discloses that the trial judge conducted a hearing, read all the affidavits, and examined the press releases, that each juror selected stated that he could render a verdict uninfluenced by the publicity, and that defendant did not exhaust his peremptory challenges, abuse of discretion in denying the motion is not disclosed. *S. v. Porth*, 329.

In this prosecution of defendants for raping, successively, prosecutrix, the State's evidence, without contradiction, showed that prosecutrix was forced from the car of her companion into a car in possession of defendants and that the first act of rape began immediately thereafter in the county in which the indictment was laid. *Held:* It was not error for the court to deny one of defendants plea in abatement for improper venue in the absence of evidence by such defendant that the offense with which he was charged occurred in another county. *S. v. Overman*, 453.

§ 16. Jurisdiction — Degree of Crime.

The Superior Court of Buncombe County has original jurisdiction over misdemeanors. G.S. 7-64. *S. v. Caldwell*, 521.

§ 18. Jurisdiction on Appeals to Superior Court.

Upon appeal to the Superior Court from a county court, defendant is entitled to a trial *de novo* without prejudice from the former proceedings in the county court, and without regard to his plea of guilty in the county court. *S. v. Broome*, 661.

§ 21. Preliminary Proceedings.

A patrolman apprehended defendant driving on a public highway while under the influence of intoxicating liquor, arrested him without a warrant and gave defendant a ticket charging defendant with the offense. Defendant was not put in jail but was released upon bond. Thereafter a warrant was issued. Defendant contended that his constitutional rights were denied in that he was required to give bond before issuance of warrant and was not carried before a magistrate as required by G.S. 15-46. *Held:* The statute does not prescribe mandatory procedure affecting the validity of the prosecution in the trial court, and the facts do not disclose a deprivation of any constitutional rights of defendant. *S. v. Broome*, 661.

§ 23. Plea of Guilty.

A plea of guilty, knowingly and voluntarily entered in a court having jurisdiction, to an indictment and information validly charging criminal of-

fenses, are formal confessions of guilt obviating the necessity of proof by the State. *S. v. Caldwell*, 521.

The record in this case *is held* to show affirmatively that defendant, who was represented by counsel, understood the charge against him, the nature and effect of his plea of guilty and the maximum sentence which might be lawfully imposed upon such plea, and that he entered the plea voluntarily without threat or inducement. *Ibid.*

A plea of guilty does not preclude defendant from claiming that the facts alleged in the indictment do not constitute a crime under the laws of the State. *S. v. Elliott*, 683.

§ 25. Plea of Nolo Contendere.

The fact that the court pronounces judgment after defendant's plea of *nolo contendere* constitutes an acceptance of the plea, and no formal record of the acceptance is required. *S. v. Hicks*, 762.

§ 26. Former Jeopardy.

Record *held* not to support defendant's contention that a new trial was ordered over his objection. *Williams v. State*, 301.

A defendant may not be put in jeopardy for any offense of which he could lawfully have been convicted upon the trial under a former indictment, but where a defendant could not be lawfully convicted under the former indictment of the offense of which he is charged in the second indictment, plea of former jeopardy will not lie, even though the separate offenses were committed in the course of the same series of acts pursuant to the same plan of action. *S. v. Overman*, 453.

The offenses of kidnapping and rape each have essential elements which are not component parts of the other, and therefore a prosecution under an indictment for kidnapping will not support a plea of former jeopardy in a subsequent prosecution for rape, even though rape may have been the motive for the kidnapping and even though defendants in the prior prosecution for kidnapping were convicted, respectively, of assault on a female and simple assault, the record in the kidnapping prosecution disclosing that the court instructed the jury that occurrences subsequent to the kidnapping were not germane to that charge and might be considered only as bearing upon the questions of force and felonious intent. *Ibid.*

§ 33. Facts in Issue and Relevant to Issue in General.

Where evidence of the acts of some of the defendants prior to the time they were joined by another of the defendants is excluded by the court as to such other defendant, but later evidence discloses that such other defendant was acting in concert and joined his co-defendants in the commission of the offense charged, the court correctly instructs the jury that the evidence theretofore excluded as to such defendant might be considered against him upon the question of his guilty knowledge and intent. *S. v. Overman*, 453.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

Reference to the fact that defendant was on parole is improper, but in this case the prejudicial effect was cured by action of the court. *S. v. Battle*, 292.

In a prosecution of defendant for maliciously and unlawfully peeping into a room occupied by a female person, testimony elicited on cross-examination of defendant that he had theretofore been convicted of assault with a deadly

CRIMINAL LAW—*Continued.*

weapon and for storebreaking and larceny is not competent as substantive evidence. *S. v. Norkett*, 679.

§ 38. Evidence of Like Facts or Transactions.

Evidence that defendant had the odor of whiskey on his breath is not evidence that defendant was intoxicated two hours prior thereto. *S. v. Reddish*, 246.

§ 41. Circumstantial Evidence in General.

Where the evidence discloses that defendants, wearing masks, feloniously broke into a dwelling, kidnapped an occupant thereof, and took a car from a passerby for their getaway, it is competent for the State to introduce in evidence disguises, clothing, guns and ammunition, properly identified as being in defendants' possession when they set out on the criminal escapade, and evidence of their respective heights and that they left an accomplice to await them in a car some distance from the scene of the crime, since all the circumstances have a direct bearing in proving identity or guilt. *S. v. Arsad*, 184.

§ 43. Photographs.

Photographs which are competent for the purpose of illustrating the testimony of the witnesses are not rendered inadmissible because they may be inflammatory or gruesome. *S. v. Porth*, 329.

Where there is testimony that a photograph introduced in evidence was an accurate representation of the scene, the court properly admits such photograph for the purpose of illustrating the testimony of the witness. *Ibid.*

§ 50. Expert and Opinion Evidence Testimony in General.

The State introduced expert testimony that defendant's wife died as a result of multiple external and internal injuries produced by some blunt instrument. *Held:* Testimony of an officer finding the body of the wife on a mountainside that there was definitely no sign to indicate a violent death, is properly excluded as the conclusion of an unqualified witness. *S. v. Porth*, 329.

Testimony of a witness that she did not voluntarily engage in sexual relations with any of defendants at any time during the night in question is not testimony of an opinion but of a fact within the knowledge of the witness. *S. v. Overman*, 453.

Testimony of a witness that defendant shot the deceased persons is not rendered incompetent because the witness was in an adjoining room and could not see the shots actually fired, when the testimony of the witness further discloses that she heard the shots, heard one of the victims accuse defendant of having shot him, heard defendant state that he had shot him and was going to shoot the rest, and that defendant immediately came into the room where the witness was and shot her, etc., so that it is apparent from the record that the witness was testifying to facts within her knowledge, gathered from the use of her other senses, actual vision not being an absolute requirement under such condition. *S. v. Butler*, 483.

§ 53. Medical Expert Testimony.

A witness qualified as a medical expert may testify that the presence of acid phosphatase in a specified concentration in the vagina indicated the presence of male seminal fluid. *S. v. Temple*, 57.

A medical expert may testify from his autopsy, even though the autopsy is made five months after deceased's death, as to the cause of death, the expert having testified that the body was in an excellent state of preservation

and quite satisfactory for examination. The delay in making the autopsy relates to the weight of the testimony rather than to its competency. *S. v. Porth*, 329.

§ 71. Confessions and Incriminating Statements.

Evidence held to support finding that incriminating statement was freely and voluntarily made. *S. v. Temple*, 57; *S. v. McKethan*, 81; *S. v. Childs*, 307.

While a witness may read to the jury a voluntary confession made by defendant as typed, transcribed or put down in shorthand by the witness when the witness testifies that the writing contains verbatim the words of defendant, this rule does not extend to the reading by the witness of the witness' interpretative narration of what the witness understood to be the purported statements made by accused. *S. v. Walker*, 135.

Where defendant signs a written statement of his purported voluntary confession, even though reduced to writing by another person, it will be presumed, nothing else appearing, that the accused had read it or had knowledge of its contents, but this presumption cannot be indulged when the State's own evidence establishes that the statement was not read to, or by, the accused before he signed it. *Ibid.*

While a witness may refer to a written memorandum prepared by him for the purpose of refreshing his memory as to incriminating statements made by the defendant, only the personal sworn testimony of the witness, and not the memorandum, would be competent as substantive evidence, and when the witness reads the memorandum itself to the jury and the memorandum does not tend to corroborate the testimony of the witness, but is in direct conflict with the statements attributed to defendant by the witness at the trial, the admission of the written statement in evidence is prejudicial error. *Ibid.*

Findings of fact by the trial court upon the *voir dire* as to the voluntariness of defendant's confession are conclusive on appeal when supported by competent evidence. *S. v. Childs*, 307.

The findings of fact by the court upon the *voir dire* in regard to the circumstances under which defendant allegedly made the confession sought to be introduced in evidence are conclusive on appeal when supported by evidence, but whether such facts support the conclusion of the court that the confession was freely and voluntarily made is a question of law reviewable on appeal. *S. v. Fuqua*, 223.

Where the State's evidence, without contradiction, is to the effect that the officer to whom defendant allegedly confessed stated prior to the confession that if defendant wanted to talk to the officer the officer would be able to testify that defendant had talked to the officer and was cooperative, *is held* to disclose a promise by the officer having the natural tendency to arouse in defendant a hope for a lighter punishment if he confessed, tainting the confession and rendering it incompetent. *Ibid; S. v. May*, 300.

A statement voluntarily made by defendant to an officer prior to any custodial or even interrogatory relationship between them is competent. *S. v. Inman*, 287.

Evidence that prior to the making of a statement while in custody, defendant was advised of his right to remain silent, that any statement he made might be used as evidence against him, that he was entitled to have an attorney, and that if he could not employ an attorney an attorney would be appointed for him, and that no promises or threats were made to induce the making of the statement, *held* to support the court's finding that the statement was voluntarily and understandingly made. *Ibid.*

It is not required that trial court *sua sponte* exclude testimony of a statement volunteered by defendant at the outset of an investigation. *S. v. Williams*, 376.

Where the court, on the *voir dire*, excludes testimony of a statement of defendant, there is no occasion for cross-examination by defendant in regard thereto. *S. v. Butler*, 483.

The ruling in *Miranda v. Arizona*, 384 U.S. 436, has no application to a trial had prior to the date of the rendition of that decision, and where there is no claim by the defendant that he was denied counsel, and the affirmative evidence is to the effect that defendant was informed of his constitutional rights and that he did not have to make a statement, testimony of defendant's statement is competent. *Ibid.*

An exculpatory statement of defendant is not a confession, even though it be in contradiction of the testimony of defendant at the trial, and the rules governing the admissibility of confessions are not germane. *Ibid.*

The intoxication of a defendant at the time of making incriminating statements does not render the statements incompetent when the trial court finds, upon supporting evidence, that at the time defendant was not intoxicated to such an extent as to render his statements involuntary. *S. v. Logner*, 550.

It is error for the trial court to charge the jury that the court had found that the incriminating statements attributed to defendant were freely and voluntarily made. *Ibid.*

Upon defendant's objection to a question in regard to an incriminating statement made by defendant while under arrest, the court should, upon a *voir dire* hearing, ascertain whether the incriminating statement was voluntarily made after defendant had been apprized of his constitutional rights, and the admission of the statement in evidence without any hearing must be held for prejudicial error. *S. v. Ross*, 739.

§ 74. Acts and Declarations of Companions, Co-defendants and Co-conspirators.

The fact that during the progress of the trial one of defendants jointly indicted changes his plea from not guilty to guilty, does not require a new trial as to the other defendants when the court is careful to remove any prejudicial effect by charging the jury that the circumstances should not be considered against the co-defendants, that the fact that they were jointly indicted did not mean that defendants must all fail or succeed together, and that the State was not relieved of its burden of proving each individual defendant guilty by the evidence and beyond a reasonable doubt. *S. v. Pearson*, 725.

§ 76. Best and Secondary Evidence; Lost and Destroyed Instruments.

The State contended that defendant murdered his wife because he was in love with another woman and his wife would not consent to a divorce. *Held:* It is competent for the other woman to testify as to the contents of letters written to her by defendant which she had burned, the testimony being competent on the question of motive. *S. v. Porth*, 329.

§ 77. Privileged Communications.

G.S. 8-35.1 does not authorize a minister to refuse to be sworn or to testify when the person against whom such testimony is directed does not invoke the privilege. *In re Williams*, 68.

Fear of loss of esteem or apprehension of decrease in ability to render service in the community does not justify a witness in refusing to testify when

the matter does not come within the purview of privileged communications. *Ibid.*

§ 79. Evidence Obtained by Unlawful Means.

When defendant consents to search, evidence obtained by search without warrant is competent. *S. v. Temple*, 57; *S. v. Williams*, 376.

§ 80. Character Evidence of Defendant.

Where defendant testifies but does not put his character in issue, evidence of prior convictions of other offenses ordinarily is not competent as substantive evidence, and when such evidence, elicited by cross-examination, does not come within any exception to the general rule, it is error for the court to fail to give defendant's request for an instruction that such evidence should be considered solely for the purpose of impeachment. *S. v. Norkett*, 679.

§ 83. Cross-Examination.

Where the place at which defendant was employed is relevant because at the time of his arrest he was wearing a uniform of his employer, it is competent for the State to show that defendant had made contradictory statements as to where he lived and where he worked. *S. v. Battle*, 292.

A defendant is entitled to show that the prosecuting witness was biased or prejudiced against him for the purpose of challenging her credibility. *S. v. Wilson*, 297.

§ 87. Consolidation and Severance of Indictments for Trial.

Where the State's case is based on evidence tending to show that defendant feloniously entered a home and kidnapped an occupant thereof, and with the kidnapped victim as a decoy, forcibly took an automobile from a passerby, so that the evidence of the whole affair is pertinent and necessary to establish identity of defendant as the perpetrator of the offences, the three indictments for feloniously entering a dwelling, kidnapping, and common law robbery are properly consolidated for trial. *S. v. Arsad*, 184.

Indictments charging defendants with rape based upon their successive attacks upon the prosecutrix, each in the company of the others, as a part of one entire plan of action, *held* properly consolidated for trial. *S. v. Overman*, 453.

Denial of motions of defendants for separate trials under an indictment jointly charging them with the commission of a single offense, will not be held for error when at the time there is no reason to anticipate that the State would offer the admission of either defendant which might prejudice the others. *S. v. Pearson*, 725.

§ 91. Withdrawal of Evidence.

Withdrawal of unresponsive answer of witness held to have obviated necessity for mistrial. *S. v. McKethan*, 81; *S. v. Battle*, 292.

Where hearsay evidence, which is of minor import and relates to a matter amply established by other competent evidence, is immediately withdrawn by the court upon defendant's objection and the jury instructed to disregard it, any prejudice in the admission of such evidence is cured. *S. v. Childs*, 307.

§ 93. Sequestration of Witnesses.

Motion to sequester the witnesses is addressed to the discretion of the trial court, and the refusal of the motion is not reviewable. *S. v. Love*, 691.

CRIMINAL LAW—*Continued.*

§ 97. Argument and Conduct of Counsel and Solicitor.

Where some of defendants jointly tried introduce evidence, the court correctly denies a defendant not introducing evidence the right to the closing argument to the jury. *S. v. Overman*, 453.

§ 99. Consideration of Evidence on Motion to Nonsuit.

Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit. *S. v. Walker*, 135; *S. v. Mabry*, 293.

On motion to nonsuit, the evidence of the State is to be considered in the light most favorable to it, and any contradictions in the testimony of the State's witnesses are to be disregarded. *S. v. Overman*, 453.

§ 100. Necessity for Motion to Nonsuit and Renewal.

Where no motion for compulsory nonsuit is made in regard to a charge contained in a warrant and no prayer for special instruction, the question of the sufficiency of the evidence to support conviction under the warrant cannot be raised for the first time after verdict. *S. v. Wiggs*, 507.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

The test of the sufficiency of circumstantial evidence to be submitted to the jury is the same as the test for direct evidence: there must be 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 of guilt. *S. v. Tillman*, 276.

If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical deduction and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to a jury. *S. v. Mabry*, 293.

Evidence which raises a mere suspicion or conjecture of guilt is insufficient to be submitted to the jury. *S. v. Batts*, 694.

§ 102. Nonsuit for Variance.

Where the indictment spells the victim's name as "Mateleane" while the record testimony spells her name "Madeleine", the variance comes within the rule of *idem sonans* and is not material. *S. v. Williams*, 376.

Where warrant does not charge that disorderly conduct was in violation of municipal ordinance, conviction of violating the ordinance must be set aside for variance. *S. v. Wiggs*, 507.

§ 103. Withdrawal of Count or Degree of Crime from Jury.

Announcement of the solicitor that he would not rely on defendants' guilt as aiders and abettors is analogous to a bill of particulars, precluding the solicitor from prosecuting defendants on that theory, but does not alter the nature of the offense charged or the proof requisite to establish guilt of such offense, and therefore where the evidence introduced by the State conforms to the solicitor's announcement but nevertheless tends to show that each defendant was present and that each, successively, raped the prosecutrix in the course of one series of acts and pursuant to the same plan of action, the court properly charges the jury upon the law of aiding and abetting arising on the evidence. *S. v. Overman*, 453.

§ 104. Directed Verdict and Peremptory Instructions.

Defendant pleaded not guilty and controverted the charge against him. *Held:* It was error for the court to instruct the jury that if they believed all

CRIMINAL LAW—*Continued.*

the evidence beyond a reasonable doubt to return a verdict of guilty. *S. v. Broome*, 661.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

Ordinarily, the trial court is required to instruct the jury as to all essential elements of the offense charged and place the burden upon the State to prove each of such elements, and whether a deficiency in this respect is sufficient ground for a new trial must be determined in relation to the circumstances of each case. *S. v. Logner*, 550.

The court's instructions to the jury made the question of guilt dependent upon whether defendant made incriminating statements attributed to him and whether he made such statements freely and voluntarily, but no where did the court charge the elements of the offenses or that the burden was on the State to satisfy the jury from the evidence beyond a reasonable doubt that defendant committed the acts constituting the offenses charged. *Held:* The failure of the court to define the offenses and properly place the burden of proof is prejudicial error. *Ibid.*

The act of the court in reading the statute upon which the indictment was based and pointing out the material parts which applied to the charge against the defendants cannot be held erroneous as amounting to a peremptory instruction of guilt, since such instruction constituted a mere discharge of the court's duty to declare and explain the law of the case. *S. v. Butler*, 733.

§ 108. Expression of Opinion by Court on Evidence in the Charge.

In a prosecution for driving while under the influence of intoxicating liquor, an instruction to the jury that the police officer who apprehended defendant had no personal interest in the case or bias toward defendant and that the officer's only interest was in seeing that the law was complied with and in protecting innocent people operating their automobiles on the highway, *is held* a prohibited expression of opinion by the court, even though the instruction was given in stating a legitimate contention of the solicitor in his argument to the jury. *S. v. Maready*, 750.

The use of the phrase "the State has presented evidence in this case which tends to show" in recapitulating the State's evidence, the same phrase being used in the recapitulation of defendant's evidence, *is held* not to constitute an expression of opinion by the court on the evidence. *S. v. Huggins*, 752.

§ 112. Charge on Contentions of Parties.

A misstatement of the contentions of the parties must be brought to the court's attention in apt time in order for an exception to be considered. *S. v. Butler*, 733.

§ 116. Additional Instructions.

The fact that the court requires the jury to continue their deliberations successively on two occasions after they had announced a "deadlock" is not ground for objection when the record discloses that the trial lasted some ten days and that the entire deliberations of the jury consumed slightly more than five hours, and further that the trial judge gave no intimation as to what the verdict should be but specifically instructed the jury that none should compromise his convictions or do violence to his conscience in order to reach a verdict. *S. v. Overman*, 453.

It is not error for the court, after the jury had failed for several hours to reach a verdict, to urge the jurors to agree upon a verdict when the record

CRIMINAL LAW—*Continued.*

discloses that the court cautioned them that they should reconcile their differences of opinion only if they could do so without any one of them surrendering his conscientious convictions in the matter. *S. v. Butler*, 483.

It is error for the court to refuse to accept a sensible verdict and require the jury to resume deliberations. *S. v. Sumner*, 555.

§ 118. Form and Sufficiency of Verdict.

The verdict of the jury may be interpreted and given significance by reference to the indictment, evidence and the charge of the court. *S. v. Childs*, 307.

While a verdict is not complete until accepted by the court, if the jury returns a verdict that is permissible under the charge and complete in itself, even though it contains surplusage, the court must accept it. *S. v. Sumner*, 555.

Upon a trial on a warrant charging defendant with operating a motor vehicle on a public highway while under the influence of intoxicating liquor and charging that defendant had theretofore been twice convicted of violating the statute, verdict of the jury of guilty of a first offense amounts to an acquittal in regard to the charge that the offense was a third offense, precluding further prosecution of that matter. *S. v. Broome*, 661.

§ 121. Arrest of Judgment.

By pleading guilty to warrants in a court having jurisdiction, defendant waives any defects incident to the authority of the persons issuing the warrants, and motion in arrest of judgment will not lie. *S. v. Wiggs*, 507.

By pleading not guilty to warrants in a court having jurisdiction, without any motion addressed to the validity of the warrant, defendant waives any defect incident to the authority of the person issuing the warrant, and motion in arrest of judgment will not lie. *S. v. Whaley*, 761.

§ 131. Severity of Sentence.

Where, upon the second trial, granted upon post-conviction hearing, defendant is sentenced to serve the maximum term, he must be allowed credit for the time actually served plus gained time, if any, under the first conviction. *Williams v. State*, 301.

Defendant is not entitled to credit for time spent while in custody in default of bond awaiting a second trial granted on a post-conviction hearing. *Ibid.*

After plea of guilty, court properly hears evidence for purpose of determining sentence, and may hear testimony of a statement made by defendant without having been advised of his constitutional right to remain silent, the rules of evidence governing prosecutions not being applicable. *S. v. Caldwell*, 522.

The imposition of sentence within the statutory maximum cannot be held cruel or unusual in the constitutional sense. *Ibid.*

§ 136. Revocation of Suspension of Judgment or Sentence.

Even though the solicitor takes a *nolle prosequi* on the charge of unlawful possession of intoxicating liquor and the jury acquits defendant of the charge of possessing intoxicating liquor for the purpose of sale, the court, upon supporting evidence at a *de novo* hearing, may find on substantially the same evidence that defendant had in his possession intoxicating liquor in violation of the terms of suspension of a prior judgment, the adjudication that defendant's possession was not unlawful not being inconsistent with a finding that defend-

CRIMINAL LAW—*Continued.*

ant had possession of intoxicating beverages in violation of the terms of suspension. *S. v. Causby*, 747.

§ 139. Nature and Grounds of Appellate Jurisdiction.

Appeal from sentence entered upon a plea of guilty, knowingly and voluntarily made, presents only the record proper for review, and while defendant may contest on appeal the suffiency and validity of the indictment and information, he waives all other defenses. *S. v. Caldwell*, 521.

Exception to the admission of incriminating statements of defendant without a *voir dire* hearing as to whether such statements were voluntarily made need not be considered when defendant is awarded a new trial on other grounds and it is probable that the matter will not arise upon the new trial. *S. v. Broome*, 661.

§ 147. Case on Appeal.

It is the duty of defendant to see that the record is properly made up and transmitted. *S. v. Childs*, 307.

§ 154. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

An assignment of error which does not disclose within itself the specific question sought to be presented, is ineffectual. *S. v. Mabry*, 293.

An appeal is in itself an exception to the judgment, presenting the face of the record proper for review, even in the absence of exceptions in the record. *S. v. Elliott*, 683.

§ 155. Objections, Exceptions and Assignments of Error to Evidence and Motions to Strike.

Where there is no objection to the solicitor's question to an officer as to the designation of the police file the photograph identified by prosecutrix as her assailant came from, and the court sustains defendant's objection to the officer's reply that the photograph came from the rape file (the prosecution being for rape), the matter is not ground for a mistrial, there being no objection until after the improper question had been asked and the answer in, and no motion to strike. *S. v. McKethan*, 81.

Ordinarily, defendant failing to object to admission of testimony may not challenge its admissibility for the first time after an adverse verdict. *S. v. Williams*, 376.

§ 156. Exceptions and Assignments of Error to Charge.

Objection to a long excerpt from the charge, an exception to instructions addressed to separate and distinct legal aspects, and exceptions which fail to point out any specific instruction deemed objectionable, are ineffectual as broadside exceptions. *S. v. Arsad*, 184.

Instructions which defendant contends the court should, but did not, give should be set forth only in the assignments of error and not incorporated in the record with the charge actually given by the court. *S. v. Porth*, 329.

§ 159. The Brief.

Assignments of error not brought forward and discussed in the brief are deemed abandoned. *Branch v. State*, 642.

§ 160. Presumptions and Burden of Showing Error.

Where the record does not support defendant's contention that the court allowed counsel to argue in the presence of the jury the court's ruling that de-

CRIMINAL LAW—*Continued.*

fendant's confession was freely and voluntarily made, defendant has failed to carry the burden of showing error, but in this case, defendant having been convicted of capital offenses, motion for diminution of the record was allowed, and the copy of the original transcript certified by the clerk of the Superior Court discloses that the jury was absent from the courtroom during the time the judge made findings of fact and conclusions of law and found that the confession was voluntary. *S. v. Childs*, 307.

The presumption is in favor of the regularity of the proceedings in the lower court, and when the record fails to show the proceedings culminating in the denial of defendant's plea in abatement on the ground of improper venue, defendant has failed to show error in the denial of the plea. *S. v. Overman*, 453.

§ 162. Harmless and Prejudicial Error in Admissions or Exclusion of Evidence.

In a prosecution for carnal knowledge of a female child under the age of twelve years, the admission of testimony of a medical expert that the female organ of prosecutrix was penetrated full depth by a man's male organ, even though such testimony is based in part on information not acquired by the witness's personal examination, can not be held for prejudicial error when there is an overwhelming mass of other competent testimony tending to show that the prosecutrix' female sexual organ was penetrated by the male sexual organ, penetration to any extent being sufficient to constitute the offense. *S. v. Temple*, 57.

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have answered had he been permitted to testify. *S. v. Mabry*, 293; *S. v. Love*, 691.

The State's evidence tended to show that the body of defendant's wife was found on a mountainside and that she died of internal and external injuries inflicted by a blunt instrument. Defendant contended that his wife died as a result of injuries received in a fall in their home and explained that he drove the body to the mountainside and left it there because of his fear that no one would believe his story of accidental death in view of his wife's prior illness from arsenic poisoning. The solicitor asked defendant's son on cross-examination whether the son did not know that the son's sister had died of arsenic poisoning. *Held:* Even if the question be held improper as injecting the question of defendant's guilt of a separate and independent crime, the witness' categorical denial, being exculpatory, rendered the inquiry harmless. *S. v. Porth*, 329.

The exclusion of evidence proffered by defendant is not prejudicial when the court later instructs the jury that the evidence was competent and the excluded evidence is admitted and fully considered by the jury. *Ibid.*

Where the court immediately sustains objection to questions asked defendant by the solicitor, defendant has sustained no prejudice, the questions not being patently unfair or improper and the testimony sought to be elicited by them being merely incompetent for technical reasons. *S. v. Butler*, 483.

Admission of exhibits in evidence will not be held for error when there is no reasonable ground to believe that the exhibits themselves, as distinguished from evidence in regard thereto, admitted without objection, were prejudicial. *S. v. Williams*, 376.

Defendant's objection to testimony of a witness which included a conclusion of the witness was sustained by the court as to the conclusion. *Held:* Since the conclusion related to a subordinate matter and the objection thereto

CRIMINAL LAW—*Continued.*

was sustained, there was no substantial prejudice to defendant. *S. v. Butler*, 733.

§ 165. Error Cured by Verdict.

Where defendant is acquitted of the charge that his offense was a third offense, the admission of evidence in regard to his alleged prior convictions cannot be prejudicial. *S. v. Broome*, 661.

§ 165.1. Invited Error.

The body of defendant's wife was found on a mountain side. Medical expert testimony was to the effect that she died from internal and external injuries inflicted by a blunt instrument. Defendant contended that the wounds and abrasions were caused by the wife's fall down a flight of stairs in their home, and that he drove the body of his wife to the mountainside and threw the body out because he was afraid no one would believe his story of accidental death because "of the arsenic case". *Held:* Defendant having injected the question of arsenic poisoning in the case, may not complain that the solicitor pursued the matter in questioning another witness in regard thereto at a time when it appeared that the evidence would be competent on the question of premeditation in the development of the circumstantial case. *S. v. Porth*, 329.

§ 167. Review of Findings and Discretionary Orders.

Denial of motion for change of venue and order for special venire are entered in exercise of discretion and are not reviewable in absence of abuse of discretion. *S. v. Childs*, 307; *S. v. McKethan*, 81; *S. v. Porth*, 329.

§ 173. Post Conviction Hearing.

The record *held* not to support defendant's contention that a new trial was ordered over his objection upon his post-conviction hearing. *Williams v. State*, 301.

A post conviction hearing is not a substitute for appeal, and upon such hearing the inquiry is limited to the question of whether there was a substantial denial of the constitutional rights of petitioner in the original criminal action. *Branch v. State*, 642.

The findings of fact of the trial court in a post conviction hearing are binding upon petitioner if they are supported by competent evidence. *Ibid.*

In a post conviction hearing, the burden is upon petitioner to show a denial of some right guaranteed to him by the Constitution of North Carolina or by the Constitution of the United States in the trial or investigatory procedures resulting in his conviction. *Ibid.*

DAMAGES.

§ 3. Compensatory Damages for Injury to the Person.

The burden is on plaintiff claiming damages for permanent injury to establish the permanency of the injury by the greater weight of the evidence, and evidence which raises a mere speculation in this regard is insufficient. *Dolan v. Simpson*, 438.

§ 13. Competency and Relevancy of Evidence.

Statutory table of life expectancy is incompetent when plaintiff's evidence leaves in mere speculation whether her injury was permanent. *Dolan v. Simpson*, 438.

DEAD BODIES.

§ 1. Right to Possession for Burial.

In an action by a father against a hospital to recover for the unauthorized act of the hospital in incinerating the body of his son, who had been a patient in the hospital, the doctrine of charitable immunity does not apply, even in those cases arising prior to the decision in *Rabon v. Hospital*, 269 N.C. 1, since such doctrine has never been applied to those who were not beneficiaries of the charity. *Quick v. Memorial Hospital*, 450.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

While action for wrongful death must be instituted by personal representative of deceased, recital in agreed statement of facts that action was instituted by plaintiff as administratrix precludes defendant from contending that plaintiff had not proven right to maintain the action. *Kinlaw v. R. R.*, 110.

An administrator appointed in this State who undertakes to defend an action for wrongful death by moving to set aside a default judgment and filing answer is thereafter estopped to deny the validity of his own appointment, and the court correctly denies his motion to dismiss the action for lack of jurisdiction of his person or the estate. The validity of his appointment is not before the court and it is error for the court to find facts in regard thereto. *King v. Snyder*, 148.

§ 4. Limitation of Time for Instituting Action for Wrongful Death.

The effect of the 1951 amendment to G.S. 1-53 and G.S. 28-173 is to make the time limitation for the institution of an action for wrongful death a statute of limitations and not a condition precedent to the right of action. *Kinlaw v. R. R.*, 110.

DEEDS.

§ 8. Consideration.

The recital of consideration in a deed is contractual and the actual consideration may be shown by parol evidence, but a recital of "other good and valuable consideration" in addition to the cash consideration recited therein adds nothing to the recital of the cash consideration in the absence of evidence by the grantor as to the nature and character of the other consideration, and the burden is on the parties resisting a creditor's action to set aside the deed as fraudulent to prove the nature and value, if any, of such other consideration. *Everett v. Gainer*, 528.

Evidence of the lack or amount of internal revenue stamps on a deed is some evidence of the amount of consideration actually paid for the conveyance. *Ibid.*

§ 18. Covenants in Regard to Indebtedness.

While the registration of a deed raises the presumption of delivery and ordinarily binds the grantee to covenants contained therein which run with the land, registration raises no presumption that the grantee agreed to a collateral contractual provision in the deed for the assumption by the grantee of a prior mortgage indebtedness on the land. *Beaver v. Ledbetter*, 142.

DESCENT AND DISTRIBUTION.

§ 3.1. Share of Widow and Establishment of Status.

In the heirs' action to remove cloud on title upon allegation that defendant claimed an interest as the widow of intestate and that her purported marriage to intestate is void because at the time of such marriage she was already married and there had been no divorce dissolving the first marriage, the marital status of the defendant at the time of intestate's death is the sole issue necessary to determine the rights of the parties, and the submission of such issue is sufficient. *Chalmers v. Womack*, 433.

DISORDERLY CONDUCT.

Where a warrant charging disorderly conduct does not contain any allegations, specific or general, to the effect that the prosecution was for the violation of a municipal ordinance, but the municipal ordinance is introduced in evidence and the trial proceeds as though defendant had been charged with the violation of the ordinance, nonsuit for variance must be allowed. *S. v. Wiggs*, 507.

DIVORCE AND ALIMONY.

§ 2. Requirement that Facts be Found by Jury.

Issuable facts raised by the pleadings in an action for alimony without divorce must be determined by the jury before a judgment granting permanent alimony may be entered, G.S. 50-16; allowances for alimony *pendente lite* do not affect the final rights of the parties and may be entered by the judge without the intervention of a jury. *Davis v. Davis*, 120.

§ 5. Cross-Actions.

In plaintiff's action for divorce on the ground of separation, defendant filed answer alleging that while the parties were living together as man and wife, plaintiff repeatedly assaulted defendant, and that on one specified occasion plaintiff knocked defendant across a counter at plaintiff's place of business. *Held:* Demurrer to the cross-action on the ground that it failed to allege facts sufficient to constitute a cause of action in defendant's favor should have been overruled. Whether cross-action for assault is appropriate in an action for divorce is not presented or decided. *Ayers v. Ayers*, 443.

§ 18. Alimony and Subsistance Pendente Lite.

Allowances for alimony *pendente lite* do not affect the final rights of the parties and may be entered by the judge without the intervention of a jury. *Davis v. Davis*, 120.

In the husband's action for divorce, the court should duly hear and pass upon defendant's application for attorney's fees *pendente lite*. *Ayers v. Ayers*, 443.

§ 23. Support and Custody of Children.

Upon the hearing of this motion for custody of the minor children of the marriage, there was evidence that the wife and her present husband carried on an adulterous relationship for many months prior to their marriage, during which period he spent a good portion of his time at the home, necessarily to the knowledge of her small children, and that the father of the children is emotionally unstable, had no adequate home for the children and no one to supervise them while he worked. *Held:* The evidence warrants order of the court denominating the children dependents and wards of the court and tem-

DIVORCE AND ALIMONY—*Continued.*

porarily placing them in the custody of the county welfare department. *Wilson v. Wilson*, 676.

§ 24. Effect and Modification of Custody Orders.

A decree awarding custody of the minor children of the marriage is not permanent in its nature and is subject to modification for change of circumstances affecting the welfare of the children. *Wilson v. Wilson*, 676.

EJECTMENT.

§ 1. Nature and Grounds of Summary Ejectment.

Breach of a condition in a lease that lessee should not use or permit the use of any portion of the premises for any unlawful purpose or purposes, without provision in the lease automatically terminating the lease or reserving the right of re-entry for breach of such condition, cannot be made the basis of summary ejectment, and provision in the lease that should the landlord bring suit because of the breach of any covenant and should prevail in such suit, the tenant should pay reasonable attorney's fees, does not constitute a provision automatically terminating the lease for breach of such condition or preserve the right of re-entry. *Morris v. Austraw*, 218.

The remedy of summary ejectment is restricted to those cases expressly provided for by G.S. 42-26, and where the landlord in summary ejectment fails to bring his rights within the statute, nonsuit is proper. *Ibid.*

ELECTIONS.

§ 1. Calling Election and Time of Holding Election.

The statute under which this local option election was held in a municipality precluded an election therein within three years after a majority of the municipal electors had voted against the proposition. In a county election less than three years prior, the proposition was defeated in the precincts in which residents of the city voted, but several of the precincts embraced territory both within and without the city limits, so that it could not be ascertained whether a majority of the municipal electors had voted for or against the proposition. *Held:* Plaintiffs have failed to carry the burden of showing that the municipal election was precluded. *Gardner v. Reidsville*, 581.

§ 10. Attack of Validity of Election.

Every reasonable presumption will be indulged in favor of the validity of an election, including local option elections, and the burden is upon one contesting an election to prove his right to maintain the proceedings and to prove the grounds of his complaint. *Gardner v. Reidsville*, 581.

An election will not be disturbed for irregularities which are insufficient to alter the result. *Ibid.*

EMINENT DOMAIN.

§ 1. Acts Constituting a "Taking."

Where the denial by the State Highway Commission of access to a limited access highway does not involve the taking or destruction of a property right, the owner of land diminished in value by such limitation of access is not entitled to compensation; if the limitation of access involves a taking or destruction of a preexisting property right, the owner of the land is entitled to com-

EMINENT DOMAIN—*Continued.*

pensation for its taking or destruction, the remedy being by proceedings under Chapter 136 of the General Statutes. *Petroleum Marketers v. Highway Comm.*, 411.

Where the Highway Commission, by agreement for compensation for the taking of a part of a tract of land, stipulates the right of such owner to access to the highway, the right of access as to the owner and his grantees by *mesne* conveyance are governed by the stipulations. *Ibid.*

Direct access from plaintiff's land to a ramp is direct access to the highway, since the ramp is a part of such highway. *Ibid.*

Right to access to road and thence along such road some distance to a ramp, is deprivation of direct access to highway. *Ibid.*

§ 7d. Proceedings to Take Land for Highway Purposes.

G.S. 136-107 limiting the time for the filing of answer in condemnation proceedings instituted by the Highway Commission must be construed as an exception to the general power of the court to extend the time for the filing of pleadings, G.S. 1-152, so that the court has no discretionary power to allow the filing of an answer after the time limited in the condemnation statute. *Highway Comm. v. Hemphill*, 535.

A petition under G.S. 136-105 to withdraw the amount deposited by the Highway Commission as compensation cannot be construed as an answer filed by a landowner in the condemnation proceedings, even though the petition states that the value placed on the land by the Commission is inadequate, since neither statute nor custom requires that the order served on the Director recite the allegations in the petition, and therefore such petition is not notice to the Highway Commission. *Ibid.*

ESCAPE.

§ 1. Elements of and Prosecutions for Escape.

An indictment charging that defendant, while serving a sentence for larceny of an automobile having a value of over $200, feloniously escaped from the prison camp in which he was held, sufficiently charges the offense of felonious escape. *S. v. Elliott*, 683.

ESTOPPEL.

§ 4. Equitable Estoppel.

Equitable estoppel must be based upon the existence of a false representation, or the concealment of a material fact, with knowledge, actual or constructive, of the truth, and the other party must have been without such knowledge and free from culpable negligence in failing to discover the facts, and the representation must have been intended or expected to be relied upon and must have been reasonably relied upon to injury. *Matthieu v. Gas Co.*, 212.

The purchasers of a furnace and air conditioning unit may not rely upon negligence of the seller in inspecting the installation after complaint when the purchasers have ready access to the means of equal knowledge of the real facts and are culpably negligent in not properly informing themselves, since if the existence of the defects are patently obvious the purchasers may not complain of absence of notice thereof. *Ibid.*

EVIDENCE.

§ 3. Judicial Notice of Matters in Common Knowledge.

The courts will take judicial notice of the concurrence of days of the week with days of the month for any year not unreasonably distant. *Kinlaw v. R. R.*, 110.

The courts will take judicial notice of meaning of traffic control lights. *Wells v. Johnson*, 192.

The courts will take judicial notice that it is the custom of telephone companies annually to issue revised directories of their subscribers, and that an uninformed person desiring a special service would probably turn to the yellow pages index of the telephone directory to ascertain where he could obtain such service. *U-Haul Co. v. Jones*, 284.

§ 15. Relevancy and Competency of Evidence in General; Negative Evidence.

In this action to recover for personal injury inflicted by a deer, plaintiff testified to the effect that she knew that the animal which attacked her was the one kept by defendants because she knew the deer and because a wild deer would not attack a person. Defendants contended that the deer kept by them was never out of his pound. *Held:* Testimony of a witness that on an occasion when she attempted to run a wild buck and several does out of her yard, the buck had attacked her, was competent upon the question, and the exclusion of the testimony was prejudicial error. *Swain v. Tillett*, 46.

Testimony of a witness that he heard no whistle or bell as he traversed the railroad crossing some seven seconds ahead of the decedent is some evidence that no signal was given, there being no evidence that the circumstances were such that the witness could not have heard the signal had it been given. *Kinlaw v. R. R.*, 110.

§ 16. Similar Facts and Transactions.

Whether the evidence of the existence of a certain state of facts at one time is competent to prove that such state of facts existed at a prior time is to be determined upon the circumstances of each case with regard to the length of time intervening and the probability of change in condition, and the matter rests largely in the discretion of the trial court. *Jenkins v. Hawthorne*, 672.

§ 19. Evidence at Former Trial or Proceedings.

Where a witness at a former trial is dead at the time of the second trial involving the same issue, the testimony of the witness at the former trial is properly admitted. *State Bar v. Frazier*, 625.

§ 25. Accounts, Ledgers and Private Writings.

The refusal of the trial court to admit in evidence letters offered by a party will not be disturbed when such party offers no evidence that such letters were genuine or authentic. *Walton v. Cagle*, 177.

§ 27. Parol Evidence Affecting Writings.

Parol evidence is competent to establish the consideration paid for a deed. *Everett v. Gainer*, 528.

§ 35. Opinion Evidence in General.

While a State wildlife protector may testify from his observation of deer for a period of five years as to whether a wild buck is likely to attack a human being during the fall season, the court may properly exclude his testi-

EVIDENCE—*Continued.*

mony when the question intended to elicit such testimony is ambiguous in asking whether only a tame deer would, under given circumstances (which were not explained) attack or attempt to attack a human being. *Swain v. Tillett*, 46.

Ordinarily, a witness may not give an opinion on the very question to be decided by the jury. *Terrell v. Ins. Co.*, 259.

§ 42. Expert Testimony in General.

The opinion of an expert must be based upon facts within the personal knowledge of the expert or upon facts, supported by evidence, stated in a proper hypothetical question. *Todd v. Watts*, 417.

§ 51. Examination of Experts.

Where a wildlife protector of some five years' experience has not been offered as an expert, the exclusion of his opinion testimony requiring expertise in the physiology of deer will not be disturbed, since it will be presumed that the court excluded the testimony on the ground that the witness had not been sufficiently qualified as expert. *Swain v. Tillett*, 46.

Testimony of a medical expert to the effect that plaintiff's lumbo-sacral strain and persistent headaches were the result of the automobile accident in suit is incompetent when the testimony is not based upon facts within the personal knowledge of the witness or upon proper hypothetical questions based upon facts in evidence as to the accident and the injuries received by plaintiff therein. *Todd v. Watts*, 417.

§ 54. Rule that Party is Bound by his own Evidence.

Where plaintiff introduces in evidence the adverse examination of a defendant, plaintiff represents that the evidence is worthy of belief. *Dolan v. Simpson*, 438.

EXECUTORS AND ADMINISTRATORS.

§ 2. Appointment of Administrators.

The clerk of the Superior Court of the county in which a nonresident dies leaving assets in this State has authority to appoint an administrator for the decedent. *King v. Snyder*, 148.

§ 5. Attack of Appointment, Revocation of Letters, and Appointment of Successors.

An administrator appointed in this State who undertakes to defend an action for wrongful death by moving to set aside a default judgment and filing answer is thereafter estopped to deny the validity of his own appointment, and the court correctly denies his motion to dismiss the action for lack of jurisdiction of his person or the estate. The validity of his appointment is not before the court and it is error for the court to find facts in regard thereto. *King v. Snyder*, 148.

The validity of the appointment of an administrator may not be collaterally attacked in an action against such administrator, but may be directly attacked by any person in interest, including an administratrix of the decedent appointed in another state, by motion before the clerk of the Superior Court who made the appointment to vacate and set aside the letters of administration theretofore issued by such clerk. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 22. Claims Based on Acts or Transactions of Personal Representative.

The evidence tended to show that after the death of the owner of a tame deer, the widow of the owner continued to keep the deer on the premises, that the widow was charged with knowledge of the vicious propensity of the deer, and that the deer thereafter inflicted personal injury upon plaintiff. *Held:* The widow in her representative capacity is not liable for the injury, since ordinarily the estate of a decedent cannot be held liable for torts committed by the administrator. *Swain v. Tillett*, 47.

FRAUD.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to raise inference that defects in roof and furnace of house existed at time seller made representations. *Jenkins v. Hawthorne*, 672.

FRAUDS, STATUTE OF.

§ 6b. Contracts to Convey.

Plaintiff's original complaint alleged that defendant gave plaintiff an option to purchase certain real estate at a stated price, payable in yearly installments, and by amendment alleged that defendant thereafter agreed to permit plaintiff to sell certain of the lots and that defendant would credit the proceeds of sale to plaintiff's contract. Plaintiff offered in evidence a memorandum signed by defendant sufficient to support the agreement originally alleged, but introduced no written memorandum of any agreement signed by defendant to accept the purchase price paid by third persons, as alleged in the amendment and supported by plaintiff's evidence. Defendant pleaded the statute of frauds. *Held:* Plaintiff may not recover on the agreement alleged in the amended complaint in the face of defendant's plea. *Carr v. Good Shepherd Home*, 241.

Upon the plea of the statute of frauds by defendant in defense to an action on an option to sell realty, plaintiff may neither enforce the agreement nor recover damages for loss of a bargain. *Ibid.*

FRAUDULENT CONVEYANCES.

§ 1. Nature and Scope of Remedy.

A voluntary conveyance executed by a grantor who fails to retain property sufficient to pay his then existing debts may be set aside by a prior creditor, regardless of the intent of the grantee. *Everett v. Gainer*, 528.

If a deed is executed by a grantor who fails to retain assets to pay his then existing debts and the consideration for the deed is grossly inadequate, the transfer is fraudulent as to a prior creditor of the grantor without a showing of actual fraud on the part of the grantee, and the fact that the grantees are sons of the grantor is pertinent to be considered with other facts and circumstances on the question of implied knowledge. *Ibid.*

§ 3. Actions to Set Aside Transfers as Fraudulent.

Evidence tending to show that the grantor executed a deed to her sons for "$100 and other valuable consideration," that the deed had no revenue stamps affixed thereto, that at the time of the execution of the deed the grantor failed to retain assets sufficient to pay her then existing debts, and that the

FRAUDULENT CONVEYANCES—*Continued.*

property had a value of some $5000, *is held* sufficient to overrule nonsuit in an action by a prior creditor to set aside the deed as fraudulent. *Everett v. Gainer*, 528.

GAMES AND EXHIBITIONS.

§ 5. Liability of Patrons to Employees of Proprietor.

In an action by a caddy to recover for injuries sustained when hit by a golf ball driven by a player following those for whom the caddy was caddying, allegations of the further answer and defense that defendant was enjoying membership privileges of the golf club, even though the allegations be construed that defendant was a member and stockholder in the club, fail to allege a contract of employment constituting a necessary predicate for the defense of assumption of risk. *McWilliams v. Parham*, 162.

It is customary for a golfer to cry "fore" or give other warning of his intent to drive a ball when there are other persons within the probable range of the intended flight of the ball, and the failure to give such warning is negligence, and therefore a player may not assert assumption of risk on the part of a caddy hit by a ball driven by the player without the customary warning, since the caddy cannot be held to have assumed the extraordinary risk of negligent failure of the player to observe the established rules and customs of the game. *Ibid.*

HIGHWAYS.

§ 5. Rights of Way and Access.

The State Highway Commission has authority to construct controlled access highways and to forbid the construction or use of a driveway affording direct access to the highway from adjoining property when such access would be an obstruction to the free flow of traffic or a hazard to the safety of travelers upon the highway. *Petroleum Marketers v. Highway Comm.*, 411.

HOLIDAYS.

The first Monday in September each year is a public holiday. *Kinlaw v. R. R.*, 110.

HOMICIDE.

§ 16. Evidence of Motive and Malice.

The State contended that defendant had murdered his wife because he was in love with another woman and his wife would not consent to a divorce. *Held:* Testimony of the woman as to conversations with defendant involving their relationship, defendant's promise of marriage, his report that his wife refused to consent to a divorce, and his remark to the woman, after the body of his wife had been found and before it was identified, that if the body turned out to be that of his wife, "all this is ours", are competent as tending to show motive. *S. v. Porth*, 329.

§ 20. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence held sufficient to be submitted to jury on issue of defendant's guilt of murder in the first degree. *S. v. Porth*, 329.

Circumstantial evidence held sufficient to support verdict of guilty of murder in second degree. *S. v. Williams*, 376.

HOSPITALS.

§ 3. Liability of Hospital for Torts.

A nonprofit hospital is liable for negligent injury to a patient inflicted by a nurse in the discharge of her duties as an employee of the hospital. The doctrine of charitable immunity in such instance cannot be supported by logic or legal principles. However, in view of the fact that hospitals have relied upon the rule of immunity and may not have adequately protected themselves with liability insurance, the rule of liability applies only to this case and those causes arising subsequent to the rendition of this decision. *Rabon v. Hospital*, 1.

In an action by a father against a hospital to recover for the unauthorized act of the hospital in incinerating the body of his son, who had been a patient in the hospital, the doctrine of charitable immunity does not apply, even in those cases arising prior to the decision in *Rabon v. Hospital*, 269 N.C. 1, since such doctrine has never been applied to those who were not beneficiaries of the charity. *Quick v. Memorial Hospital*, 450.

HUSBAND AND WIFE.

§ 3. One Spouse as Agent of the Other.

The marital relationship raises no presumption that the husband is authorized to act as agent for the wife. *Beaver v. Ledbetter*, 142.

§ 5. Contracts and Transactions Between Husband and Wife.

Where the husband alone furnishes consideration for which the borrower executes a note and deed of trust, but has the note made payable to himself and wife, there is a presumption of a gift to her of one-half of the note. *Underwood v. Otwell*, 571.

§ 9. Right of one Spouse to Maintain Action Against Other in Tort.

A wife may maintain an action against her husband for assault and battery. *Ayers v. Ayers*, 443.

§ 10. Requisites and Validity of Deeds of Separation.

A separation agreement entered into in this State which fails to comply with the requirements of G.S. 52-12 (now G.S. 52-6) is void *ab initio*. *Davis v. Davis*, 120.

Deed of separation executed in a state not requiring privy examination of wife will be upheld here without such examination provided it is not injurious to the wife. *Ibid.*

§ 11. Construction and Operation of Deeds of Separation.

Separation agreements are not final and binding as to the custody of minor children of the marriage or as to the amount provided for their support and education. *Davis v. Davis*, 120.

INDICTMENT AND WARRANT.

§ 1. Preliminary Proceedings.

The absence of a preliminary proceeding is not ground for the quashal of an indictment, since a preliminary hearing is not a prerequisite to the finding of an indictment. *S. v. Overman*, 453.

§ 2. Return of Indictment by Duly Constituted Grand Jury.

Statute providing for exemption of designated classes from jury duty is valid. *S. v. Knight*, 100.

INDICTMENT AND WARRANT—*Continued.*

§ 5. Findings and Return of Grand Jury.

Defendant is not entitled to be present in court, either in person or by his attorney, when the indictments are returned as true bills by the grand jury, and his motion to quash the indictments because neither he nor his attorney was present in court when the indictments were returned is properly overruled. *S. v. Childs*, 307.

If defendant contends that the indictment should be quashed because not returned in open court by the grand jury, it is incumbent upon defendant, in making up the record, to have the record clearly show this defect, but in this case, the record failing to disclose in clear terms that the indictments were returned in open court and defendant having been convicted of capital offenses, motion for diminution of the record was allowed, and the certified copies of the criminal minute docket of the Superior Court conclusively show that the indictments were properly returned in open court by the foreman of the grand jury, fifteen members of the grand jury being present, and that the requirements of G.S. 15-141 were strictly complied with. *Ibid.*

§ 8. Joinder of Defendants and Counts.

Separate counts charging burglary in the first degree and larceny of money from the building allegedly broken into and entered, may be joined in one indictment. *S. v. Childs*, 307.

§ 13. Bill of Particulars.

The denial of a motion for a bill of particulars will not be held for error when the record discloses that defendant's counsel was given copies of documents disclosing the basis of the State's case, and the State introduces no evidence at the trial which could have taken defendant by surprise. *S. v. Porth*, 329.

Motion for a bill of particulars is addressed to the sound discretion of the trial court, and when the record discloses that defendants were apprised of the nature of the State's case and that the evidence would be the same as in a former prosecution of defendants, no abuse of discretion is shown in the denial of the motion, there being no substantial difference in the testimony at the two trials. *S. v. Overman*, 453.

§ 14. Time of Making Motions to Quash and Waiver.

By pleading not guilty to warrants in a court having jurisdiction of the offenses charged, defendant waives defects, if any, incident to the authority of the person who issued the warrants, both in regard to a motion to quash and in regard to a motion in arrest of judgment. *S. v. Wiggs*, 507.

By pleading not guilty to warrants in a court having jurisdiction of the offense charged, without any motion addressed to the validity of the warrants, defendant waives defects, if any, incident to the authority of the person who issued the warrants, both in regard to a motion to quash and in regard to a motion in arrest of judgment. *S. v. Whaley*, 761.

INFANTS.

§ 5. Guardian Ad Litem and Recovery by Infant.

Payment of a claim asserted on behalf of an infant should be made to the infant's duly appointed guardian. *In re Truitt*, 249.

INJUNCTIONS.

§ 3. Inadequacy of Legal Remedy and Irreparable Injury.

The mere fact that the contract provides for the payment of a specified sum as liquidated damages for its breach does not in itself constitute an adequate remedy at law precluding injunctive relief against the continued breach of the agreement. *U-Haul Co. v. Jones*, 284.

Where adequate remedy by administrative procedure is provided, plaintiff must exhaust such remedy before resorting to injunction. *Michael v. Guilford County*, 515.

§ 6. Injunction to Enforce Personal Contractual Obligations.

Plaintiff's evidence that the dealer contract with defendant was terminated for cause and that defendant violated his valid covenant not to engage as agent for a competing business within the reasonable time and geographical limits set forth in the written contract of dealership signed by defendant, *held* ground for injunctive relief against continued violation during the term of the agreement, and this result is not affected by the fact that the covenant provided for the payment of a specified sum as liquidated damages for its breach. *U-Haul Co. v. Jones*, 284.

§ 8. Enjoining Public Boards, Officers or Agencies.

A citizen and taxpayer of a municipality may maintain an action to enjoin the performance by the city of an agreement granting a corporation the right to install cablevision within the municipality when such citizen alleges facts disclosing the possibility of financial loss to himself as a taxpayer and asserts the agreement is void or *ultra vires* the city. *Shaw v. Asheville*, 90; *Kornegay v. Raleigh*, 155.

§ 13. Continuance and Dissolution of Temporary Orders.

Ordinarily, a temporary restraining order will be continued to the hearing if plaintiff shows probable cause for supposing he will be able to sustain his primary equity and that injunction is reasonably necessary to protect plaintiff's rights until the controversy can be determined. *U-Haul Co. v. Jones*, 284.

INSURANCE.

§ 3. Construction and Operation of Policies in General.

While an insurance policy must be construed according to its terms in the absence of ambiguity, when there is ambiguity the policy will be construed in favor of coverage, and nontechnical terms will be given their ordinary meaning in the absence of evidence tending to show a contrary intent. *Williams v. Ins. Co.*, 235; *Ins. Co. v. Ins. Co.*, 341; *Ins. Co. v. Ins. Co.*, 358.

A policy of insurance will be construed as a whole with the purpose of giving effect to the intention of the contracting parties, and each word and clause will be given effect if possible by any reasonable construction. *Ibid.*

§ 17. Avoidance of Policy for Misrepresentation or Fraud.

Insurer may not contend that nonsuit should have been entered because plaintiff's own evidence disclosed that insured did not reveal a fact material to the risk when the defense of fraud, misrepresentation or concealment is not pleaded by insurer. *Terrell v. Ins. Co.*, 259.

§ 26. Actions on Life Policies.

Evidence and stipulations to the effect that insurer issued and delivered the life policy to insured, that premiums were paid on said policy, and that

proof of death was duly submitted, *held* to make out a *prima facie* case precluding nonsuit unless plaintiff's own evidence establishes an affirmative defense duly alleged by insurer. *Terrell v. Ins. Co.*, 259.

Where the issue is whether insured was insurable under the company's rules and regulations at the time of the delivery of the policy in suit, it is not error to exclude insurer's testimony that at such time insured was not insurable, since a witness may not give an opinion on the very question to be decided by the jury. *Ibid.*

Where plaintiff's evidence is conflicting as to whether insured on the date of the delivery of the policy was insurable according to insurer's rules and standards, an issue of fact is raised for the determination of the jury, and insurer is not entitled to nonsuit on such affirmative defense. *Ibid.*

The burden of proof is upon insurer to establish its affirmative defense in accordance with its allegations. *Ibid.*

§ 29. Confining Illness.

A policy provision for benefits for continuous confinement within doors will be construed as descriptive of the extent of the illness or injury rather than a limitation upon insured's conduct, and benefits under the clause will not be denied for visitations by insured to his physician, or walks ordered by his physician, or any other purpose not negating the seriousness of his illness and the totality of his disability. *Evans v. Ins. Co.*, 271.

Plaintiff's evidence was to the effect that he suffered a heart attack resulting in total disability and confinement for a period of over a year, that thereafter he continued to follow a strict routine of exercise, rest and medication, but that occasionally he also took automobile rides, went out for lunch at a restaurant, drove himself on short trips, and went to the movies. *Held:* The evidence is insufficient to entitle insured to the benefits provided in the policy for necessary and continuous confinement within doors, or to waiver of premiums for such disability, but only to the benefits provided in the policy for nonconfining illness. *Ibid.*

§ 47.1. Insurance Against Damages by Uninsured Vehicles.

In order for plaintiff insured to recover under an uninsured motorist provision of a policy he must show that he was legally entitled to recover damages from the owner or operator of an uninsured automobile for bodily injury caused by accident arising out of the ownership, maintenance or use of the uninsured automobile. *Williams v. Ins. Co.*, 235.

In this action on a clause of a policy providing coverage for injury to plaintiff insured caused by accident arising "out of the ownership, maintenance, or use" of an uninsured automobile, the allegations were to the effect that plaintiff, while underneath an uninsured vehicle, raised on blocks, making repairs, was injured when the owner removed a front wheel and the car fell or rolled upon plaintiff. *Held:* Repairs are a necessary incident to maintenance, and the allegations bring plaintiff within the coverage of the policy. *Ibid.*

§ 59. Risks Covered Under Liability Policies.

Whether a claim comes under the exclusion from liability under a clause relating to other insurance is to be determined by construction of the policy to determine what event will activate the exclusion, without regard to the terms of the other contract of insurance, and the construction of the other policy is required only to determine whether it constitutes an event excluding coverage under the terms of the first policy. *Ins. Co. v. Ins. Co.*, 341.

A clause excluding liability under a policy of automobile insurance if the

INSURANCE—*Continued.*

accident occurs while insured is using the vehicle in the automobile business does not apply when insured is driving a car as a prospective purchaser from an automobile dealer, since such use by insured is not a use in insured's automobile business. *Ibid.; Ins. Co. v. Casualty Co.*, 354.

Exclusion clause of garage liability policy held effective when prospective purchaser is covered by other collectible insurance. *Ibid.*

The N. C. Financial Responsibility Law will be construed to protect victims of automobile accidents, and provision in a policy of liability insurance which contravenes such statutory purpose is void. *Ibid.*

A provision in a liability policy excluding coverage if the accident in question is covered by other insurance does not contravene the N. C. Financial Responsibility Law, since the provision excluding liability is not operative unless there be in effect other insurance protecting a person injured by the use of a vehicle up to the amount required by the Law, the Law not being concerned with which company provides the coverage. *Ibid.*

Excess insurer may not recover fees paid to its attorneys against primary insurer settling claim. *Ins. Co. v. Ins. Co.*, 358.

§ 63. Defense of Action Brought by Injured Party.

The obligation of a liability insurer to defend an action brought by the injured third party against insured upon allegations bringing the claim within the coverage of the policy, is absolute and separate and apart from the policy provisions limiting liability under the policy to the amount recovered by such third party in excess of all other valid and collectible insurance. *Ins. Co. v. Ins. Co.*, 358.

§ 64. Rights of Injured Party Against Insurer Prior to Judgment Against Insured.

Provisions of a liability policy to the effect that insurer would not be liable for injury or damage inflicted by insured until after insured's liability had been determined by judgment or by written agreement of the insured, insurer and the claimant, are valid and preclude recovery against insurer in the absence of such judgment or agreement or a waiver thereof. *Fleming v. Ins. Co.*, 558.

Evidence merely that some person in liability insurer's claim department answered claimant's telephone call and promised that insurer would pay the bills for repairs to and loss of time of claimant's vehicle is insufficient to show a waiver by insurer of its policy provision requiring as a condition precedent that insured's liability be established by judgment or by written agreement of the parties, there being no evidence that the person answering the telephone in insured's claim department was acting within the scope of her authority or that her promise was supported by consideration or that claimant had surrendered any right in reliance upon her promise. *Ibid.*

§ 66.1. Subrogation and Adjustment of Loss Between Insurers.

Insured assumes no liability to the attorneys employed and paid by insurer in defending claim against insured, and therefore the amount paid by insurer to its attorneys in defending the suit may not be recovered under the subrogation clause of its policy. *Ins. Co. v. Ins. Co.*, 358.

JUDGMENTS.

§ 4. Definiteness of Judgment.

Order issued in a judicial sale proceeding that upon refusal of the last and highest bidder to comply with his bid the land should be resold and that

JUDGMENTS—*Continued.*

the defaulting bidder be held liable for the costs and for any amount that the final sale price is less than his bid, *is held* not a void conditional judgment, since it is unequivocal and the determination of the liability is a simple matter of arithmetic and an administrative duty. *Walton v. Cagle*, 177.

§ 5. Interlocutory and Final Judgments.

A judgment in a special proceeding, as well as in a civil action, may be either interlocutory or final. *Walton v. Cagle*, 177.

Order issued in judicial sale proceeding that land be resold after refusal of last and highest bidder to comply with his bid, and that defaulting bidder be held liable for costs and any amount that final sale price is less than his bid, is a final judgment. *Ibid.*

§ 6. Implementation, Modification and Correction of Judgment in Trial Court.

Jurisdiction over an action is not ended by the rendition of a final judgment, but the court retains jurisdiction for the purpose of execution, for recall of execution, or for the determination of proper credits or the amount due on the judgment. *Walton v. Cagle*, 177.

§ 24. Attack of Judgments for Fraud.

Judgment may be collaterally attacked for extrinsic fraud but not for intrinsic fraud. *Johnson v. Stevenson*, 200.

§ 29. Parties Concluded.

Where one of the parties to an action is dismissed therefrom prior to the entry of judgment adjudicating the rights as between the other parties he is not bound by the judgment therein. The fact that he is a witness in the trial of the action is immaterial upon the question of estoppel by judgment. *Kayler v. Gallimore*, 405.

Only parties and those in privity with them are estopped by a judgment, and privity denotes a mutual or successive relationship to the same right; the relationship of principal and agent or master and servant does not create such privity except in those cases in which the principal or master is sought to be held liable solely on the doctrine of *respondeat superior*. *Ibid.*

Estoppel by judgment must be mutual, and a person not estopped by a prior judgment may not assert such prior judgment as an estoppel against another. *Ibid.*

JUDICIAL SALES.

§ 1. Nature and Grounds of Remedy.

The court-appointed commissioner to conduct a judicial sale is empowered only to sell the land and distribute the proceeds, and has only such powers as may be necessary to execute the decree of the court, and therefore is not under duty to show the boundaries of the land or the means of ingress and egress to the property, the remedy of a prospective purchaser if he wishes a survey being by motion under G.S. 1-408.1. *Walton v. Cagle*, 177.

§ 5. Validity and Attack of Sale, and Title and Rights of Purchaser.

The rights of the last and highest bidder at a judicial sale, whose bid has been confirmed by order of the clerk, may not be divested except on the ground of mistake, fraud or collusion, in a hearing after notice and opportunity to be heard by all parties in interest. *Gravel Co. v. Taylor*, 617.

JUDICIAL SALES—*Continued.*

§ 7. Rights and Liabilities of Purchaser.

Last and highest bidder at judicial sale is not entitled to be relieved of his obligation for shortage in acreage or want of access when there is no fraud or mistake and bidder has ample opportunity to ascertain facts. *Walton v. Cagle*, 177.

§ 8. Costs and Commissions and Rights of Commissioner.

While the commissioner conducting a judicial sale may protect his right to commissions, G.S. 1-408, or defend an attack upon his accounts, he has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property in his hands. *Gravel Co. v. Taylor*, 617.

JURY.

§ 3. Disqualifications and Exemptions.

Statute providing for exemptions of designated classes from jury duty is constitutional. *S. v. Knight*, 100.

Defendant's evidence held not to show racial discrimination in selection of jury. *S. v. Ross*, 739.

§ 4. Challenges.

In a prosecution for a capital felony the State is entitled to challenge for cause any prospective juror who has conscientious scruples against the infliction of the death penalty, and defendant's contention that the exclusion of jurors having such conscientious scruples would result in an imbalanced jury is untenable, since to exclude such jurors on the panel would result in jurors biased in favor of defendant, and the State, as well as the defendant, is entitled to trial by an impartial jury. *S. v. Childs*, 307.

§ 6. Empanelling Jury.

The fact that the jury, pursuant to direction of the court, was empaneled by the solicitor rather than the clerk is not ground for objection. *S. v. Overman*, 453.

KIDNAPPING.

§ 2. Prosecutions.

Circumstantial evidence of guilt of kidnapping held sufficient to be submitted to jury. *S. v. Arsad*, 184.

LANDLORD AND TENANT.

§ 1. Nature of the Relationship.

An agreement under which one party erects a building on its tract of land and leases the basement of the building to another creates the relationship of landlord and tenant, which relationship governs the rights and liabilities of the parties *inter se* with respect to the leased premises and also with respect to that portion of the premises over which the landlord retains control. *Drug Stores v. Gur-Sil Corp.*, 169.

§ 7. Duty to Repair and Liability for Injuries from Disrepair.

The landlord is liable for injuries or damages to a tenant resulting from a defective condition of that portion of the property remaining under the land-

LANDLORD AND TENANT—*Continued.*

lord's exclusive control when the landlord has notice of the defect and negligently fails to correct it. *Drug Stores v. Gur-Sil Corp.*, 169.

LARCENY.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant was loitering around a store in a shopping center for the better part of a week, that on the day of the larceny defendant was present, alone, in that part of the store which was behind locked doors and clearly marked for employees only, and that the door had been jimmied open and money and valuables taken from the safe therein, *held* sufficient to be submitted to the jury in a prosecution for larceny. *S. v. Tillman*, 276.

Where the State offers no evidence tending to identify the owner of the property defendant is accused of stealing, nonsuit should be allowed. *S. v. Wiggs*, 507.

LIMITATION OF ACTIONS.

§ 2. Applicability to Sovereign.

The statute of limitations does not apply to a municipality in an action by the municipality involving public rights or the exercise of governmental functions, but the statute of limitations applies as a defense to an action by a municipal corporation to enforce private, corporate or proprietary rights. *Reidsville v. Burton*, 206.

Action by city to recover damages for breach by private developer of agreement to replace bridge constructed by him if the bridge collapsed from causes other than ordinary wear and tear *held* one to enforce corporate right, and statute of limitations is applicable. *Ibid.*

§ 3.1. Computation of Period in General.

This action for wrongful death was instituted two years and two days after the death of intestate, but the next to last day of the period was a Sunday and the last day of the period was Labor Day. *Held:* The action was instituted within the time allowed by G.S. 1-53. *Kinlaw v. R. R.*, 110.

§ 4. Accrual of Right of Action in General.

A cause of action for breach of contract accrues generally when defendant is liable to an action for such breach, and such cause of action is barred in three years when the parties are not under disability. *Reidsville v. Burton*, 206.

A cause of action accrues and the statute of limitations begins to run, in the absence of disability or fraud or mistake, whenever a party becomes liable to an action. *Matthieu v. Gas Co.*, 212.

§ 5. Accrual of Action for Continuing or Intermittent Injury.

When the basis of the cause of action produces continuing or recurring damages, the cause of action accrues at the time damages are first sustained, the subsequent damages being merely in aggravation of the original damages and not being essential to the cause of action. *Matthieu v. Gas Co.*, 212.

§ 15. Agreements not to Plead Statute and Estoppel.

This action was instituted to recover damages resulting from dust and dirt injected into plaintiffs' house by a gas furnace and air conditioner pur-

LIMITATION OF ACTIONS—*Continued.*

chased from defendant. Plaintiffs' allegations were to the effect that the defect was obvious from the beginning, that complaints were made to defendant, and that defendant's employees reported no defect could be found in the system but that they would continue to look. *Held:* Plaintiffs' cause of action accrued upon the occurrence of the first damage, and plaintiffs are not entitled to rely upon estoppel of defendant to plead the statute, since defendant consistently took the position that no defect existed and never made any representation that would have led plaintiffs to refrain from suing. *Matthieu v. Gas Co.*, 212.

§ 17. Burden of Proof.

Upon the plea of the applicable statute of limitations, the burden is upon plaintiffs to show that they instituted their action within the time limited. *Matthieu v. Gas Co.*, 212.

§ 18. Determination of Plea.

A judgment on the pleadings in favor of a defendant on defendant's plea in bar of the statute of limitations, is proper when, and only when, all the facts necessary to establish the plea in bar of the statute of limitations are alleged or admitted in plaintiff's pleadings, construing plaintiff's pleadings liberally in plaintiff's favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom. *Reidsville v. Burton*, 206.

Where it appears from the complaint of the city that the action is *ex contractu* and that the subject matter arose out of a private, corporate or proprietary right of the city, and it further appears from the city's complaint that the action was not instituted until more than three years after demand upon, and refusal of, defendant to rectify the breach, all facts necessary to establish defendant's plea of the three year statute of limitations appear from the city's complaint, and judgment on the pleadings in favor of defendant was proper. *Ibid.*

MARRIAGE.

§ 2. Validity and Attack.

A subsequent marriage is presumed valid with the burden upon the parties attacking the validity of the second marriage to prove its invalidity, which presumption prevails over the presumption of the continuance of the first marriage, and therefore the issue of the validity of the second marriage in such instance is for the determination of the jury, even though the parties attacking the marriage introduce uncontradicted evidence of the prior marriage with evidence supporting the conclusion that the prior marriage had not been terminated by divorce at the time of the second marriage. *Chalmers v. Womack*, 433.

MASTER AND SERVANT.

§ 10. Duration of Employment and Wrongful Discharge.

Alcoholism and mismanagement of employer's funds are separate defenses, each constituting a defense to action for wrongful refusal to renew employment. *Wilson v. McClenny*, 399.

§ 27. Injuries to Employees — Assumption of Risks.

The doctrine of assumption of risk is applicable only when there is the contractual relationship of employee and employer existing between plaintiff and defendant. *McWilliams v. Parham*, 162.

MASTER AND SERVANT—*Continued.*

The doctrine of assumption of risk extends only to those risks which are normally incident to the circumstances and does not extend to extraordinary risks or additional hazards. *Ibid.*

§ 65. Heart Disease and Heart Failure.

Evidence that a sheriff, while discharging his routine duties in attempting to apprehend persons breaking and entering a building, suffered a heart attack, without any evidence of unusual exertion on the part of the sheriff, is insufficient to show that the sheriff's death from the heart attack was the result of an accident arising out of and in the course of the sheriff's employment. *Andrews v. Pitt County*, 577.

§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.

The jurisdiction of the Industrial Commission may be invoked either by filing a claim for compensation or by submission of a voluntary settlement for approval before a claim is filed. *Tabron v. Farms, Inc.*, 393.

§ 84. Exclusion of Common Law Action.

Where an employee has received benefits from an agreement for compensation executed by himself, his employer, and the insurance carrier, which agreement was duly approved by the Industrial Commission, he may attack and have such agreement set aside only for fraud, misrepresentation, undue influence or mutual mistake, G.S. 97-17, and he may not attack it on the ground that the jurisdictional facts therein alleged in regard to the relationship of employer and employee and that the accident arose out of and in the course of the employment were untrue. *Tabron v. Farms, Inc.*, 393.

§ 86. Compensation Act — Common Law Action Against Third Person Tort-Feasor.

Allegations that defendant was enjoying the privileges of membership in playing on a golf course, even if such allegations be construed to mean that defendant was a member and stockholder of the club, do not show that defendant was an employer of a caddy of preceding players, G.S. 97-10.1, and do not show that defendant was "conducting" the business of the club, G.S. 97-9, and therefore such defendant is not entitled to allege the defense of immunity under the Workmen's Compensation Act in an action by the caddy to recover for injuries resulting when struck by a ball driven by defendant. *McWilliams v. Parham*, 162.

§ 91. Findings and Award of Commission.

A voluntary settlement for the payment of compensation executed by the employer, employee, and insurance carrier, when duly approved by the Industrial Commission, is as binding on the parties as an award by the Commission in an adversary proceeding. *Tabron v. Farms, Inc.*, 393.

Such settlement may be set aside only for fraud, misrepresentation, undue influence or mutual mistake; it may not be attacked on the ground that the jurisdictional facts therein alleged were untrue. *Ibid.*

MORTGAGES AND DEEDS OF TRUST.

§ 1. Equitable Mortgages.

Court decreeing cancellation of deed for mistake may decree equitable lien in favor of grantee for improvements and amount paid on purchase price. *Pendergrass v. Massengill*, 364.

MORTGAGES AND DEEDS OF TRUST—*Continued.*

§ 15. Transfer by Mortgagor and Assumption of Debt by Grantee.

Where all the evidence, uncontradicted, tends to show that upon conveyance of property subject to a deed of trust to a husband and wife, the husband agreed to assume and pay the indebtedness, and that the deed containing the debt assumption agreement was delivered to him and accepted by him, the holder of the note secured by the instrument is entitled to peremptory instructions against the husband in an action on the debt assumption agreement. *Beaver v. Ledbetter*, 142.

Evidence that a deed to husband and wife contained an agreement by the grantees to assume and pay off a prior mortgage indebtedness on the land, that the deed was delivered to the husband alone and that all communications relating to the transaction were had with him alone, and without any evidence that the wife knew of the debt assumption agreement or had knowledge of the existence of the deed, or received any benefit from the transaction, or did anything indicating a ratification thereof, is insufficient to make out a case against the wife in an action by the holder of the note on the debt assumption agreement. *Ibid.*

A debt assumption agreement by the grantee of land is a personal contractual undertaking relating to the consideration, and the registration of a deed stating that the grantee assumed the debt raises no presumption that the grantee agreed to such collateral provision. *Ibid.*

§ 24. Foreclosure by Action.

The holder of a note secured by a deed of trust may sue the makers *in personam* for the debt, and may sue *in rem* to subject the mortgaged property to the payment of the note, and may combine the two remedies in one civil action, G.S. 1-123, but in the action for foreclosure the trustee in the deed of trust is a necessary and indispensable party. *Underwood v. Otwell*, 571.

When the note is payable to joint payees, both must be parties to the action to foreclose. *Ibid.*

Complaint *held* to state single cause of action to recover on note secured by mortgage and not an action to foreclose, the trustee not having been made a party. *Ibid.*

§ 38. Actions for Damages for Wrongful Foreclosure.

Where plaintiffs' evidence is to the effect that defendant instituted foreclosure proceedings to their damage, that they had never owed and did not owe defendant any amount, and the *femme* plaintiff testifies that she had signed no deed of trust upon which the purported foreclosure was based, and neither plaintiff is asked whether he or she signed the note and deed of trust bearing their names which defendant introduced in evidence, nonsuit should not be granted, plaintiff's evidence being sufficient, notwithstanding discrepancies and contradictions, to permit the inference that they never signed and delivered to anyone the note and deed of trust upon which the foreclosure was based. *Brown v. Finance Co.*, 255.

MUNICIPAL CORPORATIONS.

§ 4. Powers of Municipalities in General.

A municipal corporation has only such powers as are granted by its charter and by general law, construed together, and all reasonable doubt concerning the existence of a power must be resolved against its existence. *Shaw v. Asheville*, 90.

MUNICIPAL CORPORATIONS—*Continued.*

§ 5. Distinction Between Governmental and Private Powers.

While maintenance of streets and bridges is a governmental function of the city, a civil action for damages for breach of private developer's contract to replace bridge if it collapsed from causes other than ordinary wear and tear is maintained by the city in its private or corporate capacity. *Reidsville v. Burton*, 206.

§ 9. Discharge of Municipal Employees.

Order of the chief of police of a municipality reducing a police captain to the grade of patrolman is an executive order and not reviewable by the courts. *Bratcher v. Winters*, 636.

Order of the civil service board of a municipality dismissing a policeman from the police department on a hearing upon written charges is entered in the exercise of a quasi-judicial function and is reviewable by *certiorari*. *Ibid.*

A valid rule or regulation governing the police force must be proven in order to support the dismissal of a policeman for the violation of one of such rules, and when the record fails to show that the rules had been approved by the board of aldermen and the city manager as required by the general municipal ordinances, order of the municipal civil service board dismissing a policeman is properly vacated. *Ibid.*

Where order of a civil service board dismissing a policeman is entered in the exercise of a judicial or quasi-judicial function, a dismissed employee is entitled, upon demand, to a record which discloses at least the substance of the evidence introduced to support the charges against him as a basis of his right to review by *certiorari*. *Ibid.*

§ 18. Municipal Franchises.

Agreement to permit defendant to establish cablevision is a franchise and not a license, and when not executed in conformity with statutory regulations for franchises, is void. *Shaw v. Asheville*, 90; *Kornegay v. Raleigh*, 155.

§ 26.1. Municipal Housing Authorities.

The selection of a site for low cost housing rests in the discretion of the housing authority, and its selection of a site may be challenged only for arbitrary or capricious conduct amounting to an abuse of discretion, and its act in selecting a site in a well developed residential area, and not an area in which the existing dwellings are substandard, unsafe, and unsanitary, cannot be considered arbitrary or capricious or an abuse of its discretion. *Philbrook v. Housing Authority*, 598.

A housing authority is not required to select a site in a slum district. *Ibid.*

Where site for public housing is suitable for that purpose, selection may not be challenged for motives of housing authorities. *Ibid.*

Property owners may not complain that the defendant municipal housing authority approved an option to purchase a site for public housing without a meeting at which a majority of the housing commissioners were present, the housing authority having ratified the acceptance of the option and plaintiffs being in no position to challenge its action, even though the commission itself could set aside unauthorized action or rescind action previously authorized. *Ibid.*

NEGLIGENCE.

§ 4. Dangerous Substances, Machinery and Instrumentalities.

A firearm is a dangerous instrumentality, and a person handling a firearm is required to exercise care commensurate with the dangerous character of the article. *Edwards v. Johnson*, 30.

NEGLIGENCE—*Continued.*

The evidence was to the effect that in the delivery of gasoline to plaintiff's underground storage tanks on a still, hot day, fumes from the gasoline collected near the ground about defendant's delivery truck, that the gasoline was being delivered by gravity and no motor or engine was in operation on the delivery truck, and that suddenly the fumes were ignited, causing the injury in suit. The evidence further tended to show that plaintiff had several electric motors on the premises. *Held:* The doctrine of *res ipsa loquitur* is not applicable, since the cause of the explosion and fire is left in conjecture, and since defendant was not in exclusive control of all factors which could have caused the accident. *O'Quinn v. Southard*, 385.

§ 5. Res Ipsa Loquitur.

When a firearm is discharged and inflicts injury while in the possession and control of a person, there is a presumption that the firing is intentional or the result of carelessness or inadvertence on the part of such person, which presumption is sufficient to take the issue of negligence to the jury in the absence of evidence in explanation. *Edwards v. Johnson*, 30.

The doctrine of *res ipsa loquitur* applies when a thing which causes injury is shown to be under the exclusive control of defendant and the accident is one which does not occur in the ordinary course of events if the person in control uses proper care; it does not apply when the premises are not under the exclusive control of defendant or when more than one inference of causation arises upon the evidence. *O'Quinn v. Southard*, 385.

§ 16. Contributory Negligence of Minors.

A 12 year old child is presumed incapable of contributory negligence. *Brown v. Board of Education*, 667.

§ 21. Presumptions and Burden of Proof.

There is no presumption of negligence from the mere fact of an accident or injury. *O'Quinn v. Southard*, 385.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Plaintiff's evidence was to the effect that his premises were damaged by fire resulting when gasoline fumes which collected around defendant's tank-truck during the delivery of gasoline to plaintiff's underground tanks, suddenly ignited. *Held:* The doctrine of *res ipsa loquitur* being inapplicable and plaintiff having offered no direct and positive evidence supporting the inference that defendant's negligence was a proximate cause of the fire and resulting explosion, nonsuit should have been allowed. *O'Quinn v. Southard*, 385.

§ 25. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence.

Evidence held insufficient to raise issue of contributory negligence on part of plaintiff in riding horse on shoulder of highway. *Murchison v. Powell*, 656.

If different inferences may be drawn from the evidence on the issue of contributory negligence, issue must be submitted to the jury. *Boyd v. Wilson*, 728.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit for contributory negligence is proper only when plaintiff's own evidence, interpreted in the light most favorable to plaintiff, discloses con-

NEGLIGENCE—*Continued.*

tributory negligence as a proximate cause of the accident so clearly that no other conclusion can reasonably be drawn therefrom. *Kinlaw v. R. R.*, 110; *Wells v. Johnson*, 192; *Black v. Wilkinson*, 689.

§ 28. Instructions.

An instruction to the effect that if plaintiff had satisfied the jury that defendant failed to exercise due care and that such failure was a proximate cause of the injury, to answer the issue of contributory negligence in the affirmative, must be held for prejudicial error in failing to instruct the jury as to what specific acts or omissions arising under the pleadings and evidence would constitute want of due care. *Griffin v. Watkins*, 650.

§ 31. Culpable Negligence.

Civil negligence is not enough to establish criminal responsibility, but culpable negligence must be predicated upon such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and while the wilful, wanton, or intentional violation of a safety statute constitutes culpable negligence, a mere unintentional violation of such statute alone does not. *S. v. Reddish*, 246.

§ 37b. Duties of Proprietor to Invitees.

While the proprietor of a store is under duty to exercise ordinary care to keep the premises in a reasonably safe condition he is not an insurer of the safety of his customers, and no inference of negligence arises merely from the fact of a fall by a customer in the store, nor does the doctrine of *res ipsa loquitur* apply thereto. *Smithson v. Grant Co.*, 575.

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence tending to show that a customer in a store stepped on a screw in the aisle and fell to her injury, without evidence as to how long the screw had been on the floor prior to the accident or that the proprietor in the exercise of due care could or should have known of its presence, is insufficient to be submitted to the jury on the issue of the proprietor's negligence. *Smithson v. Grant Co.*, 575.

NOTICE.

§ 1. Necessity for Notice.

All parties in interest must be given notice of motion before the clerk, except in regard to motions which may be granted as a matter of course. *Gravel Co. v. Taylor*, 617.

PARENT AND CHILD.

§ 5. Right to Custody.

The parent's primary right to the custody of the child may not be denied except for the most cogent reasons; nevertheless, the welfare and best interest of the child are paramount, and when the evidence discloses that the parent is not a fit and suitable person to have custody of the child because of misconduct or other circumstances which substantially affect the child's welfare, the court may properly refuse to award the custody to the parent, and, when the circumstances of the case warrant, the court may temporarily place custody of the child with the Department of Public Welfare with appropriate order for its support and maintenance. *Wilson v. Wilson*, 676.

PARTIES.

§ 1. Necessary Parties in General.

Where a note secured by a deed of trust is payable to joint payees, they must join as parties in an action on the note and to foreclose the deed of trust, and when one of them refuses to join as a plaintiff, such payee is properly joined as a defendant. *Underwood v. Otwell*, 571.

PARTITION.

§ 6. Whether Property Should be Sold for Partition or Actually Partitioned.

On appeal from the clerk's order for actual partition, the court's finding that the tract of farm land, with tobacco, corn and wheat allotments, could not be actually partitioned without injury to some of the parties, *held* supported by the evidence in view of the impact on value of the small amount of allotment for each parcel and the lack of balance between wood, farm and pasture land, and the suitability of the soil for the production of crops not subject to crop regulations. *Cotton v. Cotton*, 759.

§ 10. Validity and Attack of Sale, Title and Rights of Purchaser.

While there was pending in partition proceedings a motion to dismiss on the ground that movant had acquired the entire interest in the property, the assistant clerk entered an order confirming the prior public sale of the property, and thereafter the clerk allowed the motion to dismiss without notice to the last and highest bidder. *Held:* The entering of the order of confirmation while the motion to dismiss was pending was irregular, and the dismissal of the proceeding without notice to the last and highest bidder was also irregular, and therefore both orders must be vacated and the cause remanded for a plenary hearing before the clerk after notice to all the parties of record, including the purchaser at the judicial sale. *Gravel Co. v. Taylor*, 617.

PHYSICIANS AND SURGEONS.

§ 11. Nature and Extent of Liability of Physician or Surgeon to Patient.

A surgeon is not an insurer, and in order to recover for malpractice, plaintiff must offer evidence sufficient to permit a legitimate inference that the surgeon failed to possess the required skill and ability, or that he failed to act according to his best judgment and in a careful and prudent manner in performing the operation in suit, the sufficiency of the evidence being a question of law for the court. *Lentz v. Thompson*, 188.

§ 16. Sufficiency of Evidence and Nonsuit in Actions for Malpractice.

Evidence held insufficient to show negligence on part of physician in severing accessory nerve during operation. *Lentz v. Thompson*, 188.

PLEADINGS.

§ 2. Statement of Cause of Action in General.

A cause of action consists of the facts alleged. *Philbrook v. Housing Authority*, 598.

§ 7. Form and Contents of Answer.

A petition filed by defendant in the cause cannot be construed as an answer when under the applicable procedure the petition is not served on plain-

PLEADINGS—*Continued.*

tiff, either by statutory requirement or custom, since the objectives of pleadings are to develop and present the issues and to give the adverse party notice of the grounds of contest. *Highway Comm. v. Hemphill*, 535.

§ 8. Counterclaims and Cross-Actions.

In this action by subcontractor against prime contractor, allegations of prime contractor held insufficient to state cross-action against owner. *Connolly v. Contracting Co.*, 423.

§ 12. Office and Effect of Demurrer.

A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and all relevant inferences of fact reasonably deductible therefrom, but it does not admit inferences or conclusions of law. *Drug Stores v. Gur-Sil Corp.*, 169; *Coble v. Reap*, 229; *Williams v. Ins. Co.*, 235; *Philbrook v. Housing Authority*, 598.

Upon demurrer, a complaint will be liberally construed in favor of the pleader, and the demurrer should be overruled unless the pleading is wholly insufficient or fatally defective. *Financial Services Corp. v. Welborn*, 563.

Where an additional defendant, joined and made a party to the action on motion of the original defendant, demurs to the original defendant's cross-action on the ground that the facts alleged therein are insufficient to state a cause of action against the additional defendant, the original defendant may not contend that the additional defendant was at least a proper party, since the demurrer does not challenge the joinder of the additional defendant but only the sufficiency of the allegations of the cross-action. *Connolly v. Contracting Co.*, 423.

§ 15. Defects Appearing on Face of Pleading and "Speaking Demurrer".

A demurrer which relies on matter *de hors* the pleading is bad as a "speaking demurrer." *West v. Ingle*, 447.

§ 17. Demurrer to Jurisdiction.

Demurrer to the jurisdiction may be entered at any time, even in the Supreme Court on appeal, but such demurrer will be sustained when, and only when, the defect of jurisdiction appears on the face of the complaint. *Coble v. Reap*, 229.

When pleading is sufficient to allege action in tort for amount over fifty dollars, it will be so construed to sustain original jurisdiction of Superior Court. *Ibid.*

§ 18. Demurrer for Misjoinder of Parties and Causes.

Where complaint fails to allege cause of action for resulting trust, for reformation, or for foreclosure, but is sufficient to allege but single cause of action to recover on note secured by deed of trust, demurrer for misjoinder of parties and causes should be overruled. *Underwood v. Otwell*, 571.

A complaint alleging that the driver of the other car involved in the collision was guilty of acts constituting actionable negligence and that the corporate defendant was liable for the individual defendant's negligence under the doctrine of *respondeat superior* and on the ground that the corporate defendant was negligent in entrusting the operation of the car to defendant driver whom it knew to be an incompetent and reckless driver, states a single cause of action, and the dual theory of the corporate defendant's liability cannot constitute a misjoinder of parties; therefore the order of the trial court overruling defendants' demurrer is not appealable, notwithstanding defend-

PLEADINGS—*Continued.*

ants' averment that the demurrer was for misjoinder of parties and causes of action. *Prewitt v. Dover*, 687.

§ 19. Demurrer on Ground that Pleading Fails to State Cause of Action.

Demurrer to a cross-action set forth in the answer on the ground that the facts therein alleged are insufficient to constitute a cause of action in defendant's favor, is properly overruled if the facts alleged in the answer are sufficient to entitle defendant to any affirmative relief, even though the matters relied upon for affirmative relief and the matters relied upon as a defense are not separately stated. *Ayers v. Ayers*, 443.

Where complaint alleges cause of action against one defendant, joint demurrer of defendants must be overruled. *West v. Ingle*, 447.

§ 21.1. Judgments on Demurrers and Effect Thereof.

Where demurrer is properly sustained for want of an essential averment, the action should not be dismissed until the pleader has had an opportunity to amend. *Rodman v. Mish*, 613.

§ 25. Amendment of Pleadings.

The trial judge in term, in his discretion, may allow amendments. *Wilson v. McClenny*, 399.

Supreme Court may allow amendment to make pleadings conform to stipulations of the parties and the theory of trial, but not an amendment relating to a theory different from that upon which the case was tried. *Kayler v. Gallimore*, 405.

The Superior Court has inherent and statutory power to allow an amendment of a pleading or the filing of a pleading at any time, unless prohibited by some statutory act or unless vested rights are interfered with. *Highway Comm. v. Hemphill*, 535.

G.S. 136-107 limiting the time for the filing of answer in condemnation proceedings instituted by the Highway Commission must be construed as an exception to the general power of the court to extend the time for the filing of pleadings, G.S. 1-152, so that the court has no discretionary power to allow the filing of an answer after the time limited in the condemnation statute. *Ibid.*

§ 28. Variance.

Proof without corresponding allegation is ineffectual. *Terrell v. Ins. Co.*, 259.

§ 30. Judgment on the Pleadings.

Judgment on the pleadings is proper only when the pleadings fail to present any issue of fact for the determination of the jury, and only the pleadings themselves may be considered in determining the question; therefore, it is error for the court to hear evidence and find facts in support of its entry of judgment on the pleadings. *Reidsville v. Burton*, 206.

Judgment on the pleadings on defendant's plea of the bar of the statute of limitations is proper when plaintiff's own allegations disclose that action was barred. *Ibid.*

§ 34. Motions to Strike.

A motion to strike an entire further answer on the ground that the facts alleged therein are insufficient to constitute a defense is equivalent to a demurrer to such further answer. *McWilliams v. Parham*, 162; *Quick v. Memorial Hospital*, 450.

PRINCIPAL AND AGENT.

§ 5. Scope of Authority.

A person dealing with a known agent must be reasonably diligent to ascertain whether the agent is acting within the scope of his authority, and there is no presumption that one who answers the telephone in the business office of the principal may waive verbally provisions of the principal's written contract in direct violation of its terms, or otherwise bind the principal in matters of importance, and the burden of showing the agent's authority to waive written provisions of a contract is upon the party asserting such waiver. *Fleming v. Ins. Co.*, 558.

PROCESS.

§ 5.1. Subpoena Duces Tecum.

In an action on a note by one of the payees against the makers and against the other payee refusing to join as plaintiff, prayer that defendant payee be required to bring into court the note and deed of trust securing same, with announcement that plaintiff would apply for a subpœna *duces tecum* to this end, does not state a cause of action against the defendant payee for possession of the note and deed of trust. *Underwood v. Otwell*, 571.

PUBLIC OFFICERS.

§ 9. Personal Liability of Public Officers and Sureties to Private Parties.

In action on bonds of public officer, demurrer on grounds that bonds did not cover negligent injury to third persons held not presented by demurrer when bonds are not made part of the pleadings. *West v. Ingle*, 447.

QUIETING TITLES.

§ 2. Actions.

In the heirs' action to remove cloud on title upon allegation that defendant claimed an interest as the widow of intestate and that her purported marriage to intestate is void because at the time of such marriage she was already married and there had been no divorce dissolving the first marriage, the marital status of the defendant at the time of intestate's death is the sole issue necessary to determine the rights of the parties, and the submission of such issue is sufficient. *Chalmers v. Womack*, 433.

RAILROADS.

§ 5. Crossing Accidents.

Plaintiff's evidence permitting inferences that the automatic signal lights at a railroad crossing were not flashing at the time of the collision, that the engineer did not blow any whistle, ring any bell, or otherwise give any warning of the approach of the locomotive to the crossing, and that the view of the locomotive approaching the crossing was obstructed by an embankment, is sufficient to be submitted to the jury on the issue of negligence, and not to disclose contributory negligence as a matter of law on the part of the driver. *Kinlaw v. R. R.*, 110.

G.S. 136-20, giving the Highway Commission exclusive jurisdiction to require gates, alarm signals or other approved safety devices to be installed at railroad crossings does not include signs and notices of the existence of a crossing, and does not relieve a railroad company of the duty to give users of

RAILROADS—*Continued.*

the highway adequate notice and warning of the existence of a grade crossing, even though it be one at which the Highway Commission has not required the erection of gates, gongs or signaling devices. *Cecil v. R. R.*, 541.

In an action to recover for wrongful death of a motorist killed in a railroad grade crossing accident, plaintiff may properly allege, after averring that the crossing was obstructed so that a train or its lights were not visible to a driver along a highway until he was within 75 feet of the crossing, that the railroad company maintained only one small crossing sign which was insufficient to give notice to a motorist of his approach to the crossing, and that the railroad company was negligent in failing to erect and maintain warning devices or signs commensurate with the dangerous nature of the crossing, and order striking such allegations is reversed. *Ibid.*

RAPE.

§ 4. Competency and Relevancy of Evidence in Prosecutions for Rape.

It is competent for prosecutrix to testify that she did not voluntarily engage in sexual relations with any of defendants at any time during the night in question, the testimony being of a fact within the knowledge of the prosecutrix and not an expression of opinion invading the province of the jury, it being for the jury to determine whether her testimony as to consent was true or false. *S. v. Overman*, 453.

The fact that a girl, in company with other girls, went to a dance hall with no male escort, even though the place be one at which men of low morals might be reasonably expected to congregate, does not establish her consent to sexual intercourse with such men, although it is competent evidence to be considered by the jury on the question of consent. *Ibid.*

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that the four defendants had the 16 year old prosecutrix alone at night in an automobile driven by them successively and that each in turn had sexual intercourse with her by force and against her will, threatened to cut her throat with a knife and forced her to silence when they stopped for gasoline by holding a knife at her throat, with testimony of prosecutrix that she begged for her release and that each act of intercourse was against her will, etc., *held* sufficient to be submitted to the jury on the question of each defendant's guilt of rape. *S. v. Overman*, 453.

§ 8. Elements of Offense of Carnal Knowledge of Female under Twelve Years of Age.

Consent of prosecutrix is no defense in a prosecution for carnal knowledge of a female child under the age of twelve years. *S. v. Temple*, 57.

§ 11. Sufficiency of Evidence and Nonsuit in Prosecutions for Carnal Knowledge of Female Under Twelve Years of Age.

The evidence in this prosecution of defendant for carnal knowledge of a female child under twelve years of age *is held* amply sufficient to overrule defendant's motions to nonsuit. *S. v. Temple*, 57.

REFORMATION OF INSTRUMENTS.

§ 4. Pleadings.

Complaint alleging that husband alone furnished consideration for note, but failing to allege that note was made payable to husband and wife through

REFORMATION OF INSTRUMENTS—*Continued.*

mutual mistake, fails to state cause for reformation of note. *Underwood v. Otwell*, 571.

ROBBERY.

§ 4. Sufficiency of Evidence and Nonsuit.

The evidence in this case *held* sufficient to be submitted to the jury on the question of defendant's guilt as an aider and abettor in the perpetration of an armed robbery. *S. v. Walker*, 135.

Circumstantial evidence of defendant's guilt of common law robbery held sufficient to be submitted to jury. *S. v. Arsad*, 184.

SALES.

§ 3. Payment of Purchase Price and Transfer of Title.

Where the purchaser makes a part payment under an agreement to pay the balance of the purchase price when the purchaser picks up the articles sold, whether title passes at the time of part payment depends upon the intention of the parties, and title will be *held to have passed at that time unless* it is apparent that it was the intention of the parties that the payment of the balance of the purchase price, or some other requirement, was a condition precedent to the transfer of title. *Coble v. Reap*, 229.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant and Waiver.

Evidence on *voir dire held* to support court's finding that defendant consented to search of his automobile. *S. v. Temple*, 57.

Search warrant is not required when defendant consents to search. *S. v. Williams*, 376.

Where the victim of a robbery gives a detailed description of his assailants and the vehicle used by them, and officers shortly thereafter apprehend a car and occupants fitting the descriptions, the circumstances furnish ample evidence of probable cause authorizing one of the officers in arresting defendants, and as an incident to the arrest, to make a search. *S. v. Pearson*, 725.

Where, upon arrest of defendant in his home, defendant selects and puts on a particular pair of trousers, it is not error, nothing else appearing, to admit the trousers in evidence together with testimony as to the condition or contents of the garment, there being no element of unlawful search or seizure. *S. v. Ross*, 739.

SEDUCTION.

§ 6. Civil Actions for Seduction.

In order to maintain a civil action for seduction, plaintiff must show that intercourse was induced by promise of marriage or by deception, enticement or other artifice, and when plaintiff's evidence discloses that the first act of intercourse was consented to by plaintiff, voluntarily and knowingly, without promise or inducement, the maxim, *volenti non fit injuria* applies, and nonsuit is properly entered. *Hutchins v. Day*, 607.

SOCIAL SECURITY AND PUBLIC WELFARE.

Evidence that a welfare recipient was advised that it was his responsibility to inform the Department of any change of address, that while he was living with relatives he was imprisoned, that during imprisonment he advised one of his relatives to continue cashing his welfare checks and to spend some of the money for designated purposes and save the rest for the recipient, that upon the visit of a welfare agent to the recipient's home the wife of the recipient's cousin advised the agent that the recipient was on a visit, and that pursuant to the recipient's instructions, recipient's cousin cashed the checks, *is held* sufficient to be submitted to the jury in a prosecution of recipient and his relatives for conspiracy to defraud the Welfare Department. *S. v. Butler*, 733.

STATE.

§ 5d. Negligence of State Employee.

Evidence held sufficient to sustain conclusion that school bus driver was negligent in striking child. *Brown v. Board of Education*, 667.

§ 5f. Appeal and Review of Proceedings Under Tort Claims Act.

The determinations of the questions of negligence, proximate cause, and contributory negligence in a proceeding under the Tort Claims Act involve mixed questions of law and fact and are reviewable. *Brown v. Board of Education*, 667.

Upon appeal from the Industrial Commission in a proceeding under the Tort Claims Act, the court may not find facts in addition to those found by the Industrial Commission, even though there be evidence of record to support such additional findings. *Ibid.*

The amount of the award of damages in a proceeding under the State Tort Claims Act rests in the discretion of the Industrial Commission, and an award will not be set aside as excessive unless it is so large as to shock the conscience. *Ibid.*

STATUTES.

§ 2. Constitutional Prohibition Against Local or Special Acts Relating to Designated Subjects.

A statute applicable to a single municipality, without reasonable distinction between such city and other cities or towns for the purpose of classification, is a local act. *Gardner v. Reidsville*, 581.

The word "trade" is used in Article II, § 29 of the State Constitution in association with the words "labor," "mining" and "manufacturing" and under the maxim *noscitur a sociis*, the word "trade" as so used imports a business venture embarked upon by a person or business corporation for gain or profit, and does not embrace an activity conducted by the State itself for the purpose of control in the exercise of the police power. *Ibid.*

The statute authorizing a vote by municipal electors to determine whether the city should operate liquor stores under the Alcoholic Beverage Control Act is a statute enacted in the exercise of the police power for the control and regulation of intoxicating liquor, and is not a statute regulating "trade" within the purview of Article II, § 29 of the State Constitution. *Ibid.*

§ 4. Construction in Regard to Constitutionality.

Constitutionality of a statute will be presumed until the contrary clearly appears. *In re Truitt*, 249; *Gardner v. Reidsville*, 581.

STATUTES—*Continued.*

§ 5. Construction of Statutes in General.

A statute must be construed, if possible, to accomplish the purpose of the statute as stated therein. *Dayco Corp. v. Clayton*, 490.

A statute must be construed to effectuate the legislative intent. *Highway Comm. v. Hemphill*, 535.

Where acts of the legislature apply to the same subject, the statutes are to be reconciled if this can be done by any fair and reasonable intendment, but to the extent that they are necessarily repugnant the latter statute prevails. *Ibid.*

A special or specific statute will be construed as an exception to a prior general statute to the extent of conflict. *Ibid.*

Where the language of the legislature is plain and free from ambiguity, the definite and sensible meaning of the statute must be given effect. *Ibid.*

Statutes dealing with the same subject matter will be construed *in pari materia* and harmonized to give effect to each. *Gravel Co. v. Taylor*, 617.

TAXATION.

§ 7. Public Purpose.

The tax levied on the owner or keeper of a dog over six months of age, G.S. 67-5, has been declared valid and constitutional, and its validity perforce extends to the expenditure of the funds, it being the purport of the statute that the funds raised by the tax should be used for school purposes subject to valid claims, established in the manner provided by the Act, for injuries and damages caused by dogs. *In re Truitt*, 249.

§ 26. Franchise and License Taxes.

The fact that the activity of a company is limited to insurance premium financing renders it no less a finance company, and the authority given by a borrower to such finance company to cancel the policy and collect the unearned premium upon the borrower's default, is security analogous to a chattel mortgage or a conditional sale, and therefore an insurance premium financing company comes within the purview of G.S. 105-88(a) and is liable for the privilege license tax imposed by that section for the purpose of revenue in addition to the license fee imposed by G.S. 53-56 for the purpose of defraying expenses of regulation. *Northcutt v. Clayton*, 428.

§ 28b. Computation and Liability of Foreign Corporation for Income Tax.

The State is under no constitutional compulsion to allow a loss incurred by a taxpayer in a prior year to be carried over and deducted from the net taxable income for succeeding years, and the right to deduct such loss carry-over is governed solely by the statute and must be determined in accordance with the statutory provisions permitting such loss carry-over. *Dayco Corp. v. Clayton*, 490.

Dividends received by a foreign corporation from shares of stock owned by it in non-subsidiary corporations and capital gains received by it from the sale of shares of stock in such non-subsidiary corporations, even though such income is derived from out of state transactions and is not taxable here, must be deducted from the amount of loss carry-over claimed by the corporation against its income taxable by this State in succeeding years, since the income derived from dividends and capital gains is "income not taxable under this article" within the provisions of the statute. *Ibid.*

TAXATION—*Continued.*

§ 29. Levy and Assessment of Sales and Use Taxes.

Sale of goods to interstate carriers for use by carriers at terminals outside this State are intrastate transactions subject to the North Carolina sales tax when the goods are delivered to the carriers at the seller's plant in this State notwithstanding the carriers take the goods f.o.b. the seller's plant under bills of lading with themselves as consignees at the respective terminals, without transportation charges, and inspection of the goods is had at, and payment is forwarded from, such foreign terminals. The imposition of such tax does not offend the Commerce Clause of the Federal Constitution and is not precluded by sales tax regulation No. 23. *Excel Co. v. Clayton*, 127.

TENDER.

Tender to party who has given notice that he will not accept is not required. *Walton v. Cagle*, 177.

The refusal of a legally sufficient tender does not extinguish the principal debt or obligation. *Evans v. Ins. Co.*, 271.

TIME.

In computing the time within which an act must be done, the first day must be excluded and the last day included, and if the last day is a Saturday, Sunday or a legal holiday, it must be excluded. *Kinlaw v. R. R.*, 110.

TORTS.

§ 1. Nature and Elements of Torts in General.

Liability for tortious conduct is the general rule, immunity is the exception. *Rabon v. Hospital*, 1.

TRESPASS.

§ 13. Prosecutions for Criminal Trespass.

Where defendant's evidence in a prosecution for trespass is to the effect that the prosecutrix had forbidden him the premises only when he was intoxicated and that on the occasion in question he was sober, defendant is entitled to an instruction on the legal effect of his evidence, and an unqualified instruction to find defendant guilty if the jury was satisfied beyond a reasonable doubt that the prosecutrix had previously forbidden defendant to come on the premises and that on the date in question he wilfully entered upon them, must be held for prejudicial error. *S. v. Keziah*, 681.

TRIAL.

§ 11. Argument and Conduct of Counsel.

While counsel are entitled to argue both the law and the facts to the jury and, to this end, in proper instances, may read a decision of the Supreme Court stating the applicable law and recounting some of the facts which the court had before it when it pronounced the rule in question, it is improper argument for counsel to read the facts in prior decisions and state that the fact situations in those cases were the same as those in the case at trial and that therefore the prior decisions impel a like conclusion. *Wilcox v. Motors Co.*, 473.

TRIAL—*Continued.*

It is not sufficient, upon objection to improper argument of counsel, for the court merely to stop the argument without instructing the jury not to consider it, either at the time or in the court's charge to the jury. *Ibid.*

§ 20. Necessity for Motions to Nonsuit.

The power of the court to grant a motion for judgment of compulsory nonsuit is altogether statutory, and when defendant's motion for nonsuit made at the close of plaintiff's evidence is not renewed at the close of all of the evidence, neither the correctness of the denial of nonsuit nor the sufficiency of plaintiff's evidence to carry the case to the jury is presented. *Jenkins v. Hawthorne*, 672.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion for involuntary nonsuit, the evidence must be taken as true and considered most strongly against defendant. *Edwards v. Johnson*, 30; *Kinlaw v. R. R.*, 110; *Murchison v. Powell*, 656.

§ 26. Nonsuit for Variance.

Allegations that defendant drove his automobile into the right side and rear of plaintiff's vehicle, with evidence that defendant struck plaintiff's vehicle as plaintiff's vehicle was making a right turn from the highway into a private driveway, that plaintiff's vehicle was damaged on its right side and rear and that defendant's vehicle was damaged on the left side and front, *held* not to disclose material variance between allegation and proof, since plaintiff's allegation, liberally construed, cannot be restricted to allegation that defendant's car was driven directly against the rear of plaintiff's car. *Kidd v. Burton*, 267.

§ 31. Directed Verdict and Peremptory Instructions.

Where the issue is for the determination of the jury, the court may not direct a verdict, and plaintiffs' uncontradicted evidence cannot entitle them to more than a peremptory instruction permitting the jury to answer the issue in the negative if the jury should fail to find from the greater weight of the evidence the facts to be as all of the evidence tended to show. *Chalmers v. Womack*, 434.

§ 33. Statement of Evidence and Application of Law Thereto.

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request and apply the law to the various factual situations presented by the conflicting evidence. *Griffin v. Watkins*, 650.

Where the inadvertence of a witness in calculating the value of land on the basis of the number of square feet is discovered and corrected before the jury while the witness is on the stand, it is not required that the trial court, *ex mero motu*, recapitulate and explain the incident. *Charlotte v. Gottlieb*, 692.

§ 35. Expression of Opinion on Evidence in Instructions.

Where an affirmative defense is not available to a defendant because such defense was not pleaded, the trial court's instruction that such defense was not involved in the case is a correct statement of a matter of law, and does not constitute an expression of opinion by the court as to the facts, the weight of the evidence, or the credibility of the witness. *Terrell v. Ins. Co.*, 259.

§ 37. Instructions — Statement of Contentions.

Defendant's objection to a statement by the court of a contention of plain-

tiff on the ground that the statement omitted an essential fact, will not be sustained when immediately thereafter the court supplies the omission so that, when read contextually, the statement of the contention is without prejudicial error. *Terrell v. Ins. Co.*, 259.

The misstatement of the contention of a party must be brought to the trial court's attention in apt time in order for exception thereto to be considered. *Murchison v. Powell*, 656.

Ordinarily, a factual inadvertence in stating the evidence will not be held for prejudicial error when the misstatement is not called to the court's attention in apt time. *Outlaw v. Gurley*, 755.

§ 40. Form and Sufficiency of Issues.

In the absence of waiver, the court must submit such issues as are raised by the pleadings and supported by law, including new matter alleged in the answer. *Wilson v. McClenny*, 399.

The number, form and phraseology of the issues rest in the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all controversies and to enable the court to render judgment fully determining the cause. *Chalmers v. Womack*, 433.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence.

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound judicial discretion of the trial judge, and the refusal to grant the motion is not reviewable in the absence of manifest abuse of discretion. *Williams v. Boulerice*, 499.

A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court, and where the issue is for the determination of the jury, the fact that the jury answered the issue in the negative, notwithstanding peremptory instruction of the court to answer it in the affirmative, does not in itself tend to show abuse of discretion in the court's refusal to set aside the verdict. *Chalmers v. Womack*, 433.

A motion to set aside a verdict on the ground that it is contrary to the weight of the evidence must be made and heard at the trial term unless the parties consent that it be heard thereafter, and where the motion is made and denied at the trial term, agreement of the parties that the court could sign the judgment at the succeeding term does not authorize the court to grant the motion to set aside the verdict at the succeeding term and the court's order doing so must be vacated and the cause remanded for entry of judgment on the verdict. *Rouse v. Snead*, 623.

TROVER AND CONVERSION.

§ 1. Nature and Essentials of Action for Possession of Personalty or Damages for Detention.

Allegations held to allege conversion by seller of articles sold to purchaser. *Coble v. Reap*, 229.

Mere application for subpœna *duces tecum* to require one payee to bring note into court does not constitute action to recover possession of note. *Underwood v. Otwell*, 571.

TRUSTS.

§ 4. Construction, Operation and Modification of Trusts.

Evidence held sufficient to support order of sale of trust property to preserve the trust and effectuate intent of testator, but trustee cannot purchase

TRUST—*Continued.*

at the sale except after full disclosure of facts showing that sale to trustee was advantageous and a showing that there were no other prospective purchasers at price equally advantageous. *Trust Co. v. Johnston*, 701.

§ 13. Resulting Trusts.

Where complaint alleges that husband alone furnished consideration for note, but does not allege facts rebutting presumption of gift to his wife of half the note, complaint fails to state cause of action for resulting trust. *Underwood v. Otwell*, 571.

§ 14. Constructive Trusts.

Beneficiaries under will may not be held trustees *ex maleficio* except for extrinsic fraud which interferes with right to caveat. *Johnson v. Stevenson*, 200.

UNJUST ENRICHMENT.

§ 1. Nature and Essentials of Remedy.

Where owner, by mistake, conveys lot 13 instead of the intended lot 15, and later, in an effort to rectify the error, conveys lot 15, and then purchases lot 13 at the foreclosure of the deed of trust executed by the purchaser, and institutes action to cancel the deed to lot 15 for mutual mistake, *held* the grantee is entitled to an equitable lien for the amount paid on the purchase price together with the value of improvements. *Pendergrass v. Massengill*, 364.

UTILITIES COMMISSION.

§ 7. Hearings and Orders in Respect to Franchises and Services.

Conclusion of Utilities Commission that approval of transfer of all capital stock of franchise carrier from one holding corporation to another was in the public interest, *held* supported by evidence. *Utilities Comm. v. Coach Co.*, 717.

§ 9. Appeal and Review.

In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, the Commission's decision limiting its order to approval of the transfer of the stock does not involve questions as to the extent and scope of the franchise holder's presently subsisting franchise rights or the rights of the transferee to merge the franchise holder into its corporate structure, even though a future intent to merge is adumbrated by its evidence, and the questions of the extent of the franchise rights and the right to merge is to be determined *de novo* when properly raised in subsequent proceedings. *Utilities Comm. v. Coach Co.*, 717.

The findings of fact of the Utilities Commission are conclusive and binding when supported by competent, material and substantial evidence in view of the entire record. *Ibid.*

VENDOR AND PURCHASER.

§ 1. Requisites and Validity of Contracts.

Where the vendor offers in writing to sell described realty at a stated price, payable in yearly installments, a verbal acceptance of the offer by the purchaser is sufficient to constitute an option enforceable by the purchaser. *Carr v. Good Shepherd Home*, 241.

WEAPONS AND FIREARMS.

§ 2. Liability for Injury.

A firearm is a dangerous instrumentality, and a person handling a firearm is required to exercise care commensurate with the dangerous character of the article. *Edwards v. Johnson*, 30.

When a firearm is discharged and inflicts injury while in the possession and control of a person, there is a presumption that the firing is intentional or the result of carelessness or inadvertence on the part of such person, which presumption is sufficient to take the issue of negligence to the jury in the absence of evidence in explanation. *Ibid.*

Evidence held for jury upon issue of negligence in accidental discharge of gun, and not to show contributory negligence as a matter of law on part of victim. *Ibid.*

WILLS.

§ 7. Revocation of Wills.

The fact that testator becomes mentally incompetent and is thereafter unable to change the will, even if such incapacity continues until testator's death, does not revoke the will. *Abbott v. Abbott*, 579.

§ 8. Proof of Will and Probate in Common Form.

The probate of a will in common form is conclusive as to the validity of the instrument until set aside in a *caveat* proceeding duly instituted, and while the beneficiaries under the will may be held trustees *ex maleficio* for extrinsic fraud which interferes with the right to *caveat* the instrument, the probate may not be collaterally attacked for intrinsic fraud constituting grounds for attack of the instrument by *caveat* proceedings when there is nothing to show that plaintiff's right to attack by *caveat* was interfered with in any manner. *Johnson v. Stevenson*, 200.

Plaintiff and her brother were the sole surviving children of their parents. The joint will of their parents, which left the property in suit to the brother's children, was probated in common form. Plaintiff sought to hold the beneficiaries as trustees to the extent that she would have been entitled to a share in the property as an heir upon allegations that her brother and his wife secured the execution of the instrument by undue influence. *Held:* The action to establish the constructive trust was a collateral attack on the probate for intrinsic fraud, and demurrer to plaintiff's complaint was properly sustained. *Ibid.*

§ 15. Caveat — Parties.

A plaintiff executor asserting his right to administer the estate by reason of the will cannot assert the invalidity of the will on the ground of mental incapacity of the testator. *Abbott v. Abbott*, 579.

§ 60.1. Divorce and Abandonment as Affecting Widow's Rights.

The right of the widow to take a devise or bequest under the will of her husband is not forfeited by her abandonment of him. *Abbott v. Abbott*, 579.

§ 71. Actions to Construe Wills.

In an action by an executor for a declaration that testator's widow was not entitled to share in the estate because she had abandoned him, the complaint which fails to allege that the widow had attempted to dissent from the will or that she had filed any claim against the estate, either as creditor, distributee, or widow, or that the will contained any bequest or devise for her benefit, fails to allege a justiciable controversy, and demurrer thereto is properly sustained. *Abbott v. Abbott*, 579.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-15; 1-52(1). Cause of action for breach of contract accrues generally when defendant is liable to an action for such breach. *Reidsville v. Burton*, 206.

1-53; 28-173. Limitation of action for wrongful death is statute of limitations and not condition precedent. *Kinlaw v. R. R.*, 110.

1-70. Where necessary party will not join as plaintiff, he may be joined as defendant. *Underwood v. Otwell*, 571.

1-86. Order for special venire is entered in discretion of court and is not reviewable in absence of abuse. *S. v. Childs*, 307.

1-122. Cause of action consists of facts alleged. *Philbrook v. Housing Authority*, 598.

1-131. Where complaint is not fatally defective, action should not be dismissed upon the demurrer until pleader has had opportunity to amend. *Rodman v. Mish*, 613.

1-180. Instruction pointing out material part of statute applicable cannot be construed as expression of opinion on evidence. *S. v. Butler*, 733.
Use of phrase "the State has presented evidence in this case which tends to show" held not to constitute expression of opinion on evidence. *S. v. Huggins*, 752.
Assignment of error that court failed to charge in conformity with statute is broadside exception. *Chalmers v. Womack*, 433.

1-269. Order of police chief reducing policeman in grade is not appealable; order of Civil Service Board dismissing policeman is reviewable by *certiorari*. *Bratcher v. Winters*, 636.

1-276; 1-272. Superior Court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from order of the clerk by a party aggrieved. *Gravel Co. v. Taylor*, 617.

1-339.30(e). Order issued in judicial sale proceeding that upon refusal of last and highest bidder to comply with bid the land should be resold and the defaulting bidder held liable for losses and damages held valid. *Walton v. Cagle*, 177.

1-407. Trustee purchasing at own sale must give bond as required by statute. *Trust Co. v. Johnson*, 701.

1-408. Commissioner conducting judicial sale has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property in his hands. *Gravel Co. v. Taylor*, 617.

1-408.1. Court appointed commissioner is not under duty to show boundaries of land or the means of ingress and egress to the property. *Walton v. Cagle*, 177.

1-568.9; 1-568.10. Application for discovery must be restricted to matters reasonably necessary to enable plaintiff to draw pleading. *Brown v. Hospital*, 253.

1-593. In computing time, first day must be excluded and last day included, and if last day is Saturday or Sunday or a legal holiday it must be excluded. *Kinlaw v. R. R.*, 110.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

5-4; 5-5. Refusal of a person to be sworn as a witness is direct contempt, carrying maximum punishment of fine not exceeding $250 or imprisonment not exceeding 30 days, or both. *In re Williams*, 68.

7-13. Supreme Court may allow party to amend to make his pleading conform to theory of trial but will not allow an amendment at variance with theory of trial. *Kayler v. Gallimore*, 405.

7-63; 7-121; 7-122. Complaint held sufficient to allege action in tort and not in contract within exclusive jurisdiction of justice of the peace. *Coble v. Reap*, 229.

7-64. Superior Court of Buncombe County has original jurisdiction of misdemeanors. *S. v. Caldwell*, 521.

8-35.1. Does not authorize minister to refuse to be sworn as witness. *In re Williams*, 68.

9-19; 90-45; 90-150; 127-84. Statutory exemption of classes from jury duty held constitutional. *S. v. Knight*, 100.

14-11. It is not applicable to actions seeking to invoke inherent supervisory jurisdiction of equity court to authorize sale of trust property. *Trust Co. v. Johnston*, 701.

14-21. Consent of prosecutrix is no defense in prosecution for carnal knowledge of female child. *S. v. Temple*, 57.

14-22. Evidence held for jury in prosecution for assault with intent to commit rape. *S. v. Mabry*, 293.

14-25. Verdict held to relate to charge of burglary in the first degree. *S. v. Childs*, 307.

14-32. Charge of assault with deadly weapon with intent to kill and inflicting serious injury not resulting in death, includes the offense of assault with a deadly weapon. *S. v. Caldwell*, 521.

14-55. Pistol is not implement of housebreaking. *S. v. Godwin*, 263.

14-269. Information held sufficient to charge carrying concealed weapon. *S. v. Caldwell*, 521.

14-335(10). Officer may arrest without warrant person intoxicated at public place. *S. v. Shirley*, 695.

15-46. Statute does not prescribe mandatory procedure affecting validity of prosecution. *S. v. Broome*, 661.

15-134. Evidence held not to show that offense was committed in county other than that in which indictment was laid. *S. v. Overman*, 453.

15-141. Record held to show that indictments were properly returned in open court by foreman of jury. *S. v. Childs*, 307.

15-143. Denial of motion for bill of particulars held not error. *S. v. Porth*, 329.

15-177.1. Defendant is entitled trial *de novo* on appeal to Superior Court unaffected by plea of guilty in county court. *S. v. Broome*, 661.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

15-180. Defendant has duty to show that record is properly made up and transmitted. *S. v. Childs*, 307.

18-11; 18-32(2). Acquittal of charge of illegal possession of whiskey does not preclude revocation of suspension of sentence for violation of condition that defendant possess no alcoholic beverages. *S. v. Causby*, 747.

20-71.1. Evidence held to require peremptory instruction to answer issue of *respondeat superior* in negative. *Wilcox v. Motors Co.*, 473; *Torres v. Smith*, 546.

20-124. Owner may not be held liable for defective brakes unless he knew or should have known of defect. *Wilcox v. Motors Co.*, 473.

20-129; 20-141(e). Inability to stop within radius of headlights is negligence *per se* when motorist is traveling at excessive speed. *Griffin v. Watkins*, 650.

20-140. Evidence held insufficient to present issue of careless and reckless driving. *Williams v. Boulerice*, 499.

20-149. Applies to overtaking and passing another vehicle and not a horse on shoulder of highway. *Murchison v. Powell*, 656.

20-154(a). Evidence tending to show that defendant turned left across path of on-coming vehicle held to take issue of negligence to jury. *Black v. Wilkinson*, 689.

20-279.21(j). Financial Responsibility Law does not preclude one insurer from excluding itself from liability when loss is covered by another insurer. *Insurance Co. v. Insurance Co.*, 342; *Insurance Co. v. Casualty Co.*, 354.

22-2. Statute of frauds precludes enforcement of agreement or action for damages for breach. *Carr v. Good Shepherd Home*, 241.

28-1(4). Clerk of Superior Court of county in which nonresident dies leaving assets has authority to appoint administrator. *King v. Snyder*, 148.

31-5.7. Fact that testator becomes mentally incompetent does not revoke will. *Abbott v. Abbott*, 579.

31A-1. Right of widow to take devise or bequest is not forfeited by her abandonment of him. *Abbott v. Abbott*, 579.

36-38; 36-42. Rule that trustee may not purchase at his own sale is subject to exception only in extraordinary cases upon approval of court of equity. *Trust Co. v. Johnson*, 701.

42-26. Breach of condition of lease is not basis for summary ejectment. *Morris v. Austraw*, 218.

49-2. Issues must present inquiries as to all facts necessary to determine guilt, including fact that prosecution was commenced within time limited. *S. v. McKee*, 280.

50-16. Issues of fact in action for alimony without divorce must be determined by jury, but court determines alimony *pendente lite*. *Davis v. Davis*, 120.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

52-5. Wife may maintain action against husband for assault. *Ayers v. Ayers*, 443.

52-6. Separation agreement executed in another state will be upheld here even though not executed in accordance with our statutory requirements, providing it is not injurious to the wife under the then existing conditions of the parties. *Davis v. Davis*, 120.

62-3. Statutory definitions of "public utility" and "franchise" are not controlling in determining whether agreement of municipality is franchise or license. *Shaw v. Asheville*, 90.

62-94(b)(5). Findings of Utilities Commission supported by competent evidence are conclusive. *Utilities Comm. v. Coach Co.*, 718.

62-111(a). Evidence held to support conclusion that transfer of stock of franchise carrier from one holding company to another was justified by public convenience and necessity and G.S. 62-262(e)(1) is not applicable. *Utilities Comm. v. Coach Co.*, 718.

62-111(d). Finding that franchise carrier did not in fact obtain its franchise for the purpose of transferring it to another obviates the proscription of the statute. *Utilities Comm. v. Coach Co.*, 718.

67-5. Dog tax constitutional, and expenditure for damages inflicted by dogs is valid. *In re Truitt*, 249.

67-13. Appeal to Superior Court from denial by county commissioners of Guilford of claim for injuries inflicted by dog is *de novo*. *In re Truitt*, 249.

84-28(3)d2; 84-28(3)f. State Bar may initiate proceedings against attorney, and Superior Court on appeal has jurisdiction to review order of Bar Council in procedure analogous to reference by consent. *State Bar v. Frazier*, 625.

97-10.1; 97-9. Caddy is not an employee so as to preclude action by him to recover for negligent injury from ball hit by player. *McWilliams v. Parham*, 162.

97-17. Award of Industrial Commission may be set aside only for fraud, misrepresentation, undue influence or mutual mistake. *Tabron v. Farms, Inc.*, 393.

97-82. Submission of voluntary settlement for approval invokes jurisdiction of Industrial Commission, *Tabron v. Farms, Inc.*, 393.

105-88(a); 53-56. Premium finance company is liable for privilege license tax and for license fees. *Northcutt v. Clayton*, 428.

105-147(9)(d). Dividends received by foreign corporation from shares of stock owned by it in non-subsidiary corporations and capital gains received from sale of shares of stock in such non-subsidiary corporations must be deducted from loss carry-over. *Dayco Corp. v. Clayton*, 490.

108-73.2(d). Evidence of conspiracy to defraud Welfare Department held sufficient to be submitted to jury. *S. v. Butler*, 733.

109-34. It not appearing from the complaint that bonds were not public bonds, demurrer should have been overruled. *West v. Ingle*, 447.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

136-20. Does not relieve railroad company of duty to give users of highway adequate notice of grade crossing. *Cecil v. R. R.*, 541.

136-89.49; 136-89.51. Highway Commission has authority to limit access to highway. *Petroleum Marketers v. Highway Comm.*, 411.

136-105. Petition to withdraw amount deposited by Highway Commission cannot be construed as answer to condemnation proceedings. *Highway Comm. v. Hemphill*, 535.

136-107; 1-152. Court is without discretionary authority to extend time for filing answer in condemnation proceedings. *Highway Comm. v. Hemphill*, 535.

143-293. Evidence held sufficient to sustain conclusion that school bus driver was negligent in striking child. *Brown v. Board of Education*, 667.

148-45(a). Indictment held sufficient to charge felonious escape. *S. v. Elliott*, 683.

153-266.17. Plaintiff failing to apply for hardship permit may not sue for injunctive relief against zoning ordinance. *Michael v. Guilford County*, 515.

160-2. Cablevision must be awarded in accordance with charter regulations. *Shaw v. Asheville*, 90; *Kornegay v. Raleigh*, 155.

160-272. Where warrant does not charge violation of municipal ordinance, defendant may not be convicted of violation. *S. v. Wiggs*, 507.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

I, § 7. Statutory exemption of classes from jury duty held constitutional. *S. v. Knight*, 100.

I, § 13. Statutory exemption of classes from jury duty held constitutional. *S. v. Knight*, 100.

I, § 17. Statutory exemption of classes from jury duty held constitutional. *S. v. Knight*, 100.

I, § 26. Religious freedom is not absolute but must give way to the State in the exercise of constitutional regulations necessitated by compelling State interests. *In re Williams*, 68.

II, § 29. Statute authorizing municipal ABC vote is not statute relating to trade. *Gardner v. Reidsville*, 581.

IV, § 12. General Assembly has power to regulate procedure in courts inferior to Supreme Court. *Highway Comm. v. Hemphill*, 535.

CONSTITUTION OF UNITED STATES, SECTIONS OF, CONSTRUED.

Fourteenth Amendment. Religious freedom is not absolute but must give way to the State in the exercise of constitutional regulations necessitated by compelling State interests. *In re Williams*, 68.
Statutory exemption of classes from jury duty held constitutional. *S. v. Knight*, 100.