NORTH CAROLINA REPORTS

Vol. 270

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1967

JOHN M. STRONG

REPORTER

RALEIGH:

BYNUM PRINTING COMPANY

PRINTERS TO THE SUPREME COURT

1967

CITATION OF REPORTS.

Rule 46 of the Supreme Court is as follows:

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				Phillips Law	"	61	"
				" Eq.	"	62	"

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

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

SUPREME COURT OF NORTH CAROLINA.

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ASSOCIATE JUSTICES:

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SUPERIOR COURTS, FALL SESSIONS, 1967.

FIRST DIVISION

First District—Judge Cohoon.

Camden—Sept. 25; Dec. 11†.

Chowan—Sept. 11; Nov. 27.

Currituck—Sept. 4; Dec. 4†.

Dare—Oct. 23.

Gates—Oct. 16.

Pasquotank—Sept. 18†; Oct. 9†; Nov. 6†; Nov. 13*.

Perquimans—Oct. 30.

Second District—Judge Peel.

Beaufort—Aug. 21*; Aug. 28†(2); Sept. 18*; Oct. 16†(2); Nov. 6†; Dec. 4*.

Hyde—Oct. 9; Oct. 30†.

Martin—Sept. 25*; Nov. 20†(2); Dec. 11.

Tyrrell—Oct. 2.

Washington—Sept. 11; Nov. 13†.

Third District—Judge Bundy.

Carteret—Aug. 21†(A)(2); Oct. 16†; Nov. 6; Nov. 27†(A).

Craven—Sept. 4(2); Oct. 2†(2); Nov. 13; Nov. 27†(2).

Pamlico—Sept. 18(A); Oct. 23.

Pitt—Aug. 21(2); Sept. 18†(2); Oct. 9(A); Oct. 23†(A); Oct. 30(A); Nov. 20; Dec. 11.

Fourth District—Judge Hubbard.

Duplin—Aug. 28; Oct. 9; Nov. 6*; Dec. 4†(A)(2);

Jones—Sept. 25; Oct. 30†; Nov. 27.

Onslow—July 17(A); July 31†(2); Sept. 25(A)(2); Oct. 16†(A)(2); Nov. 13†; Dec. 4; Dec. 11†.

Sampson—Aug. 14; Sept. 4†(2); Oct. 16*; Oct. 23†; Nov. 20†; Nov. 27(A).

Fifth District—Judge Mintz.

New Hanover—Aug. 7*(2); Aug. 21†(2); Sept. 11†(2); Oct. 2*(A)(2); Oct. 16†(2); Oct. 30*(2); Nov. 13†(3); Dec. 4*(2).

Pender—Sept. 4†; Sept. 25; Oct. 2†; Nov. 13(A).

Sixth District—Judge Parker.

Bertie—Sept. 18; Nov. 20(2).

Halifax—Aug. 14(2); Oct. 2†(2); Oct. 23*; Dec. 11(A).

Hertford—July 24(A); Oct. 16; Dec. 4†(2).

Northampton—Aug. 7; Oct. 30(2).

Seventh District—Judge Fountain.

Edgecombe—Aug. 14*; Sept. 4†(A); Oct. 2*(A); Oct. 30†(2); Nov. 13*.

Nash—Aug. 7†(A); Aug. 21*; Sept. 11†(2); Oct. 9*(A); Oct. 16†(2); Nov. 20*(A)(2); Dec. 11†.

Wilson—July 17*; Aug. 28*(2); Sept. 25†(2); Oct. 16*(A)(2); Nov. 20†(2); Dec. 4*.

Eighth District—Judge Cowper.

Greene—Oct. 9†; Oct. 16*(A); Dec. 4.

Lenoir—Aug. 7†(A)(2); Aug. 21*; Sept. 4(A); Sept. 11†(2); Oct. 16†; Oct. 23*(2); Nov. 13†(A); Nov. 27†; Dec. 11.

Wayne—Aug. 7*(2); Aug. 28†(2); Sept. 25†(2); Oct. 23†(A); Nov. 6*(2); Dec. 4†(A)(2).

SECOND DIVISION

Ninth District—Judge Hobgood.

Franklin—Sept. 18†(2); Oct. 16*; Nov. 27†.

Granville—July 17; Oct. 9†(A); Nov. 13(2).

Person—Sept. 11; Oct. 2†(A)(2); Oct. 30; Dec. 4†.

Vance—Oct. 2*; Nov. 6†; Dec. 11†.

Warren—Sept. 4*; Oct. 23†.

Tenth District—Wake.

Schedule "A"—Judge Bickett.

July 10*(2); Aug. 7†(A)(2); Aug. 21*(2); Sept. 4*(2); Sept. 18†(2); Oct. 2*(2); Oct. 23*(2); Nov. 6*(2); Nov. 20†(2); Dec. 4*(2).

Schedule "B"—Judge Canaday.

July 10†(2); July 31*(A)(2); Aug. 14(A)(2); Aug. 21†(2); Sept. 4†(2); Sept. 11(A)(2); Sept. 18*(2); Oct. 2†(2); Oct. 9(A)(2); Oct. 23†(2); Nov. 6†(2); Nov. 13(A)(2); Nov. 20*(2); Dec. 4†(2); Dec. 11(A).

Eleventh District—Judge Braswell.

Harnett—Aug. 14†(2); Aug. 28*; Sept. 11†(A)(2); Oct. 9†(2); Nov. 13*(A)(2); Dec. 11†(A).

Johnston—Aug. 21(A); Aug. 28†(A); Sept. 25†(2); Oct. 16†(A); Oct. 23; Nov. 6†(2); Dec. 4(2).

Lee—July 31*; Aug. 7†; Sept. 11†(2); Oct. 9†(A); Oct. 30*; Nov. 27†; Dec. 4†(A).

Twelfth District—Judge Mallard.

Cumberland — Aug. 14*; Aug. 28*(2); Aug. 28†(A)(2); Sept. 11†(2); Sept. 25*(2); Sept. 25(A)(2); Oct. 9†; Oct. 16*(A)(2); Oct. 23†(2); Nov. 6*(2); Nov. 6†(A)(2); Nov. 27†(2); Nov. 27*(A)(2); Dec. 11*.

Hoke—Aug. 21; Nov. 20.

Thirteenth District—Judge Hall.

Bladen—Aug. 21; Oct. 16*(A); Nov. 13†.

Brunswick—Aug. 28†; Sept. 18; Oct. 23†; Dec. 4†(2).

Columbus—Sept. 4*(2); Sept. 25†(2); Oct. 9*; Oct. 30†(2); Nov. 20*(2); Dec. 11†(A).

Fourteenth District—Judge Bailey.

Durham—July 10*(A)(2); July 24†(A); Aug. 28*(2); Aug. 28†(A)(2); Sept. 11†(2); Sept. 11*(A)(2); Oct. 2*(2); Oct. 2†(A); Oct. 16†(2); Oct. 30*(2); Nov. 13†(2); Nov. 27*(2); Dec. 4†(A)(2); Dec. 11*.

Fifteenth District—Judge Carr.

Alamance—July 17†(A); July 31†; Aug. 14*(2); Sept. 11†(2); Oct. 16*(2); Nov. 13†(2); Dec. 4*.

Chatham—Aug. 28†; Sept. 4; Oct. 30†(2); Nov. 27.

Orange—Aug. 7*; Sept. 18*(A); Sept. 25†(2); Nov. 6*(A); Nov. 13†(A)(2); Dec. 11.

Sixteenth District—Judge McKinnon.

Robeson—July 10(2); Aug. 14*; Aug. 28†; Sept. 4*(2); Sept. 18†(2); Oct. 9†(2); Oct. 23*(2); Nov. 13†(2); Nov. 27*.

Scotland—July 24†; Aug. 21; Oct. 2; Nov. 6† Dec. 4.

THIRD DIVISION

Seventeenth District—Judge Shaw.
Caswell—Oct. 30(A); Dec. 4†.
Rockingham—July 24†(A)(2); **Aug. 21*** (2); Sept. 18†(2); Oct. 16(A)(2); Oct. 30†; Nov. 20†(2); Dec. 11*.
Stokes—Oct. 2; Oct. 9(A).
Surry—Aug. 7*(2); Sept. 4†(2); Oct. 9† (2); Nov. 6*(2); Dec. 4(A).

Eighteenth District—
Schedule "A"—Judge Lupton.
Greensboro—July 10*(2); Sept. 11†(3); Oct. 2*(2); Oct. 16*(2); Oct. 30*(2); Nov. 13; Nov. 20*(2); Dec. 11†.
High Point—Dec. 4†.

Schedule "B"—Judge Crissman.
Greensboro—Aug. 28*(2); Oct. 2†(3); Nov. 20†(2); Dec. 4*(2).
High Point—July 17*; Aug. 21†; Sept. 11 †(2); Sept. 25*; Oct. 23†; Oct. 30*; Nov. 6†(2).

Schedule "C"—Judge to be Assigned.
Greensboro—July 10†(A)(2); **Aug. 14*** (A); Aug. 28†(A)(2); Sept. 11*(A)(2); Sept. 25†(A); Oct. 9(A); Oct. 30†(A)(2).
High Point—Nov. 20*(A); Dec. 11*(A).

Nineteenth District—Judge Armstrong.
Cabarrus—Aug. 7†(A); Aug. 21*; Aug. 28†; Sept. 11†(A)(2); Oct. 9(2); Nov. 6† (A)(2); **Dec. 11†.**
Montgomery—July 10; Aug. 14†; Oct. 2.
Randolph—July 24†(A)(2); Sept. 4*; Sept. 25†(A)(2); Oct. 23†(2); Nov. 6†(2); Nov. 27*; Dec. 4†(A).
Rowan—July 17†(A); Sept. 11(2); Sept. 25†; Oct. 23†(A)(2); Dec. 4†; Dec. 11† (A).

Twentieth District—Judge McConnell.
Anson—Sept. 18*; Sept. 25†; Nov. 20†.
Moore—Aug. 14*(A); Sept. 4†(2); Nov. 13.
Richmond—July 17†; July 24*; Aug. 28 †(A); Oct. 2†; Oct. 9*; Nov. 6†(A); Dec. 4†(2).
Stanly—July 10; Oct. 16†; Nov. 27.
Union—Aug. 21†(A); Aug. 28; Oct. 30 (2).

Twenty-First District—Forsyth.
Schedule "A"—Judge Johnston.
July 10†(2); July 24†(A)(2); Aug. 21†; Aug. 28; Sept. 4†(3); Sept. 25†(2); Oct. 16; Oct. 23†(2); Nov. 6†(2); Nov. 20; Nov. 27; Dec. 4†(2).

Schedule "B"—Judge McLaughlin.
July 24(2); Aug. 7(2); Aug. 21†(A)(2); Sept. 4(3); Sept. 18(A); Sept. 25(2); Oct. 9(2); Oct. 9†(A)(2); Oct. 30(2); Nov. 13 (3); Dec. 4(2); Dec. 11(A).

Twenty-Second District—Judge Gambill.
Alexander—Sept. 25.
Davidson—July 10†(A)(2); Aug. 21; Sept. 11†(2); Sept. 25(A)(2); Oct. 9†; Oct. 23† (A)(2); Nov. 6(2); Dec. 4†(A); Dec. 11†.
Davie—Aug. 7; Oct. 2† Nov. 6(A).
Iredell—Aug. 28; Sept. 4†; Oct. 16†(A); Oct. 23(2); Nov. †(2).

Twenty-Third District—Judge Gwyn.
Alleghany—Aug. 28; Oct. 2.
Ashe—July 17(A); Sept. 11†; Oct. 30.
Wilkes—Aug. 14(2); Sept. 18†(2); Oct. 9; Nov. 6†(2); Dec. 11.
Yadkin—Sept. 4*; Nov. 20†(2); Dec. 4.

FOURTH DIVISION

Twenty-Fourth District—Judge Falls.
Avery—July 10(A)(2); Oct. 16(2).
Madison—Aug. 28†(2); Oct. 2*; Oct. 30†; Dec. 4*.
Mitchell—Sept. 11(2).
Watauga—Sept. 25; Nov. 13†.
Yancey—Aug. 7; Aug. 14†(2); Nov. 27.

Twenty-Fifth District—Judge Farthing.
Burke—Aug. 14; Oct. 2; Oct. 16; Nov. 20(2).
Caldwell—Aug. 21(2); Sept. 18†(2); Oct. 23†(2); Dec. 4(2).
Catawba—July 24(A)(2); Aug. 7(A); Sept. 4†(2); Sept. 18(A); Nov. 6(2).

Twenty-Sixth District—Mecklenburg.
Schedule "A"—Judge Campbell.
Aug. 7*(2); Aug. 21†(2); Sept. 4*(2); Sept. 18†(2); Oct. 2*(2); Oct. 23*(2); Nov. 6*(2); Nov. 20†(2); Dec. 4*(2).

Schedule "B"—Judge Clarkson.
July 10*(2); Aug. 7†(A)(2); Aug. 21† (2); Sept. 4†(2); Sept. 18†(2); Oct. 2†(2); Oct. 16†(2); Oct. 30†(2); Nov. 13†(A); Nov. 20†(2); Dec. 4†(2).

Schedule 'C"—Judge to be Assigned.
July 10*(A)(2); Aug. 7*(A)(2); Aug. 21 †(A)(2); Sept. 4*(A)(2); Sept. 25*(A); Oct. 2*(A)(2); Oct. 16†(A); Oct. 23*(A) (2); Nov. 6*(A)(2); Nov. 20†(A)(2); Dec. 4*(A)(2).

Schedule "D"—Judge to be Assigned.
July 10†(A); Aug. 7†(A)(2); Sept. 4* (A)(2); Sept. 4†(A)(2); Oct. 2†(A)(2); Oct. 16†(A)(2); Oct. 30†(A)(2); Nov. 13† (3); Dec. 4†(2).

Twenty-Seventh District—
Schedule "A"—Judge Froneberger.
Cleveland—Oct. 23*(2); Nov. 27†(2).
Gaston—July 10*; July 17†(2); **July 31†;** Sept. 4†(2); Sept. 18*; Sept. 25†(2); Oct. 9*(2); Nov. 13†(2); Dec. 11†.

Schedule "B"—Judge McLean.
Cleveland—July 10(2); Sept. 25†(2).
Gaston—July 24*(2); Aug. 14*(2); **Aug.** 28*(2); Oct. 9†; Oct. 16†(2); Oct. 30†(2); Nov. 13*; Nov. 20*(A)(2); Dec. 4*(A)(2).
Lincoln—Sept. 11(2).

Twenty-Eighth District—Judge Jackson.
Buncombe—July 10*(A)(2); July 24†(A) (2); Aug. 7†(2); Aug. 7*(A); **Aug. 21*(2);** Aug. 21†(A)(2); Sept. 4*(2); **Sept. 4†(A)** (2); Sept. 18†(2); Sept. 25*(A)(2); **Oct.** 2†(3); Oct. 23*(2); Oct. 23†(A)(2); **Nov.** 6†(A)(3); Nov. 13*(2); Nov. 27†; Nov. 27* (A); Dec. 4†(2); Dec. 11*(A).

Twenty-Ninth District—Judge Bryson.
Henderson—Aug. 14†(2); Oct. 16.
McDowell—Sept. 4(2); Oct. 2†(2).
Polk—Aug. 28.
Rutherford—Aug. 14*†(A); Sept. 18*† (2); Nov. 6*†(2).
Transylvania—July 10; Oct. 23(2).

Thirtieth District—Judge Anglin.
Cherokee—July 31, Nov. 6(2).
Clay—Oct. 2.
Graham—Sept. 11.
Haywood—July 10(2); Sept. 18†(2); Nov. 20(2).
Jackson—Oct. 9(2).
Macon—Aug. 7; Dec. 4(2).
Swain—July 24; Oct. 23.

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

† For Civil Cases. * For Criminal Cases.
# Indicates Non-Jury Term.
(A) Judge to be Assigned.

UNITED STATES COURTS FOR NORTH CAROLINA.

EASTERN DISTRICT

Judges

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

U. S. Attorney

ROBERT H. COWEN, RALEIGH, N. C.

Assistant U. S. Attorneys

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

U. S. Marshal

HUGH SALTER, RALEIGH, N. C.

Clerk U. S. District Court

SAMUEL A. HOWARD, RALEIGH, N. C.

Deputy Clerks

WILLIAM A. KOPP, JR., RALEIGH, N. C. (Chief Deputy)
MRS. ELSIE LEE HARRIS, RALEIGH, N. C.
MRS. BONNIE BUNN PERDUE, RALEIGH, N. C.
MISS NORMA GREY BLACKMON, RALEIGH, N. C.
MRS. IDA M. GODWIN, RALEIGH, N. C.
MRS. JOYCE W. TODD, RALEIGH, N. C.
MRS. NANCY H. COOLIDGE, FAYETTEVILLE, N. C.
MRS. ELEANOR G. HOWARD, NEW BERN, N. C.
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L. THOMAS GALLOP, ELIZABETH CITY, N. C.
MRS. MARGARET P. PARRISH, RALEIGH, N. C.

MIDDLE DISTRICT

Judges

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

Senior Judge

JOHNSON J. HAYES, WILKESBORO, N. C.

U. S. Attorney

WILLIAM H. MURDOCK, GREENSBORO, N. C.

Assistant U. S. Attorneys

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

U. S. Marshal

E. HERMAN BURROWS, GREENSBORO, N. C.

Clerk U. S. District Court

HERMAN AMASA SMITH, GREENSBORO, N. C.

Deputy Clerks

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

WESTERN DISTRICT

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1967

STATE OF NORTH CAROLINA v. ELMER DAVIS, JR., (PETITION OF NIVENS AND BELL, ATTORNEYS).

(Filed 12 April, 1967.)

1. Appeal and Error § 2—

The Supreme Court has the power to issue any remedial writ necessary to give it general supervision and control over proceedings of the lower courts, Constitution of North Carolina, Art. IV, § 10(1), and to this end will grant *certiorari* to review an order of the Superior Court which involves a question of public importance.

2. Attorney and Client § 7—

The language of G.S. 15-5 is clear and unambiguous and provides for the payment of fees to lawyers who are appointed to represent indigent defendants in the courts of this State but does not authorize the payment of fees to lawyers appearing for indigent defendants in the courts of the United States; therefore an order of the Superior Court that attorneys representing an indigent should be paid a fee out of State funds for services in representing their client in the Federal Courts, in addition to the sum theretofore paid them for their services in representing the indigent in the State courts, must be reversed.

3. Attorney and Client § 1—

An attorney is an officer of the court and takes his office *cum onere*, including the duty of rendering gratuitous service to a poor person when appointed by the court to do so.

4. Attorney and Client § 7; Constitutional Law § 23—

Since one of the burdens of an attorney is to render gratuitous services to an indigent when appointed by the court to do so, an attorney appointed to represent an indigent may not complain that his constitutional rights under the Equal Protection and Due Process Clauses of the Federal Constitution were violated because of the fact that he received no or inadequate compensation for services rendered to an indigent.

5. Statutes § 4—

A person who asserts that a particular act violates his rights under the Constitution ordinarily must point out the particular provision of the Constitution that he claims is violated.

6. Constitutional Law § 6—

The legislative power is supreme over the public purse, and moneys paid into the hands of the State Treasurer by virtue of State law become public funds which may be disbursed only in accordance with legislative authority. Article XIV, § 3, of the Constitution of North Carolina.

ON *certiorari,* allowed 4 November 1966, on petition of the Attorney General of North Carolina to review a judgment entered by *McLean, J.,* 14 October 1966, B Session of MECKLENBURG, ordering the State of North Carolina to pay to Walter B. Nivens and Charles V. Bell, pursuant to Ch. 1080 of the Session Laws of 1963, the sum of $8,000, to be equally divided between them, for legal services rendered by them in the courts of the United States in behalf of Elmer Davis, Jr., an indigent defendant, whose sentence of death by asphyxiation, based upon a jury verdict of guilty of murder in the first degree, had been upheld by the Supreme Court of North Narolina in the case of *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, in an opinion filed 12 October 1960, which fee of $8,000 was allowed them in addition to the sum of $1,700 formerly paid to them by Mecklenburg County by order of court for their legal services in defending the said Elmer Davis, Jr., in the courts of the State of North Carolina. Docketed and argued as Case No. 272-L, Fall Term 1966.

The history of this case is as follows: At the 2 November 1959 Term of the Superior Court of Mecklenburg County the grand jury returned a true bill of indictment charging that Elmer Davis, Jr., on 20 September 1959 with force and arms at and in Mecklenburg County did unlawfully, willfully, and feloniously while perpetrating a felony, to wit, rape, kill, and murder Foy Bell Cooper. On 10 November 1959 Francis O. Clarkson, Judge presiding over the court in Mecklenburg County, entered an order finding that the said Elmer Davis, Jr., is an indigent person charged in an indictment with the capital felony of murder in the first degree, and appointed Walter B. Nivens and Charles V. Bell to represent him "in the Superior Court of Mecklenburg County, North Carolina." Upon this indictment the said Elmer Davis, Jr., was tried by Campbell, J., and a jury at the 7 December 1959 Regular Criminal Term of Mecklenburg County Superior Court. Upon his arraignment defendant through his court-appointed counsel, Nivens and Bell, entered a

plea of not guilty. The jury returned for its verdict, "Guilty of murder in the first degree." From a judgment of death in the manner prescribed by law, defendant appealed. Upon his appeal the Supreme Court of North Carolina found no error in the trial below. *S. v. Davis, supra.* Thereafter, the said Nivens and Bell, court-appointed counsel for Elmer Davis, Jr., petitioned the Supreme Court of North Carolina for a rehearing, which motion was denied.

Upon the denial of their petition for rehearing by the Supreme Court of North Carolina, the said Nivens and Bell procured from the North Carolina Supreme Court a stay of execution of the death sentence of Elmer Davis, Jr., and filed a petition for *certiorari* before the United States Supreme Court. The United States Supreme Court denied the *certiorari.* Mr. Justice Douglas was of the opinion that the *certiorari* should be granted. *Davis v. State of North Carolina,* 365 U.S. 855, 5 L. Ed. 2d 819 (20 March 1961).

Thereafter, the said Nivens and Bell filed a petition in behalf of the said Elmer Davis, Jr., who was in the custody of the State of North Carolina under sentence of death, for a writ of *habeas corpus* in the United States District Court for the Eastern District of North Carolina, Raleigh Division. Butler, Chief Judge for the United States District Court for the Eastern District, filed an elaborate written opinion on 25 July 1961 denying the writ. *Davis v. State of North Carolina,* 196 F. Supp. 488. Petitioners, in behalf of the said Elmer Davis, Jr., appealed to the United States Court of Appeals, which court in a majority opinion, with Haynsworth, J., dissenting, reversed Judge Butler's decision and remanded the case to the Federal District Court for a rehearing on the question of whether defendant's confession was obtained within the bounds of due process. *Davis v. State of North Carolina,* 310 F. 2d 904, decided 7 November 1962. Upon the rehearing, pursuant to the mandate of the Fourth Circuit Court of Appeals, Judge Butler wrote an elaborate opinion again denying the petition for a writ of *habeas corpus. Davis v. State of North Carolina,* 221 F. Supp. 494. The opinion was filed 10 September 1963.

The said Nivens and Bell, in behalf of the said Elmer Davis, Jr., appealed again to the United States Court of Appeals, Fourth Circuit, which court in a majority opinion joined in by three judges, with two dissenting, affirmed Judge Butler's decision in an opinion filed 8 December 1964. *Davis v. State of North Carolina,* 339 F. 2d 770. The said Nivens and Bell, according to a petition for the allowance of counsel fees for their appearances for the said Elmer Davis, Jr., in the United States courts, allege that they again filed a petition for a *certiorari* with the United States Supreme Court.

The Supreme Court of the United States granted the petition for *certiorari* in the following language:

> "No. 37, Misc. *Davis v. North Carolina.* C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of *certiorari* granted. The case is transferred to the appellate docket. Conrad O. Pearson for petitioner. T. W. Bruton, Attorney General of North Carolina, and James F. Bullock, Assistant Attorney General, for respondent. Reported below: 339 F. 2d 770." 382 U.S. 953, 15 L. Ed. 2d 358.

On 30 June 1966 the Supreme Court of the United States, in an opinion written by Chief Justice Warren expressing the views of six members of the Court, held that the confession of Elmer Davis, Jr., was involuntary and inadmissible in evidence. Mr. Justice Clark, in an opinion joined in by Mr. Justice Harlan, dissented on the ground that the findings supported the conclusion that the confession was voluntary. The majority opinion reversed the judgment of the Court of Appeals for the Fourth Circuit and remanded the case to the District Court to enter "such orders as are appropriate and consistent with this opinion, allowing the State a reasonable time in which to retry the petitioner." *Davis v. State of North Carolina,* 384 U.S. 737, 16 L. Ed. 2d 895.

On 19 July 1966 Walter B. Nivens and Charles V. Bell filed a petition in Mecklenburg County Superior Court stating in substance: Your petitioners have put in many hours in research, preparation of briefs, and perfection of appeals in the various courts of the United States (which we have set forth above); that they have incurred expenses in the amount of $1,758.72 in connection with their work in the Federal courts; that they have sought and obtained the assistance of another attorney in doing research; and that they are of the opinion that the reasonable value of their services rendered in all of these proceedings in the Federal courts, aside from the outlay of expenses, amounted to $30,000. Wherefore, they prayed the State court to enter an order that they be reimbursed for their expenses in the amount of $1,758.72 and be allowed attorney fees of $15,000 each. They filed as an exhibit to their petition an itemized statement of their alleged expenses in representing Elmer Davis, Jr., in the Federal courts.

The State of North Carolina filed an answer to the petition of Nivens and Bell for expenses and counsel fees for their appearances for Elmer Davis, Jr., in the United States courts, in which it alleges in substance: That the State of North Carolina is not liable for and is not authorized by law to pay any counsel fees and expenses to any attorney for services performed in the United States courts;

that petitioners Nivens and Bell have been compensated for their legal services in behalf of the defendant in both the Superior and Supreme Courts of North Carolina by the payment to them of $1,700 as fees by Mecklenburg County.

The County of Mecklenburg filed an answer to the request of Nivens and Bell for expenses and counsel fees in the United States courts, in which it alleges in substance: That it has paid to Nivens and Bell by order of court the sum of $1,700 for legal services rendered by them to Elmer Davis, Jr., in his trial in the Superior Court, the Supreme Court of North Carolina, and on a motion for rehearing in the State Supreme Court; that since the enactment of Ch. 1080 of the Session Laws of 1963, the State of North Carolina is responsible for the payment of legal fees for indigent defendants charged with crime in the State courts; and that it is not responsible, certainly since the legislation of 1963, for the payment of counsel fees for an indigent defendant in the United States courts.

On 13 October 1966 McLean, J., allowed petitioners Nivens and Bell to amend their petition for counsel fees to allege: "That the failure to allow these petitioners attorney fees for the defendant herein for their services expended in the Federal Courts of the United States is a denial of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and a deprivation of their rights under the Constitution of North Carolina."

Judge McLean on 14 October 1966 heard the petition of the said Nivens and Bell for an allowance of attorney fees for their representation of Elmer Davis, Jr., in the United States courts. He entered a judgment wherein, after reciting the history of the case as we have set forth above, he stated in substance: That the State of North Carolina elected not to retry Elmer Davis, Jr., for the rape and murder of Foy Bell Cooper, and he was thereafter ordered released from the State Prison in Raleigh, North Carolina, by the Honorable Algernon Butler, Chief Judge of the United States District Court for the Eastern District of North Carolina; that the Attorney General's office and the solicitor of the Mecklenburg solicitorial district represented the State of North Carolina in the United States courts, that it is stipulated by all the parties that the expenses incurred by the petitioners herein in representing the defendant Davis in the courts of the United States amounted to $1,758.72; and that during all the proceedings Elmer Davis, Jr., was an indigent. When Nivens and Bell were appointed to represent Elmer Davis, Jr., Mecklenburg County was liable to pay them reasonable attorney fees, and that Mecklenburg County did pay these petitioners the sum of $1,700 for their services, and that since

21 June 1963 the responsibility for paying attorney fees for indigent defendants was placed upon the State of North Carolina pursuant to the provisions of Ch. 1080 of the Session Laws of 1963. This case originated in the North Carolina State courts and hence the State of North Carolina is liable for payment of attorney fees due these petitioners; that the State of North Carolina paid all costs assessed by the government which covered the costs in the United States District Court, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court in the amount of $3,700; that a refusal to pay these petitioners their fees for representing Elmer Davis, Jr., in the Federal courts is a denial of their rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and a deprivation of their rights under the Constitution of North Carolina. Wherefore, Judge McLean ordered and decreed that the State of North Carolina pay to petitioners Nivens and Bell "out of the Indigent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963" the sum of $8,000 for their appearances for the defendant Davis in the United States courts, which amount is to be equally divided between the petitioners herein, and said amount is allowed in addition to the $1,700 heretofore paid them by Mecklenburg County.

On 14 October 1966 McLean, J., entered an order staying the execution of his order for the payment of counsel fees to Nivens and Bell until the State of North Carolina could have his order for the payment of counsel fees reviewed by the Supreme Court, on condition that the State of North Carolina file application for *certiorari* within 15 days from 14 October 1966.

On 20 October 1966 the Attorney General of the State of North Carolina filed a petition for a writ of *certiorari* for a review by the Supreme Court of Judge McLean's order ordering the payment of $8,000 for counsel fees to the petitioners. We allowed the petition for *certiorari* on 4 November 1966.

Attorney General T. W. Bruton, Deputy Attorney General Ralph Moody, and Assistant Attorney General George A. Goodwyn for the State, appellant.

W. B. Nivens, Charles V. Bell, and Calvin L. Brown for respondents, appellees.

Ruff, Perry, Bond, Cobb & Wade by James O. Cobb and William H. Cannon for Mecklenburg County.

PARKER, C.J. Article IV, Judicial Department, of the Constitution of North Carolina, was entirely rewritten by an amendment

adopted by a majority vote of the people of North Carolina in the general election held on 2 November 1962. Article IV, sec. 10(1), now provides in part: The Supreme "Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the other courts." The North Carolina Constitution, Article IV, sec. 8, as it was written before the general election of 2 November 1962 vested the Supreme Court with authority to issue any remedial writs to give it a general supervision and control over the proceedings of the inferior courts. *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663. The legal question here presented is of such public importance that we decided to exercise our constitutional supervisory authority to issue a *certiorari* to review the validity of Judge McLean's judgment ordering the State of North Carolina to pay Nivens and Bell the sum of $8,000 as legal fees for their appearances for defendant, Elmer Davis, Jr., in the United States courts "out of the Indigent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963."

On 10 November 1959 Francis O. Clarkson, Judge presiding over the court in Mecklenburg County, entered an order finding that Elmer Davis, Jr., is an indigent person charged in an indictment with the capital felony of murder in the first degree, and appointed Walter B. Nivens and Charles V. Bell to represent him "in the Superior Court of Mecklenbury County, North Carolina." Nivens and Bell appeared for the defendant Davis in the Superior Court of Mecklenburg County and in the Supreme Court of North Carolina, as set forth above. Pursuant to the mandatory provisions of G.S. 15-5 as it was in force prior to the 1963 Session of the General Assembly, the court entered an order that Mecklenburg County pay to the said Nivens and Bell a fee of $1,700 for their services in defending the said Davis in the Superior Court of Mecklenburg County and in the Supreme Court of North Carolina, which fee has been paid by Mecklenburg County.

Thereafter, the said Nivens and Bell filed a petition in behalf of the said Elmer Davis, Jr., who was in the custody of the State of North Carolina under sentence of death, for a writ of *habeas corpus* in the United States District Court for the Eastern District of North Carolina, Raleigh Division. Butler, Chief Judge for the United States District Court for the Eastern District filed a written opinion on 25 July 1961 denying the writ. *Davis v. State of North Carolina,* 196 F. Supp. 488. Thereafter, the said Nivens and Bell made appearances in behalf of the said Davis in various courts of the United States, and as a final result of their appearances the Supreme Court of the United States, in an opinion filed 30 June 1966, held

that the confession of Elmer Davis, Jr., was involuntary and inadmissible in evidence, and reversed the judgment of the Court of Appeals for the Fourth Circuit and remanded the case to the District Court to enter "such orders as are appropriate and consistent with this opinion, allowing the State a reasonable time in which to retry the petitioner." *Davis v. State of North Carolina,* 384 U.S. 737, 16 L. Ed. 2d 895. Nivens and Bell and the Attorney General of North Carolina entered into the following written stipulations signed by them:

> "1. That at the time of the appointment of Nivens and Bell, Attorneys, to represent Elmer Davis, Jr., by Judge Clarkson on the 10th of November, 1959, and down to the present date, Elmer Davis, Jr., was and is an indigent person.
>
> "2. That at no time did either Mr. Nivens or Mr. Bell receive an order from any Federal Judge or Federal Court appointing them or either of them as counsel for Elmer Davis, Jr., in any proceedings in the Federal Court."

On 18 March 1963 the Supreme Court of the United States handed down its decision in *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, overruling *Betts v. Brady,* 316 U.S. 455, 86 L. Ed. 1595, and held in the majority opinion that the Sixth Amendment's provision that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense was made obligatory upon the states by the Fourteenth Amendment.

The 1963 General Assembly of North Carolina, which was in session on March 18, passed Ch. 1080 of the Session Laws of 1963 as a result of the decision in the *Gideon* case. Ch. 1080 of the Session Laws of 1963, codified as G.S. 15-4.1, 15-5 *et seq.,* provides, in part, for the appointment of counsel by Superior Court Judges for every defendant in all felony cases when the court finds that the defendant is indigent and unable to employ counsel, but the act provides that the defendant may waive counsel if he so desires in a felony case, except in a capital case. G.S. 15-5 as it now is in force provides that the fees of counsel appointed by Superior Court Judges to defend indigent defendants shall be paid by the State of North Carolina.

Ch. 1080, section 4, of the Session Laws of North Carolina 1963, reads as follows:

> "There is hereby appropriated from the general fund of the State of North Carolina, or from any other available funds of the State, the sum of five hundred thousand dollars ($500,000.00) for the fiscal year ending June 30, 1964, and five hundred

thousand dollars ($500,000.00) for the fiscal year ending June 30, 1965, for the purpose of paying the fees, costs and expenses provided for by this Act. All costs, fees, and expenses shall be paid by voucher issued by the State Treasurer according to the procedures for payment of debts due by the State and supported by order of the court."

For the fiscal year ending 30 June 1964 there was paid out of the State Treasury by orders of Superior Court Judges the sum of $238,956 in payment of fees to lawyers who were appointed by Superior Court Judges to represent 3,003 indigent defendants, and for the fiscal year ending 30 June 1965 there was paid out of the State Treasury by orders of Superior Court Judges the sum of $390,427 in payment of fees to lawyers who were appointed by Superior Court Judges to represent 3,941 indigent defendants. Ch. 914, section 2, of the Session Laws of North Carolina 1965 appropriated from the general fund of the State for counsel for indigent defendants $442,332 for the fiscal year ending 30 June 1966, and $475,382 for the fiscal year ending 30 June 1967. For the fiscal year ending 30 June 1966 there was paid out of the State Treasury by orders of Superior Court Judges the sum of $491,600 in payment of fees to lawyers who were appointed by Superior Court Judges to represent 4,450 indigent defendants: this was more money than appropriated by the General Assembly, so $50,000 was added to the appropriation from the State's contingency and emergency fund. For the fiscal year ending 30 June 1967 up through 31 March 1967 there was paid out of the State Treasury by orders of Superior Court Judges the sum of $379,950 in payment of fees to lawyers who were appointed by Superior Court Judges to represent 3,301 indigent defendants. All of these payments of fees by order of Superior Court Judges to lawyers who were appointed by Superior Court Judges to represent indigent defendants were made for representation in the courts of the State of North Carolina, and none for lawyers to represent indigent defendants in the courts of the United States. The above information was furnished from the records of the Administrative Assistant to the Chief Justice.

A careful study of Ch. 1080, Session Laws of 1963, shows that the language of the statute is clear and unambiguous, and that the statute provides for the payment of fees to lawyers who are appointed by Superior Court Judges of the State to represent such defendants only in the courts of the State of North Carolina. There cannot be read into the clear and unambiguous words of this statute language authorizing a Superior Court Judge of the State to order the State Treasury to pay public funds raised by taxation of its

people for fees for lawyers appearing for indigent defendants in the courts of the United States. There is no statute of North Carolina that provides for the payment of fees to lawyers representing indigent defendants in criminal cases in the United States courts.

G.S. 15-4 provides: "Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense." In *Pardee v. Salt Lake County,* 39 Utah 482, 118 P. 122, the Court held that the Utah Constitution, Article 1, section 7, providing that no person shall be deprived of his property without due process of law, would not apply to make a county liable for the services of an attorney appointed by the court to defend an indigent accused. In a scholarly opinion, with voluminous citation of authority, the Court states in substance that the power to provide compensation for lawyers representing indigent defendants rests with the Legislature and not the courts. In *Ruckenbrod v. Mullins,* 102 Utah 548, 133 P. 2d 325, 144 A.L.R. 839, it is said:

> "The majority of jurisdictions hold that an attorney is an officer of the court with many rights and privileges, and must accept his office *cum onere.* One of the burdens incident to the office, recognized by custom of the courts for many years, is the duty of the attorney to render his services gratuituously to indigent defendants at the suggestion of the court."

Many cases and authorities are cited in support of the statement.

No Judge of the State of North Carolina entered an order authorizing Nivens and Bell to appear in behalf of the defendant, Elmer Davis, Jr., in the courts of the United States. Nivens and Bell and the Attorney General of North Carolina stipulated as follows: "That at no time did either Mr. Nivens or Mr. Bell receive an order from any Federal Judge or Federal Court appointing them or either of them as counsel for Elmer Davis, Jr., in any proceedings in the Federal Court."

This is stated in an annotation in 130 A.L.R. 1440:

> "The weight of authority supports the view that in the absence of statute providing therefor, an attorney who has been assigned by the court to defend an indigent accused cannot recover compensation therefor from the public."

Many cases are cited in support of the statement. To the same effect, 7 C.J.S., Attorney and Client, § 172a(1).

This is said in 7 Am. Jur. 2d, Attorneys at Law, § 207:

> "It has often been held that an attorney appointed by the court to defend cannot recover compensation from the public

for his services in the absence of an enabling statute. The reason is that an attorney, being an officer of the court, like other officers takes his office *cum onere,* and one of the burdens of office which custom has recognized is the gratuitous service rendered to a poor person at the suggestion of the court. The constitutional guaranty of the right of an accused to be heard by counsel does not impose any liability on the part of the government to pay an attorney assigned to represent the indigent. And the courts have stated that requiring an attorney to defend an accused who cannot pay does not involve an unconstitutional taking of property without compensation or without due process of law.

* * *

"The circumstances under which an attorney may receive compensation for representing an indigent on an appeal from a conviction appears to be regulated by statute."

The United States Congress in 1964 — which was subsequent to the enactment of Ch. 1080, Session Laws of 1963 of North Carolina — passed an act providing for the appointment and payment of counsel for indigent defendants. 18 U.S.C.A. § 3006A.

In *Dolan v. United States,* 351 F. 2d 671, the United States Court of Appeals for the Fifth Circuit, in an opinion filed 8 October 1965, held that an attorney was not entitled to compensation for professional services rendered in representation of an indigent defendant by court appointment prior to enactment into law of the Criminal Justice Act of 1964. 18 U.S.C.A. § 3006A.

In *United States v. Dillon,* 346 F. 2d 633, decided 16 June 1965, rehearing denied 27 July 1965, the United States Court of Appeals for the Ninth Circuit stated:

". . . the vast majority of the courts which have passed on the question have denied claims of appointed counsel for nonstatutory just compensation, pointing out that representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and that the obligation of the legal profession to serve without compensation has been modified only by statute. An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when

> he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.' Cf. *Kunhardt & Company, Inc., v. United States,* 266 U.S. 537, 45 S. Ct. 158, 69 L. Ed. 428 (1925)."

See a most interesting appendix to this opinion, stating in substance that representation of indigents upon court order is an ancient tradition of the legal profession, going as far back as fifteenth-century England and pre-Revolutionary America, and the appointment of counsel to represent an indigent is not a "taking." This appendix states:

> "Clearly, the lawyer's traditional obligation to represent indigents upon court order has not included any common-law right to compensation. And the statutory compensation which exists in some states usually contains limitations which in most cases would prevent a lawyer from receiving what his time is worth when working for private clients — limitations which would clearly be invalid if constitutional standards of just compensation were applicable. . . . These statutory fees, which frequently cover capital cases only, range from the Kansas maximum of $10 a day . . . to the $1,500 maximum per case in New York (for capital cases only). . . .
>
> "A Fifth Amendment 'taking' does not occur when the state simply requires an individual to fulfill a commitment he has made. [Citing authority.]"

Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, relied upon by Nivens and Bell is not in point. In that case a majority of the Court held the due process and equal protection clauses of the Fourteenth Amendment were violated by the State's denial of appellate review solely on account of a defendant's inability to pay for a transcript. The last paragraph of G.S. 15-4.1 reads: "When an appeal is taken under this section the county shall make available trial transcript and records required for an adequate and effective appellate review."

The State of North Carolina assigns as error this legal conclusion of Judge McLean: "That a refusal to pay these petitioners is a denial of their rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and a deprivation of their rights under the Constitution of North Carolina." This assignment of error is sustained for the following reasons: One. Under the facts of this case and the law stated above, petitioners Nivens and Bell have no right under the equal protection and due process clauses of the Fourteenth

Amendment to compensation to be paid them by the State for their appearances in behalf of the defendant Davis in the United States courts. Two. Judge McLean in his judgment states in part "that a refusal to pay these petitioners is . . . a deprivation of their rights under the Constitution of North Carolina," but Judge McLean does not state any specific provision of the State Constitution that is violated. Nivens and Bell and Brown in their brief do not cite any specific provision of the Constitution of North Carolina that is violated. Constitutional questions are of great importance, and should not be presented in uncertain form to a court for decision. It is generally held that a person who asserts that a particular act violates his rights under the Constitution must point out the particular provision of the Constitution that he claims is violated. Ordinarily, a court will not inquire into the alleged violation of a constitutional right without a precise statement of the constitutional right violated, for that would lead to the court formulating a rule broader than that necessitated by the precise situation in question. *Rice v. Rigsby,* 259 N.C. 506, 131 S.E. 2d 469. Suffice it to say that petitioners Nivens and Bell have not shown any rights of theirs under the State Constitution will be violated by the State of North Carolina not paying them fees for representing the defendant Davis in the United States courts under the particular facts of this case.

The State of North Carolina assigns as error Judge McLean's judgment ordering and decreeing "that the State of North Carolina pay to these petitioners out of the Indigent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963 aforesaid, the sum of Eight Thousand ($8,000.00) Dollars, which amount is to be equally divided between the petitioners herein, and said amount is allowed in addition to the amount heretofore paid by Mecklenburg County to these petitioners." This assignment of error is good.

Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible, and may be disbursed only in accordance with legislative authority. State Constitution, Article XIV, section 3; *Gardner v. Retirement System,* 226 N.C. 465, 38 S.E. 2d 314. To the same effect, 81 C.J.S., States, § 156.

So far as an exhaustive search upon our part discloses, and so far as briefs of counsel show, this is a case of first impression in this jurisdiction, and of first impression in the appellate courts of this Nation.

The judgment of Judge McLean ordering and decreeing "that the State of North Carolina pay to these petitioners out of the In-

digent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963 aforesaid, the sum of Eight Thousand ($8,000.00) Dollars, which amount is to be equally divided between the petitioners herein, and said amount is allowed in addition to the amount heretofore paid by Mecklenburg County to these petitioners," for their appearances for defendant Davis, an indigent, in the courts of the United States, under the facts set forth above, is not authorized by any statute of the State of North Carolina and is repugnant to the specific provisions of Article XIV, section 3, of the North Carolina Constitution, which states in language no man can misunderstand that the legislative power is supreme over the public purse. Judge McLean's judgment is void, and is

Reversed.

WARREN REDD, JANE REDD AND CHARLES J. HENDERSON, CO-EXECUTORS OF THE ESTATE OF BESSIE FLOWE REDD, DECEASED, PLAINTIFFS, v. THEODOCIA TAYLOR; QUEENS COLLEGE, INCORPORATED, A CORPORATION; BARIUM SPRINGS HOME FOR CHILDREN, INC., A CORPORATION; DOLPHUS ORR, JR.; DIVISION OF WORLD MISSIONS OF THE BOARD OF MISSIONS OF THE METHODIST CHURCH, A CORPORATION; BOARD OF WORLD MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES, A CORPORATION; JACK N. NORWOOD, ONE OF A CLASS COMPOSING ALL OF THE NEXT OF KIN AND HEIRS AT LAW OF BESSIE FLOWE REDD, DECEASED; JAMES H. CARSON, JR., GUARDIAN AD LITEM FOR ANY PERSON, PERSONS, FIRMS, OR CORPORATIONS FORMED OR UNFORMED, DESIGNATED OR MAKING ANY CLAIMS TO THE ESTATE OF BESSIE FLOWE REDD, DECEASED, UNDER THE NAME "WORLD MISSIONS"; LLOYD F. BAUCOM, GUARDIAN AD LITEM OF ANY UNKNOWN OR UNBORN HEIRS AT LAW, OR MINORS, OR ANY UNKNOWN PERSON OR PERSONS NON COMPOS MENTIS, OR IMPRISONED, OR RESIDING OUTSIDE THE STATE OF NORTH CAROLINA, OR OTHERWISE UNDER LEGAL DISABILITY, CLAIMING AS NEXT OF KIN AND HEIRS AT LAW OF BESSIE FLOWE REDD, DECEASED; ORIGINAL DEFENDANTS, AND WARREN REDD AND JANE REDD, ADDITIONAL DEFENDANTS.

(Filed 12 April, 1967.)

1. Wills § 27—

Where the words of a will are plain and intelligible but ambiguity arises in its designation of a beneficiary in one clause and the particular property intended to be devised in another, the ambiguities are latent and evidence *de hors* the instrument is competent to ascertain the intent of testatrix, and when such evidence clarifies testatrix' intent the provisions of the will will not be declared void for uncertainty.

2. Wills § 50—

Testatrix devised and bequeathed property to "World Missions." The Division of World Missions of the Board of Missions of the Methodist

Church, Inc., and the Board of World Missions of the Presbyterian Church in the United States, Inc., claimed to be the beneficiary. The evidence tended to show that testatrix was a lifelong and devout Presbyterian, and that the agency for the Board of World Missions of the Presbyterian Church was commonly referred to as "World Missions" and was so denominated in the Church bulletin and on envelopes provided for donations. *Held:* The latent ambiguity is resolved by the competent evidence *de hors* the instrument, and the agency of testatrix' denomination takes the property.

3. Wills § 55— Evidence held to make certain the boundaries of that part of a larger tract of land which testatrix intended to devise to claimants.

The will provided that named beneficiaries were to have "the part of the farm on the Albemarle Road that they wanted in fee simple. The rest of the farm to go with the rest of my estate." The evidence disclosed that testatrix had leased a part of the farm to the beneficiaries for a number of years, that on several occasions the beneficiaries had asked testatrix to sell them the part that they had leased, and that testatrix had declared to third persons that she would not sell such part to the beneficiaries but that "they will get it." *Held:* It is apparent from the will that testatrix did not intend to devise to the beneficiaries the entire tract, and that the will referred to the land that the beneficiaries wanted at the time the will was written and not to land which they might desire after her death, and the beneficiaries take only that part of the tract described in the lease.

APPEAL by Jack N. Norwood, one of the class composing the next of kin and heirs at law of Bessie Flowe Redd, deceased; Lloyd F. Baucom, guardian *ad litem* for all persons under legal disability and for any unknown or unborn persons "claiming as next of kin and heirs at law of Bessie Flowe Redd"; and additional defendants Warren Redd and Jane Redd, as individuals, from *Brock, S.J.*, June 13, 1966 Schedule "C" Civil Session of Mecklenburg. This appeal was docketed in the Supreme Court as Case No. 292 and argued at the Fall Term 1966.

Action for a declaratory judgment brought by the executors for construction of the will of Bessie Flowe Redd (Mrs. Redd, or testatrix).

Testatrix, a resident of Mecklenburg County, died on December 21, 1962, leaving between 55-70 persons as her heirs at law. Her husband, Judge F. M. Redd, had predeceased her in 1956, and no parent, child, or other lineal descendant survived her. Her holographic will, executed on May 31, 1953 — republished by a first codicil dated February 2, 1956, a second undated codicil, and a third codicil dated October 3, 1962 — was probated on December 28, 1962. The will and codicils are as follows:

"Page 1/ May 30, 1953
Last Will February 2, 1956
1956

"I Bessie Flowe Redd being of sound mind and memory do make this my last will and Testament.

"I will that my just debts be paid out of the first monies that come into the hands of my Executor hereinafter named.

"I will my farm about six miles out on the Albemarle Road to my beloved husband, F. M. Redd to be used as he desires his lifetime, at his death it is my will that it goes back to my estate.

"I will all of my personal property of every kind and description to my beloved husband F. M. Redd for his lifetime, at his death it is to go back to my estate.

"All of the remainder of my estate

(end of page 1)

2—

"I will to my beloved husband F. M. Redd during his lifetime, at his death it is my will that one half of my estate go to Barium Springs Orphanage as a Trust Fund, only the income to be used. This in memory of my beloved Father & Mother. J. Lee Flowe and Addie Belk Flowe. I will one thousand dollars to Theodocia Taylor, my maid for a number of years.

"I will two thousand dollars to Queens College Endowment Fund.

"I will one half of the remainder of my estate to establish a memorial Scholarship Fund at Queens College, one half of this fund in memory of my beloved Father & Mother—J. Lee Flowe & Addie Belk Flowe, and the other half of this fund for my beloved husband and myself—F. M. Redd (Bessie Flowe Redd) Mrs. F. M. Redd — I will the other half of the remainder of my estate to be a permanent Fund to World Missions in memory of my beloved Father & Mother, J. Lee Flowe & Addie Belk Flowe and for my beloved husband, F. M. Redd and myself (Mrs. F. M. Redd) Bessie Flowe Redd.

(end of page 2)

"(On un-numbered page) I hereby appoint my beloved husband F. M. Redd as Executor of this my last Will and Testament. It is my desire that he be not required to give bond.

(end of un-numbered page)

"Page 3/
~~-give bond.~~

"If my beloved husband, F. M. Redd is not able to be my Executor I will that The Wachovia Bank & Trust Company and A. C. Cline of Concord be my Executor.

"In witness whereof I do here unto set my hand and Seal this the 31st day of May, 1953.
2nd day of February 1956 —

/s/ Bessie Flowe Redd
SEAL

"If Warren & Jane Redd take care of my beloved husband F. M. Redd and me (not to pay bills, that to come out of my estate but see that we are properly taken care of) as long as we live, They are to have the part of the Farm on the Albemarle Road that they want in fee Simple. The rest of the farm to go with the rest of my estate.

(over)

February-2-1956

/s/ Bessie Flowe Redd
(SEAL)

(back of page 3)

"I wish Charles J. Henderson and Wachovia Bank to be my
+ Warren Redd
Executors —

(Mrs. F. M.) /s/ Bessie Flowe Redd
(SEAL)

"I wish Charles J. Henderson, Warren & Jane Redd to be my Executors.

October 3, 1962
(Mrs. F. M.) Bessie Flowe Redd
(SEAL)

"Witness — /s/ Lydia E. Crane."

Charles J. Henderson, Warren and Jane Redd, the executors named in the last codicil, duly qualified and are performing the duties of the office. On March 4, 1964, Warren and Jane Redd notified their co-executor that they had met the conditions imposed upon them in the first codicil to Mrs. Redd's will and that they elected to take *all* of the 108.2-acre farm on Albemarle Road. The

executors, being uncertain what interest in the farm, if any, the Redds took under the will and whether the bequest to World Missions referred to the Division of World Missions of the Board of Missions of the Methodist Church, the Board of World Missions of the Presbyterian Church in the United States, or to some other organization, brought this action to have the court determine these and any other questions of construction arising under the will of Mrs. Redd. All individuals and organizations named in the will were made parties defendant, Warren and Jane Redd, as individuals, being made additional parties defendant. Division of World Missions of the Board of Missions of the Methodist Church, Inc. (Methodist World Missions) and Board of World Missions of the Presbyterian Church in the United States, Inc. (Presbyterian World Missions) were both made defendants.

When the case came on for trial, all parties waived a jury trial and agreed that Judge Brock might determine all issues "related to law or facts" arising in the action. They further stipulated, *inter alia,* that the references in the will to Queens College and Queens College Endowment Fund relate to Queens College, Inc., and that references to Barium Springs Orphanage pertain to Barium Springs Home for Children, Inc. All parties except defendants Taylor, Orr, and Carson, guardian *ad litem,* offered evidence which was without material conflict. It disclosed the following:

Mrs. Redd, the daughter of two Presbyterians, was a lifelong Presbyterian. She graduated from Queens College, a Presbyterian school, in 1919. Shortly thereafter, she married F. M. Redd, who became a Presbyterian with her. She had two uncles and two first cousins who were Presbyterian ministers. One of the uncles went to Brazil as a missionary; a cousin was also a missionary. Unless prevented by her husband's illness or her own, Mrs. Redd regularly attended the Presbyterian Church of which she was a member. Over 69% of her recorded donations to all causes went to the Covenant Presbyterian Church of Charlotte, to which she gave $1,636.00 during the last two years of her life. Her records disclose no gifts to any churches other than Presbyterian. She belonged to a Presbyterian Church circle, an organization of Presbyterian women.

Prior to October 11, 1949, the missionary work of the Presbyterian Church was conducted by an organization known as the Executive Committee on Foreign Missions. On that date, the name was changed to Board of World Missions of the Presbyterian Church in the United States. Thereafter, except in formal writings, the organization was referred to, "in the language of Presbyterians,"

as World Missions. It was thus denominated in the church bulletins and on the envelopes provided for donations to be used in the church's missionary activities. The church observed a "World Mission Season," and a "week of prayer and self denial for World Missions." Approximately 50% of the total budget of the Presbyterian Church is for the Board of World Missions, actively promoted after 1949 under the name of World Missions.

Mrs. Redd's gross estate was tentatively valued for federal estate tax purposes at $392,662.85. Among her holdings was a 108.2-acre farm on Albemarle Road, which she had inherited from her father. It was appraised at $198,158.00 on October 17, 1963. Warren Redd, the nephew of testatrix' husband, owns land adjoining the southern line of this tract of land. Warren's parents died when he was a child and Judge Redd educated him. Until his marriage in 1938, Warren was in the home of testatrix and her husband, Judge Redd, every day. Thereafter, they continued a very close association. After her husband's death, Warren and Jane Redd stayed with her for several months in an effort to help her adjust to his passing. Although Mrs. Redd had no financial worries, she became increasingly concerned about having someone to turn to if she became ill or helpless. On one occasion, Mrs. Redd told a neighbor and close friend that she was leaving her property only to Barium Springs Orphanage, Queens College, World Missions, Docie (Theodocia Taylor), and Warren Redd.

In 1950, Warren started Greenway Nursery, a corporation in which he was an officer. On behalf of the corporation, he leased 19-25 acres of the Albemarle Road farm from Mrs. Redd. The written lease described the property by metes and bounds as "29.15 acres more or less," less certain areas containing 10 acres more or less. The term of the lease was for five years from March 1, 1951; the rental, $225.00 a year. On March 1, 1960, a similar lease for six years was executed. Mrs. Redd also gave Warren Redd oral permission to use a barn and pasture for a mule. At the time of the execution of the second codicil, Warren Redd owned all the stock in Greenway Nursery.

Over the objection of defendants Warren and Jane Redd, Dr. Harry H. Bryan, a Presbyterian minister, was permitted to testify that after 1957 Mrs. Redd had told him several times that Warren and Jane Redd had asked her to sell to them that part of the land which they were leasing. "She said . . . 'they were here yesterday or today, asking me to sell the part of the nursery they were using . . . they want to buy the part they are renting . . . I do not want to sell it at this time; they will get it.'" Similar testimony

was elicited, over objection by the Redds, from A. C. Cline, who had been named co-executor with Wachovia Bank & Trust Company in the will of May 31, 1953. He testified that Mrs. Redd had told him at least a dozen times that Warren wanted to buy that part of the farm which he was leasing for the nursery, but that she would not sell; that, instead, she had decided to leave it to him if he looked after her and Mr. Redd and took care of their needs, other than financial, when they were old. On one of these occasions, she and Mr. Cline had gone out to the farm and actually looked at the part which Warren was leasing. Mrs. Redd "got out the pieces of paper on which she had written her will and read them over" to Mr. and Mrs. Cline.

On cross-examination by counsel for defendant Norwood, Dr. Bryan testified, without objection by any party, as follows:

> "I had more than one conversation with her with reference to the farm and Warren and Jane — she would mention it whenever this matter came up in the family conversation. I do not recall the exact instances or circumstances. She stated they wanted to buy the part of the farm that they had leased for a nursery and that she had refused to sell it to them, but that they would get it later."

Judge Brock made detailed findings of fact, which can be summarized as follows:

(1) The dispositive provisions of Mrs. Redd's will and the donations which she made during her lifetime showed her intention to benefit Presbyterian projects, and, in so doing, to establish memorials to her parents, her husband and herself. She intended the bequest to World Missions as a bequest to Board of World Missions of the Presbyterian Church in the United States.

(2) Warren and Jane Redd had attempted to purchase from Mrs. Redd the portion of her Albemarle Road farm which they had leased from her since February 26, 1951; that she had refused to sell the land to them and had decided to leave it to them if they continued to take care of her and her husband as long as they lived; that Warren and Jane Redd satisfied these "care" requirements; that the devise to them in the February 2, 1956 codicil of "the part of the farm on the Albemarle Road that they want in fee simple" referred to the land described in the two written leases from Mrs. Redd to Greenway Nursery, Inc.

The court adjudged:

(1) Warren and Jane Redd are the owners of that portion of Mrs. Redd's Albemarle Road Farm described in the leases from her to Greenway Nursery.

(2) One-half of the remainder of the estate belongs to Barium Springs Home for Children, Inc., to be held in trust by that institution as a memorial to testatrix' parents and the income therefrom to be used for institutional purposes.

(3) The remaining one-half of the estate shall be divided and distributed as follows: First, $1,000.00 shall be paid to Theodocia Taylor and $2,000.00 to Queens College, Inc., to be held as a part of the endowment fund of that institution. The balance left shall then be divided into two parts — one part to go to Queens College, Inc., as an addition to its memorial scholarship fund; the other part to the Board of World Missions of the Presbyterian Church in the United States to be held by that organization and the income expended to promote Protestant World Missions. These charitable bequests are to be held and designated as a memorial to the persons named in the will. The judgment further designated the funds from which the cost of administration, taxes, and other liability should be paid.

Warren and Jane Redd, individually, Jack N. Norwood, and Lloyd F. Baucom, guardian *ad litem,* each excepted to the findings of fact and conclusions of law adverse to him, and each appealed.

Ray Rankin and Henry E. Fisher for Jack N. Norwood, defendant appellant.

Lloyd F. Baucom, Guardian ad litem, defendant appellant.

Boyle, Alexander and Carmichael for Warren Redd and Jane Redd, additional defendant appellants.

Helms, Mulliss, McMillan & Johnston for Board of World Missions of the Presbyterian Church in the United States, defendant appellee.

Ervin, Horack, Snepp & McCartha for Queens College, Inc., defendant appellee.

W. R. Pope for Barium Springs Home for Children, Inc., defendant appellee.

SHARP, J. Appellants Jack N. Norwood, as the representative of the heirs at law of Mrs. Redd, and Lloyd F. Baucom, guardian *ad litem* for her unknown heirs, contend that both the devise to Warren and Jane Redd and the gift to World Missions are void "for indefiniteness and ambiguity"; that parol evidence is inadmissible to effect identification; and that these purported gifts pass as undevised property to Mrs. Redd's heirs at law. Appellants Warren and Jane Redd contend that no ambiguity exists in the devise to them; that it gave them the right to take any part or all of the

farm on Albemarle Road; and that the court erred in admitting evidence which contradicted the plain terms of the will. None of these contentions can be sustained.

Mrs. Redd's gift to "World Missions" and her devise to Warren and Jane Redd of "the part of the farm on Albemarle Road that they want in fee simple" created latent ambiguities, which could be removed by parol testimony.

A latent ambiguity occurs when the words of an instrument are plain and intelligible, but extrinsic facts are necessary to identify the person or thing mentioned therein. A latent ambiguity, therefore, presents a question of identity — a fitting of the description in the will to the person or thing the testator intended. As Pearson, J. (later C.J.), said in *Institute v. Norwood,* 45 N.C. 65, 68, "(I)n cases of *latent* ambiguity, evidence *dehors* is not only competent, but *necessary*. . . . for how can any instrument identify a person or thing? It can describe, but the identification, the fitting of the description, can only be done by evidence *dehors.*" *Accord, McDaniel v. King,* 90 N.C. 597; *Kincaid v. Lowe,* 62 N.C. 42; Note, 35 N.C.L. Rev. 167 (1956); 95 C.J.S., Wills § 636 (1957); See *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246.

In the bequest or devise to World Missions, testatrix was obviously using a proper name and was designating a particular organization as the object of her bounty. Here, the capitalization negates any idea that she was merely stating a purpose to aid world missions, or foreign missions, in general. *Bridges v. Pleasants,* 39 N.C. 26. When both Division of World Missions of the Board of Missions of the Methodist Church, Inc., and Board of World Missions of the Presbyterian Church in the United States, Inc., claimed to be the designated beneficiary, the executors were confronted with one of the classic examples of a latent ambiguity — the situation in which two "persons allege themselves to be the identical A. B. meant by the testator, or, as is said in the books, as if there be two 'Cousin Johns.'" *Institute v. Norwood, supra* at 70.

In *McLeod v. Jones,* 159 N.C. 74, 74 S.E. 733, testator devised one-third of his residuary estate to Home Missions of the Baptist denomination, one-third to Foreign Missions of the Baptist denomination, and one-third to Thomasville Orphanage. On consideration of the facts in evidence, the habits and customs of the testator, his church affiliation, and *his direct declarations,* the jury found that the intended donees were the Home Mission Board of the Southern Baptist Convention, the Foreign Mission Board of the Southern Baptist Convention, and the trustees of the Thomasville Baptist

Orphanage, and the judgment so decreed. In affirming his judgment this court said:

> "Under our decisions, the facts in evidence present an instance of a latent ambiguity, requiring and permitting the reception of extrinsic evidence; not to alter or affect the construction, but to apply the description to the intended donee, as designated by the language appearing in the will. . . . And in such case and for such purpose, authority here and elsewhere is to the effect that the surrounding circumstances as well as the declarations of the testator are relevant to the inquiry, and especially where, as in this case, they were made at the time the will was executed." *Id.* at 76, 74 S.E. at 734.

Accord, Thomas v. Summers, 189 N.C. 74, 126 S.E. 105; *Fulwood v. Fulwood,* 161 N.C. 601, 77 S.E. 763. Annot., Admissibility of extrinsic evidence to aid interpretation of will, 94 A.L.R. 26, 275. See *Thomas v. Lines,* 83 N.C. 191, 197. Declarations of intent by a testator, of course, are not admissible to control the construction of his will or to vary, contradict, or add to its terms. *Holmes v. York,* 203 N.C. 709, 166 S.E. 889; *Reynolds v. Trust Co.,* 201 N.C. 267, 159 S.E. 416; *McDaniel v. King, supra;* Annot., 94 A.L.R. 26, 272.

The "circumstances attendant" when Mrs. Redd wrote her will (see *Trust Co. v. Wolfe,* 245 N.C. 535, 540, 96 S.E. 2d 690, 694) — the evidence with reference to her church affiliation, her loyalty to the Presbyterian faith, and her customs —, and her oral declarations lead to the inescapable conclusion that her intended beneficiary was Presbyterian World Missions. The words of Pearson, J. (later C.J.), in *Institute v. Norwood, supra* at 75, are again well applicable to this case: "The rules of law as well as of good sense forbid that the charitable intention of the testator should be defeated because (she) did not (use) the precise name of the corporation, and had fallen into the common practice of calling it by a *short name.*" In *Norwood,* a bequest to the *Deaf and Dumb Institution* was held to be a case of latent ambiguity and "the President and Directors of the North Carolina Institute for the education of the Deaf and Dumb" was identified as the taker of the legacy.

In the gift to "World Missions," the latent ambiguity related to the identity of the donee; in the devise to Warren and Jane Redd, it pertains to the identity of the property devised. The dispositive provision is: "They are to have the part of the farm on Albemarle Road that they want in fee simple." It is clear to us that, by the use of this language, Mrs. Redd did not intend to give Warren and Jane Redd the whole of Albemarle Road farm in the event they

should declare that they wanted it. She could safely assume that, if by wanting it they could have it, they would want the 108 acres of land adjacent to or just inside the city limits of Charlotte, a property conservatively valued at $198,158.00. Had she intended for them to have the entire farm, she would have said so. The words of the devise deny a gift of the whole; they speak also in the present tense, as of the date Mrs. Redd wrote the codicil. She said, "the part . . . that they want" — not *"such part as they may want or choose."* Her reference was to land that they then wanted and not land which they might desire after her death. Furthermore, this devise concludes with the words: *"The rest* of the farm to go with the rest of my estate." (Italics ours.)

Testatrix' intention to give Warren and Jane Redd a certain, definite portion of the farm, the boundaries of which she and they both knew, is plain. This provision is not analogous to the devise of 25 undesignated acres out of a larger tract of 82 acres, which was held void for indefiniteness of description in *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723. The executors' problem here was simply to identify the particular part of the Albemarle Road farm which Warren and Jane Redd had indicated to testatrix, prior to February 2, 1956, that they wanted. *Trust Co. v. Dodson,* 260 N.C. 22, 131 S.E. 2d 875; 4 Strong, N. C. Index, Wills § 28 (1961). The problem is no different from the one created by a devise of "the Linebarger plantation" (*Kincaid v. Lowe, supra*), "the homestead tracts" (*Fulwood v. Fulwood, supra*), "My homeplace on McIver Street" *(Thomas v. Summers, supra).* In *Kincaid v. Lowe, supra* at 42, Battle, J., said: "This is a plain case of *latent* ambiguity, as to which it is equally *plain* that it may be removed by parol testimony." The devises in *Kincaid, Fulwood,* and *Thomas,* and in the instant case, were of specified tracts of land; the question: Can it be identified and, if so, what land was meant? The description of the property in each of those cases — and in this one — was sufficiently definite to permit its *identification* by parol evidence, including the declarations of the testator. *Thomas v. Summers, supra; Fulwood v. Fulwood, supra; McLeod v. Jones, supra;* Annot., 94 A.L.R. at 75; 95 C.J.S., Wills § 637 (1957); 4 Wigmore, Evidence § 2472 (3d Ed., 1940). Parol evidence of testatrix' declarations that the Redds had sought to buy the land they had leased from her since 1951 was sufficient and competent to identify it as the land they wanted when she wrote the codicil. The written lease established its boundaries by metes and bounds.

Judge Brock's findings of fact are all based on competent evidence and support his conclusions of law. In our opinion, the judge

correctly construed the will and ascertained the actual intention of testatrix.

The judgment of the court below is, in all respects,

Affirmed.

STATE v. ALLAN BELL, JR.

(Filed 12 April, 1967.)

1. Criminal Law § 102—

A fatal variance between indictment and proof may be raised by motion for nonsuit.

2. Robbery § 4—

Where the indictment charges defendant with armed robbery of property from a named person and the entire proof is that the property was taken from a person of a different name, there is a fatal variance between the indictment and proof, and nonsuit should be allowed.

3. Criminal Law § 101—

If there be substantial evidence of defendant's guilt of each essential element of the offense charged, regardless of whether the evidence is direct, circumstantial, or a combination of both, defendant's motion to nonsuit is properly overruled, it being for the jury to determine whether the evidence convinces them of defendant's guilt beyond a reasonable doubt and whether the circumstantial evidence excludes every reasonable hypothesis of innocence.

4. Robbery § 4—

The doctrine of recent possession obtains in prosecutions for robbery as well as in prosecutions for larceny and breaking and entering.

5. Same—

Evidence that a portion of the property taken by armed robbery from a named person was found not more than 25 minutes after the robbery in defendant's automobile, which had been described by the victim and which was being operated by defendant from the direction where the armed robbery occurred, and that a pistol of the same description as that given by the victim as being used in the perpetration of the robbery was in plain sight on the seat of the automobile, is sufficient to be submitted to the jury on the question of defendant's guilt of armed robbery, notwithstanding the evidence tended to show that the actual perpetrator of the offense was a passenger in the car.

6. Searches and Seizures § 1—

Where, upon defendant's objection to the admission in evidence of exhibits which were obtained from a search of defendant's automobile, the trial court, in the absence of the jury, hears the State's evidence as to the circumstances under which the search was made, and defendant

cross-examines the State's witness at length, but offers no evidence, although defendant had opportunity to do so, the ruling by the trial court that the evidence was competent is necessarily based on a finding that the search was legal, and the failure of the court to make specific findings of fact is not fatal.

7. Same; Criminal Law § 79; Arrest and Bail § 3—

Where some half hour after the perpetration of armed robbery an officer stops an automobile fitting the description of the one used in conjunction with the robbery and observes a pistol on the seat of the automobile, the officer may arrest the driver and owner of the car without a warrant, G.S. 15-41, and, as an incident to the arrest, may search the automobile without a search warrant, and incriminating exhibits found in the car are competent in evidence, G.S. 15-27.1, particularly when the exhibits were visible from outside the automobile without the necessity of a search.

8. Criminal Law §§ 9, 10—

A person who counsels, procures or commands another to commit a felony is guilty as an accessory before the fact, G.S. 14-5; a person who aids and abets in the commission of a crime is guilty as an aider and abettor.

9. Robbery § 2—

A person who aids or abets another in the commission of armed robbery is guilty under the provisions of G.S. 14-87, and it is not required that the indictment charge defendant with aiding and abetting.

APPEAL by defendant from *Froneberger, J.*, 7 November 1966 Regular Schedule "A" Criminal Session of MECKLENBURG.

Defendant was tried on bill of indictment No. 48215, charging the felony of robbery with firearms of Jean Rogers, and on indictment No. 48216, charging the felony of robbery with firearms of Frances Frazier. Defendant pleaded not guilty to both counts and the cases were combined for the purpose of trial.

The State presented evidence substantially as follows:

Susan Rogers testified that on the night of 12 October 1966, at about 9:30, she was returning to her home, and as she pulled into her driveway a white Chevrolet automobile stopped in front of her house. A man got out and the car drove off. As she was leaving her car the man walked up and said: "Don't make any noise or I will have to shoot you." He had a small silver gun in his hand. He asked if he could kiss her, to which she replied "No." The man then snatched her pocketbook and ran. She identified State's Exhibits 1 and 2 as being her pocketbook and the contents thereof which were taken from her on the night of 12 October 1966. She further testified that the man who robbed her was colored, but that she could not identify him. She was unable to identify or give the race of the man driving the automobile.

Frances Frazier testified that as she returned to her home on

the same evening, at around 11:15, she noticed a 1961 white Chevrolet Impala automobile following her. When she drove into her driveway she heard the other car stop in front of the house next door, and heard a car door slam. As she was about to leave her car she saw a man walking up the driveway towards her. She asked the man if he was looking for someone, and he replied, "Yes, you." She got out of the car, whereupon the man threatened her with a small silver snub-nosed gun, took her pocketbook, and ran. She further testified that prior to trial she had identified the man who robbed her in a police line-up as being James Edward Johnson. She identified State's Exhibit 4 as being her pocketbook, containing personal items belonging to her, and also identified State's Exhibit 5 as the silver gun which was used in the robbery.

S. A. Funderburk testified that on 12 October 1966 he was employed as a police officer by the Charlotte Police Department and was patrolling in the area of Statesville Avenue with other police officers. He further testified that in response to a radio dispatch he stopped a 1961 white Chevrolet automobile which was owned and was being driven by defendant Allan Bell, and in which James Edward Johnson was riding as a passenger. The automobile was stopped between 11:15 and 11:35 P.M., coming from the direction in which he had been advised a robbery with firearms had been committed. The officer testified that he got the two subjects out of the car, whereupon the defendant's attorney requested the court that he be allowed to qualify the witness out of the presence of the jury. The jury was sent from the courtroom and officer Funderburk was examined by defendant's attorney. He testified, in part, on *voir dire* that upon stopping the white Chevrolet he had the two men get out, and he observed firearms on the seat of the car. One of the pistols, identified as State's Exhibit 5, was lying near the center of the front seat of the automobile. He stated that he could see this pistol while standing on the outside of the automobile, and that he also found a lady's purse, which was identified as State's Exhibit 4, lying on the back floorboard of the car. The officer testified that he could see the purse from outside the car also. The other pistol was found between the left end of the front seat and the floor mat.

At the conclusion of the examination by defendant's attorney the court stated, "I will overrule your objection." The defendant offered no evidence during the *voir dire* examination. There was further testimony by officer Funderburk that immediately upon removing the pocketbook and pistols from the automobile, defendant Bell was put under arrest. James Johnson broke away from the officer and ran, but was apprehended a short time later. Several hours later, the officers obtained a search warrant for the purpose

of searching defendant Bell's home, and upon searching it found a pocketbook and contents of the pocketbook which were introduced into evidence at the trial and identified as State's Exhibits 1 and 2, and further identified as being the property taken from Susan Rogers.

Defendant testified in his own behalf and stated that on the night in question he and James Johnson went to a club called the Atmosphere Club at around 8:00 o'clock to play whist, and at about 8:30 his cousin, Frank Bell, came to the club and borrowed defendant Bell's car. He further testified that Frank Bell and James Johnson left in his automobile, and that sometime thereafter he walked to his home, which was about three blocks away, and found Frank Bell and James Johnson inside his house. He then walked back to the Atmosphere Club and stayed there until about 11:00 o'clock, when he got a bus to the place where his girl friend worked. From there he and the girl took a cab to her house, where Johnson came and picked him up; that while driving his automobile from his girl friend's house he was stopped and arrested by the police.

James Edward Johnson testified substantially to the same facts as did Bell and admitted that it was he who committed the robberies, and that Frank Bell, and not Allan Bell, was the person who was operating the automobile when the robberies were committed.

The jury returned a verdict of guilty of armed robbery as charged in bill of indictment No. 48215, and guilty of armed robbery as charged in bill of indictment No. 48216. Sentence of 15 years was imposed in case No. 48215, and sentence of 10 years was imposed in case No. 48216, to commence at the expiration of the sentence given in case No. 48215. Defendant appealed.

Attorney General Bruton and Staff Attorney Vanore for the State.

Francis O. Clarkson, Jr., for defendant, appellant.

BRANCH, J. Bill of indictment No. 48215 charges that:

> "Allen Bell, Jr., late of the County of Mecklenburg on the 12th day of October, 1966, with force and arms at and in the county aforesaid, unlawfully, wilfully, and feloniously, having in his possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means, to wit: A pistol whereby the life of Jean Rogers was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, rob, steal, 1 Timex watch, 1 high school pen, and 1 pair ear bobs, the property of Jean

Rogers and carry away 1 brown purse, 1 blue billfold, 1 pair eyeglasses, 1 citadel charm bracelet to-wit: $60.00 of the value of less than $200 from the presence, person, place of business, and residence of Jean Rogers contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

There is a fatal variance between the indictment and the proof on this record. The indictment in bill No. 48215 charges that "Jean" Rogers was the person robbed. The entire proof and the record is that the person robbed was "Susan" Rogers.

The defendant in a criminal action may raise the question of variance between the indictment and proof by a motion for nonsuit. *State v. Overman,* 257 N.C. 464, 125 S.E. 2d 920; *State v. Smith,* 237 N.C. 1, 74 S.E. 2d 291. Here, defendant made motion for nonsuit at the close of the State's evidence and at the close of all the evidence. The motion for judgment of nonsuit should have been allowed as to the charge under this indictment, with leave to the solicitor to secure another bill of indictment if so advised. *State v. Hicks,* 233 N.C. 31, 62 S.E. 2d 497; *State v. Overman, supra.*

This opinion will hereafter be directed to the trial on bill of indictment No. 48216, which charges defendant Allan Bell, Jr., with the felony of robbery with firearms of Frances Frazier.

Defendant assigns as error that the trial court erred in denying his motion for nonsuit. This is a case in which the State relies upon circumstantial evidence. To determine whether there is sufficient evidence to go to the jury we must consider the evidence in the light most favorable to the State, *State v. Orr,* 260 N.C. 177, 132 S.E. 2d 334, and apply the rule enunciated in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, as follows:

"We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the

motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. (Citing cases)."

It is recognized in this State that: "If and when it is established that a store has been broken into and entered and that merchandise has been stolen therefrom, the recent possession of such stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny *and* of the breaking and entering." *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578. However,

> " 'The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law, and is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. This presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. The duty to offer such explanation of his possession as is sufficient to raise in the mind of the jury a reasonable doubt that he stole the property, or the burden of establishing a reasonable doubt as to his guilt, is not placed on the defendant, however recent the possession by him of the stolen goods may have been.' — Schenck, J., in *S. v. Baker,* 213 N.C. 524, 196 S.E. 829." *State v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725.

If there be substantial evidence of every essential element that goes to make up the offense charged, the case is for the jury.

A majority of the cases which have considered the doctrine of "recent possession" in this jurisdiction have been cases involving breaking, entering and larceny. However, we find no valid reason why the rule does not apply to property taken in a robbery with firearms in the same manner as property taken by breaking and entering.

"When a proper foundation has been laid, evidence that the property taken in the robbery in question was, or that the fruits thereof were, found in the possession of the accused shortly thereafter is admissible against him, in accordance with and subject to the rules governing the admissibility of evidence of the possession of the fruits of crime generally." 46 Am. Jur., Robbery, § 48, p. 160.

In the instant case a portion of the property taken in the armed robbery of Frances Frazier was found not more than 25 minutes after the robbery occurred in defendant's automobile, which was being operated by defendant from the direction where the armed robbery occurred. Defendant Bell was accompanied by James Johnson, the person identified by the victim Frances Frazier, as holding the gun on her and taking her property. A pistol of the same description given by the victim of the robbery as being used in the robbery was in plain sight in defendant's automobile. Applying the well established rules of law to the facts in this case, we hold that the evidence was sufficient to require submission to the jury and to support the verdict.

Appellant contends the trial judge erred in allowing testimony as to State's Exhibits 4, 5 and 6, which were obtained in the search of defendant's automobile, and in failing to find facts upon which the legal conclusion of the admissibility of this testimony was based.

When Officer Funderburk was testifying, defendant's attorney asked that he be allowed to qualify the officer out of the presence of the jury. Whereupon, the jury was excused and defendant's attorney cross-examined the officer at length. Both the State and defendant had opportunity to offer evidence showing the circumstances under which the search was made. Defendant offered no evidence. By overruling defendant's objection, the trial judge ruled the evidence admissible, and this ruling is supported by competent evidence.

When the trial court finds upon consideration of all the testimony offered on the preliminary inquiry that a confession was voluntarily made, his finding is not subject to review, if supported by competent evidence. *State v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885. While it is better practice for a judge on *voir dire* to make finding of fact and enter it in the record, a failure to do so is not fatal. The ruling that the evidence was competent was of necessity bottomed on the finding that the search was legal. *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84.

The court fully granted defendant's requests concerning a *voir dire.* The fact that defendant offered no contradictory evidence

further negated the necessity for the judge to find facts. We hold there was no prejudicial error in the court's failure to find facts in making its ruling.

We must, however, decide as a matter of law whether the circumstances of this case constitute an illegal search so as to prevent testimony relative to State's Exhibits 4, 5, and 6.

G.S. 15-27.1 provides in part: "No facts discovered or evidence obtained by reason of the issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under conditions requiring a search warrant, shall be competent as evidence in the trial of any action."

> "To render evidence incompetent under the foregoing section, it must have been obtained (1) 'in the course of . . . search,' (2) 'under conditions requiring a search warrant,' and (3) without a legal search warrant. The purpose of this and similar enactments (G.S. 15-27) was 'to change the law of *evidence* in North Carolina, and not the substantive law as to what constitutes legal or illegal search.' Therefore a search that was legal without a warrant before these enactments is still legal, and evidence so obtained still competent. 30 N.C. Law Review 421. It will be noted that the statutes use the phrase 'under conditions requiring a search warrant.' No search warrant is required where the officer 'sees or has absolute personal knowledge' that there is intoxicating liquor in an automobile. *State v. Giles,* 254 N.C. 499, 119 S.E. 394; *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133. No search warrant is required where the owner or person in charge consents to the search. *State v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501." *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736.

If the search was incidental to the arrest of defendant, it was not illegal. Webster's Third New International Dictionary defines "incidental" as "subordinate, nonessential, or *attendant* in position or significance."

In *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544, officers within twenty minutes of a lawful arrest searched the car in which defendant was at the time of the arrest. Holding the search lawful, the Court said:

> " 'As incident to a lawful arrest, the conveyance of the person arrested may be searched without a warrant. Accordingly, a search warrant is not necessary to authorize a search of an automobile in which a person was riding or beside which he

was standing when arrested, and an officer, after arresting and incarcerating accused, may return and make a search of his automobile.' 79 C.J.S., Searches and Seizures § 67e (1952); Cf. *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394."

A review of other jurisdictions shows that many of the cases turn on whether or not the officer had reasonable cause to arrest the defendant and as an incident to the arrest were entitled to search defendant's car. In the case of *People v. Cantley,* 163 Cal. App. 2d 762, 329 P. 2d 993, police officers saw defendant stop his car in front of an apartment house and enter the house for about two or three minutes and upon his return he made a "U" turn to drive away. The officers stopped the car and saw him make a motion as if he were reaching under the front seat, and further observed that he met, to some extent, the description of a person wanted in connection with a robbery and murder. One of the officers flashed his light into the car and found a loaded revolver on the floorboard. The Court concluded that the officers acted reasonably in the light of the information they had received, and that they entertained a reasonable suspicion that defendant had committed a felony, and they had reasonable cause to arrest the defendant, and as an incident to the arrest they were entitled to search defendant's car.

In the case of *State v. Brooks,* 57 Wash. 2d 422, 357 P. 2d 735, officers saw an automobile with two occupants parked in a no-parking zone and stopped to investigate. Upon opening the door they saw some paper bags in the car with uncovered trousers protruding from them. The bags were opened and four new suits were found, with sales tags still upon them, whereupon the officers arrested the occupants. It was held that since it appeared from the record that the officers had sufficient cause to believe that a felony had been or was being committed, they had a right to arrest them without a warrant, and therefore the search of the paper bags and the seizure of the contents before the arrest of the occupants was lawful.

In *U. S. v. Sala,* (1962 D.C. Pa.), 209 F. Supp. 956, it was held that a search without a warrant of a panel truck was legal, although it preceded the arrest of the driver, when officers making the search had probable cause therefor, by reason of facts and circumstances known to them, which would have warranted a prudent man to believe that a felony had been or was being committed in his presence.

In the present case, when the officers stopped the automobile fitting the description of the one used in conjunction with the robbery and observed the pistol on the seat of the automobile, they

had reasonable ground to believe that defendant had committed a felony and would evade arrest if not taken into custody. G.S. 15-41. The search and seizure were so closely related in time and circumstance to the arrest as to make the search and seizure reasonable. Under the circumstances, the officers would have been derelict had they not stopped the car for investigation. Upon observing the pistol in the automobile, the bounds of reasonableness were not overstepped by placing the defendant under arrest or by the attendant and incidental search of the automobile.

Moreover, it has been recognized in this jurisdiction that " 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand.' " *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394.

There is competent evidence from the officers that the pistol and pocketbook were visible from the outside of the automobile and were fully disclosed and open to the eye without the necessity of search.

Defendant contends that the court erred in charging the jury that they could find the defendant guilty if they found he aided and abetted in the commission of armed robbery, because the indictment does not charge defendant with aiding and abetting.

A defendant may be tried and convicted as a principal where he either counsels, procures or commands another to commit a felony, as an accessory before the fact, G.S. 14-5, or aids and abets in the commission of the crime, *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398. He need not be actually present; he may be only constructively present. See *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225, where the Court states:

> " 'When two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty.' *State v. Horner,* 248 N.C. 342, 103 S.E. 2d 694. The defendant not only collaborated with Yopp in planning and setting the stage for the robbery and in escaping with the stolen money, but also waited and watched, armed with a pistol, near enough to the scene to render aid if needed. Thus, he was constructively present when the robbery actually occurred and is guilty as a principal in the second degree."

G.S. 14-87 provides:

> "Any person or persons who, having in possession or with

the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

This statute creates no new offense. "It does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission of the offense, more severe punishment may be imposed." *State v. Hare,* 243 N.C. 262, 90 S.E. 2d 550; *State v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355. Thus, it was not necessary for the bill of indictment to charge defendant with aiding and abetting, and the charge of the court was without error.

As to trial under Indictment No. 48215—Reversed.

As to trial under Indictment No. 48216—No error.

STATE v. BOBBY RAND MATTHEWS.

(Filed 12 April, 1967.)

1. Indictment and Warrant § 7—

An order and its supporting affidavit must be considered a single document and constitutes the warrant of arrest, and a fatal defect in the order of arrest constitute a fatal defect in the warrant.

2. Indictment and Warrant § 14—

While a plea of not guilty in a municipal court having jurisdiction waives defects with reference to the authority of the person who issues the warrant, a motion to quash the warrant made for the first time in the Superior Court on appeal may be determined by the judge of the Superior Court in his discretion, and when the trial judge hears the motion in his discretion, the motion has the same legal effect as if timely made first in the municipal court and later in the Superior Court.

3. Indictment and Warrant § 6—

The issuance of a warrant of arrest is a judicial act, and under the Fourth and Fourteenth Amendments to the Federal Constitution a warrant must be issued in the exercise of judicial power, and a "desk officer"

appointed by the chief of police is not a neutral and detached magistrate within the requirement of the Fourteenth Amendment to the Federal Constitution in issuing a warrant of arrest on the affidavit of a fellow officer.

4. Same; Constitutional Law § 1—

The Fourth Amendment to the Federal Constitution is binding on the States by virtue of the Fourteenth Amendment to the Federal Constitution, and the limitations of the Fourth Amendment apply to warrants of arrest as well as to search warrants.

5. Constitutional Law § 10—

The primary purpose of the Amendment to Article IV of the State Constitution is to establish a unified judicial system, and the General Assembly has no power to establish or authorize any courts other than as permitted by this Article. Constitution of North Carolina, Art. IV, § 1.

6. Same—

While every presumption will be indulged in favor of the constitutionality of a statute, when a statute is clearly in excess of the authority vested in the General Assembly, it is the duty of the Court to declare the act unconstitutional.

7. Same; Indictment and Warrant § 6—

G.S. 160-20.1 and Chapter 1093, Session Laws of 1963, purporting to confer judicial powers on persons who are not officers of the General Court of Justice and who were not vested with judicial power on November 6, 1962, are void, and a "desk officer" appointed by the chief of police of a municipality may not issue a warrant of arrest, even in those instances in which the complainant is a private citizen and has no connection with any law enforcement agency, since these statutes exceed the limitations placed upon the power of the General Assembly by Article IV of the State Constitution.

8. Same—

All officials authorized to issue warrants by statutes in force on November 6, 1962, may continue to issue warrants until district courts are established in the district. Art. IV, § 21 of the State Constitution.

APPEAL by State of North Carolina from *Braswell, J.,* October 3, 1966 Regular Criminal Session of WAKE.

Criminal prosecution based on a warrant issued May 22, 1965, by "R. F. Johnson, Desk Officer," on affidavit of C. G. Smith, a Raleigh Police Officer, charging that defendant, on said date, operated an automobile on designated public streets of Raleigh while under the influence of intoxicating liquor. After trial and conviction in the City Court of Raleigh, defendant appealed from the judgment there pronounced to the superior court for trial *de novo.*

At a trial in superior court on November 16, 1965, the jury was unable to agree on a verdict and a mistrial was ordered.

When the case came on for (second) trial on October 13, 1966,

defendant's counsel moved "to quash the warrant." Judge Braswell elected, in his discretion, to entertain the motion; and, after consideration thereof, entered an order which, after recitals, provides:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion to quash and dismiss the purported warrant is allowed; AND

"IT IS FURTHER ADJUDGED AND DECREED that G.S. 160-20.1 and S. L. 1963, Chapter 1093, are unconstitutional and therefore are of no force and effect."

The State, pursuant to G.S. 15-179, appealed.

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

Carl C. Churchill, Jr., for defendant appellee.

BOBBITT, J. The motion to quash challenges the warrant on the ground "R. F. Johnson, Desk Officer," had no authority to issue such warrant.

The order of arrest signed by "R. F. Johnson, Desk Officer," and the attached affidavit of C. G. Smith on which it is based, are to be read and considered as a single document and together constitute a warrant. *S. v. Gupton*, 166 N.C. 257, 80 S.E. 989; *Moser v. Fulk*, 237 N.C. 302, 74 S.E. 2d 729, and cases cited. Defects, if any, in the warrant affect its validity as a basis for a criminal prosecution on the charge set forth in the affidavit as well as its validity as a basis for a legal arrest. *S. v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867.

By pleading not guilty to such warrant in the City Court of Raleigh, defendant waived all defects with reference to the authority of the person who issued the warrant. Whether the motion to quash *would be entertained when made for the first time in the superior court* was for determination by the trial judge in the exercise of his discretion. *S. v. Turner*, 170 N.C. 701, 86 S.E. 1019; *S. v. Wilson*, 237 N.C. 746, 75 S.E. 2d 924; *S. v. Doughtie*, 238 N.C. 228, 77 S.E. 2d 642; *S. v. St. Clair*, 246 N.C. 183, 97 S.E. 2d 840; *S. v. Wiggs*, 269 N.C. 507, 153 S.E. 2d 84; *S. v. Whaley*, 269 N.C. 761, 153 S.E. 2d 493; *S. v. Blacknell, post*, 103, 153 S.E. 2d 789. Judge Braswell, in his discretion, elected to do so; and, after consideration, allowed defendant's motion on the ground the statutes purporting to confer authority on such desk officer are unconstitutional.

In *S. v. Blackwell, supra*, this Court affirmed a judgment quashing a warrant on the ground the person who issued it, a police sergeant, was not authorized by law to do so. The defendant had made timely motions, first in the Municipal Court of the City of High Point and later in the superior court. Here, Judge Braswell having

elected to entertain defendant's motion, it became and is for consideration as if timely made.

Chapter 1093, Session Laws of 1963, entitled "AN ACT TO AUTHORIZE THE ISSUANCE OF WARRANTS BY CERTAIN LAW ENFORCEMENT OFFICERS OF THE CITY OF RALEIGH," ratified June 21, 1963, provides: "Officers of the police department of the City of Raleigh, who are or may be designated as 'desk officers' by the chief of police, are hereby authorized to issue warrants in criminal matters in the same manner, to the same extent, and under the same rules of law as are now or hereafter applicable to the issuance of such warrants by justices of the peace; provided, that no warrant so issued may be served by the issuing officer."

Chapter 1261, Session Laws of 1963, entitled "AN ACT TO AUTHORIZE THE ISSUANCE OF WARRANTS BY CERTAIN LAW ENFORCEMENT OFFICERS," ratified June 26, 1963, and now codified as G.S. 160-20.1, provides: "Officers of the police department of any municipality, who are or may be designated as 'desk officers' by the chief of police, are hereby authorized to issue warrants in criminal matters in the same manner, to the same extent, and under the same rules of law as are applicable to the issuance of such warrants by justices of the peace on June 30, 1963; provided, that no warrant so issued may be served by the issuing officer. Providing the provisions of this Act shall not apply to any municipality having a population of less than four thousand (4,000) based upon the most recent Federal decennial census."

The two statutes, one special and the other general, are identical in respect of all provisions pertinent to decision on this appeal.

Although the record is silent with reference thereto, both briefs assume, and for present purposes we assume, that the Chief of Police of Raleigh, pursuant to the authority purportedly conferred upon him by the quoted statutes, designated R. F. Johnson, an officer of the Police Department of the City of Raleigh, as a "desk officer," and that R. F. Johnson was acting pursuant to such designation on May 22, 1965.

The statutes now challenged purport to confer on "desk officers," appointed as provided therein, authority "to issue warrants in criminal matters in the same manner, to the same extent, and under the same rules of law as are applicable to the issuance of such warrants by justices of the peace." Justices of the peace are authorized to issue: (1) Warrants of arrest, G.S. 15-18; (2) search warrants, G.S. 15-25; and (3) peace warrants, G.S. 15-28. The warrant now challenged by defendant's motion to quash is a warrant of arrest.

G.S. 15-18 provides: "The following persons respectively have power to issue process for the apprehension of persons charged with

any offense, and to execute the powers and duties conferred in this chapter, namely: The Chief Justice and the associate justices of the Supreme Court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns."

G.S. 15-19 provides: "Whenever complaint is made to any such magistrate that a criminal offense has been committed within this State, or without this State and within the United States, and that a person charged therewith is in this State, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him."

G.S. 15-20, in pertinent part, provides: "If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before a magistrate, to be dealt with according to law. A justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county."

While G.S. 15-18 confers authority to issue warrants upon justices of the peace, a justice of the peace may lawfully exercise such authority only by complying with the requirements of G.S. 15-19 and G.S. 15-20. After the required examination on oath of "the complainant and any witnesses who may be produced by him," the justice of the peace is authorized to issue the warrant upon his determination there is sufficient ground for the arrest and prosecution of the accused person for the described criminal offense.

"The issuance of a warrant of arrest is a judicial act." *S. v. McGowan,* 243 N.C. 431, 90 S.E. 2d 703; 22 C.J.S., Criminal Law § 318. That the exercise of judicial power is prerequisite to the issuance of a valid warrant is emphasized in decisions of the Supreme Court of the United States interpreting the Fourth Amendment to the Constitution of the United States.

The Fourth Amendment provides, in part, that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It was held in *Giordenello v. United States,* 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245, that the quoted language of the Fourth Amendment "applies to arrest as well as search warrants." In *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933, it was held specifically that the constitutional prohibitions of

the Fourth Amendment are enforceable against the States through the Fourteenth Amendment.

In *Aguilar v. Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, the question for decision was the admissibility, in a prosecution in a Texas State Court, of evidence obtained by police officers as the result of a search made under authority of a search warrant issued by a local justice of the peace. It was held the affidavit submitted to the magistrate was insufficient to justify the issuance of the search warrant and that the evidence should have been excluded. Mr. Justice Goldberg quoted with approval the excerpts from prior opinions set forth below.

In *Nathanson v. United States,* 290 U.S. 41, 78 L. Ed. 159, 54 S. Ct. 11, Mr. Justice McReynolds stated: "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation."

In *Johnson v. United States,* 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367, Mr. Justice Jackson stated: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

In *Giordenello v. United States, supra,* Mr. Justice Harlan stated: "The purpose of the complaint, then, is to enable the appropriate magistrate . . . to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause."

As stated by Higgins, J., in *S. v. Myers,* 266 N.C. 581, 583, 146 S.E. 2d 674, 676, citing *Aguilar, Mapp, Giordenello* and *Nathanson,* our decisions "are subject to the overriding authority of the Supreme Court of the United States to determine the citizen's rights under the Fourth and Fourteenth Amendments to the United States Constitution."

Our law enforcement officers deserve our gratitude, confidence and support. Even so, we cannot hold that a "desk officer" appointed by his chief of police, as provided in the statutes now challenged, has the status of "a neutral and detached magistrate" when considering an affidavit of a fellow officer of the same department. In this factual situation, we are of opinion, and so decide, that the warrant issued by "R. F. Johnson, Desk Officer," is invalid for

failure to meet the requirements of the Fourth and Fourteenth Amendments to the Constitution of the United States.

There remains for consideration whether the General Assembly can confer upon a police officer judicial power sufficient to authorize the issuance of a valid warrant under any circumstances, *e. g.,* where the complainant is a private citizen and has no connection with any law enforcement agency. The answer to this question is to be found in Article IV of the Constitution of North Carolina as amended by the voters in the general election held November 6, 1962.

Sections 1, 2 and 3 of Article IV, as amended in 1962, provide:

"Section 1. Division of judicial power. The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

"Sec. 2. General Court of Justice. The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration; and shall consist of an appellate division, a Superior Court division, and a District Court division.

"Sec. 3. Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice."

"The General Court of Justice consists exclusively of *the courts* constituting the appellate, superior court and district court divisions thereof." *Utilities Commission v. Finishing Plant,* 264 N.C. 416, 422, 142 S.E. 2d 8, 12.

Section 2 of Article IV, prior to amendment in 1962, provided:

"The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, *and such other courts inferior to the Supreme Court as may be established by law.*" (Our italics.)

Section 12 of Article IV, prior to amendment in 1962, provided:

"The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate 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; provide also a proper system of appeals; *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." (Our italics.)

The last clause of Section 1 of Article IV, as amended in 1962, providing that the General Assembly shall have no power to "establish or authorize any courts other than as permitted by this Article," is entirely new.

The primary purpose of said amendment of Article IV of the Constitution of North Carolina was to establish "a unified judicial system." To accomplish this result, *all* judicial power, except that vested in a court for the trial of impeachments and in administrative agencies, is now vested *by the Constitution* in the General Court of Justice. A police officer is not an official of the General Court of Justice. Obviously, he is not an administrative agency within the meaning of Section 3. Hence, the General Assembly lacks constitutional authority to confer judicial power upon a police officer.

Mindful of the fact that a district court will not be established in Wake County, the Tenth Superior Court Judicial District, until the first Monday in December 1968, G.S. Chapter 7A, Article 13, this excerpt from Section 21 of Article IV, as amended in 1962, is pertinent: "The statutes and rules governing procedure and practice in the Superior Courts and inferior courts, *in force at the time the amendments constituting this Article are ratified by the people,* shall continue in force until superseded or repealed by rules of procedure and practice adopted pursuant to Section 11(2) of this Article." (Our italics.) The statutes authorizing "desk officers" to issue warrants were adopted in 1963, *subsequent* to the date (November 6, 1962) of ratification of the amendments to Article IV. Thus, until a district court is established, no officials have authority to issue warrants except those authorized to do so by statutes in force on November 6, 1962.

In *S. v. Furmage,* 250 N.C. 616, 109 S.E. 2d 563, cited by the State, the validity of a public-local law authorizing the prosecuting attorneys of the Recorders' Courts of Robeson County "to issue warrants . . . and administer oaths" was challenged *solely* on the ground it violated Article I, Section 8, of the Constitution of North Carolina, providing that "(t)he legislative, executive and *supreme* judicial powers of the government ought to be forever sep-

arate and distinct from each other." (Our italics.) This Court held the issuance of a warrant did not require or involve the exercise of *supreme* judicial power. Defendant does not contend the statutes now challenged are unconstitutional as violative of said Article I, Section 8.

Although every presumption is to be indulged in favor of the constitutionality of a statute, *S. v. Leuders*, 214 N.C. 558, 561, 200 S.E. 22, 24, we are mindful that, as stated by Parker, J. (now C.J.), in *Wilson v. High Point*, 238 N.C. 14, 23, 76 S.E. 2d 546, 552, "when it is clear a statute transgresses the authority vested in the legislature by the Constitution, it is a duty of the Court to declare the act unconstitutional."

This Court is of opinion, and we so hold, that the 1963 statutes now challenged, purporting to confer judicial power on persons who are not officers of the General Court of Justice and who were not vested with such judicial power on November 6, 1962, exceeded the limitations placed upon the power of the General Assembly by Article IV of the Constitution of North Carolina. Hence, in agreement with Judge Braswell, we hold the 1963 Acts now challenged unconstitutional and void. Accordingly, the judgment of the court below sustaining defendant's motion to quash the warrant is affirmed.

Affirmed.

ELSIE W. WATERS v. CITY OF ROANOKE RAPIDS.

(Filed 12 April, 1967.)

1. Municipal Corporations § 12—

It is the duty of a municipality to exercise a reasonable and continuing supervision over its streets and sidewalks, including the inspection thereof in a manner and with a frequency reasonable in view of the location, nature and extent of the use of each street or walk.

2. Same—

In an action to recover for injuries received in a fall on a sidewalk, plaintiff must introduce evidence sufficient to support findings that she fell and sustained injuries as the proximate result of a defect in or condition of the sidewalk, that the defect was of such nature and extent that a reasonable person, knowing of its existence, should have foreseen that it would likely cause injury, and that the city had actual or constructive notice of the existence of the defect for a sufficient time prior to the fall to remedy the defect or guard against injury therefrom.

3. Same—

Evidence tending to show that plaintiff fell when she stepped from the paved portion of a sidewalk to an unpaved portion thereof, on a dark

night, at a point at which the street lights failed to give appreciable light, that there was a declivity of some two inches at the end of the paved portion and a declivity of some three to five inches at a point 18 inches from the paved portion, and that the general condition of the sidewalk had existed for several years, *held* sufficient to be submitted to the jury on the issue of negligence of the municipality and not to show contributory negligence as a matter of law on the part of plaintiff.

4. Negligence § 26—

Nonsuit on the ground of contributory negligence is proper only when plaintiff's evidence, construed most favorably to her, establishes this defense so clearly that no other conclusion can reasonably be drawn therefrom.

5. Municipal Corporations § 12—

In an action by a pedestrian to recover for injuries from a fall on a sidewalk, evidence as to the location of the point of the fall with reference to the principal business district of the city and with reference to a store, and that the sidewalk at the site of the accident was heavily traveled both day and night, is competent, since it is relevant upon the frequency of inspection required of the municipality concerning the condition of the sidewalk at this point.

6. Same—

In an action by a pedestrian to recover for injuries from a fall on a sidewalk at a point where the paved portion of the sidewalk ended, evidence of the difference in levels between the paved portion and the unpaved portion at a point some 18 inches beyond the pavement is competent, even though plaintiff's evidence fails to show that she stepped the full 18 inches beyond the paved portion, since the condition of the sidewalk throughout the vicinity is competent upon the question of whether the condition was such as to put the city upon notice that injuries to a pedestrian using the walk at night could have been foreseen.

7. Evidence § 35—

It is competent for a non-expert to testify as to the declivity between the unpaved and paved portions of a sidewalk, ascertained by the witness by laying one measuring rule upon the surface of the pavement with its end projecting over the unpaved walk, and with another rule, measuring the distance from the under edge of the first rule down to the surface of the dirt, since such measurement requires no greater skill than that possessed by any intelligent adult, and the testimony relates to facts within the knowledge of the witness and not opinions or conclusions drawn by him from the facts.

APPEAL by defendant from *Cowper, J.*, at the October 1966 Civil Session of HALIFAX.

The plaintiff sues for damages on account of personal injuries alleged to have been received when she fell upon a public sidewalk maintained by the city. She alleges that her fall occurred as she walked at night upon the sidewalk, with which she was not familiar, at a point which was not lighted, and at which a paved por-

tion of the walk joined an unpaved portion thereof so as to cause a substantial drop-off or change of level. She further alleges that this constituted a dangerous defect in the walk, the existence of which reasonable diligence in inspecting its streets and sidewalks would have disclosed to the city, and that the city was negligent in failing to make such inspection, in failing to remove the dangerous condition, and in failing to provide adequate street lights, warning lights or protective devices, which negligence was the proximate cause of the plaintiff's fall and resulting injuries. In its answer the city denies any negligence by it and alleges, alternatively, that the plaintiff by the exercise of reasonable prudence and the keeping of a reasonable lookout could have seen the alleged defect in the sidewalk and that her own negligence was the sole proximate cause of her injuries.

Issues of negligence, contributory negligence and damages recoverable were submitted to the jury and answered in favor of the plaintiff. From judgment entered in accordance with the verdict, the city appeals, assigning as error the denial of its motion for judgment of nonsuit, and the admission, over its objection, of certain testimony offered by the plaintiff. Other exceptions taken by the defendant in the course of the trial have been abandoned, no argument being made or authority cited with reference thereto in the defendant's brief.

It was stipulated that the city had control over the sidewalk at the point where the plaintiff fell, which sidewalk ran upon the east side of Jackson Street throughout the length of the block between Ninth Street and Tenth Street.

The defendant offered no evidence. Evidence offered by the plaintiff with reference to the nature and extent of her injuries is not pertinent to any question presented by the defendant's appeal. Other evidence introduced by the plaintiff may be summarized as follows:

The plaintiff, 54 years of age at the time of her injury, had lived and worked in Roanoke Rapids for many years. Her several places of residence were in a different part of the city from that in which her fall occurred. Her place of employment was on Jackson Street, four blocks from the place where she fell. She does not remember ever having walked upon this sidewalk prior to this occasion.

On 15 February 1963, the plaintiff went to a beauty shop on Ninth Street. She remained there until 6:45 p.m., at which time it was dark. She walked along Ninth Street to the east side of Jackson Street and then turned south upon this sidewalk, intending to walk to the Colonial Store at Tenth and Jackson Streets. For 55 yards, approximately one-fourth of the block, the sidewalk was

paved and in good condition. The pavement then ended and for the next 63 yards the sidewalk was unpaved, its surface being broken by ruts and tree roots. Then the pavement began again and continued to the end of the block.

At the point where the first or northernmost paved portion of this sidewalk joined the unpaved portion there was a difference in level, the paved portion being the higher. The paved walk was five feet wide. At the immediate point of juncture between the paved and unpaved portions of the walk, the "drop-off" from the paved portion to the unpaved portion varied, approximately uniformly, from zero at the interior edge of the walk to two and three-quarters inches at the outer or street edge of the sidewalk. Proceeding southwardly, the dirt portion slanted downward for the next 18 inches so that, at that point, the difference in level between the paved and unpaved portions was three and three-quarters inches at the inside edge of the walk and five and three-quarters inches at the outside or street edge of the walk. Thus, immediately south of the juncture of the paved walk with the dirt walk, the dirt portion slanted both to the west and to the south; that is, both toward the plaintiff's right and in the direction of her travel as she stepped off the edge of the paved portion of the walk. This portion of the unpaved sidewalk was used as a driveway, giving access from the street into the rear yard of the adjoining church building.

As she stepped from the paved portion onto the uneven dirt portion of the walk, the plaintiff fell to the ground, sustaining severe injuries. She was walking in the middle of the sidewalk, carrying nothing in her hand save her pocketbook, and was wearing shoes with one-inch heels, such as she wore at her work. Her last step was straight ahead and she was not walking rapidly. She did not observe the change in the nature or level of the walk before she fell.

The night was dark, with no moon. There was no flare or other warning at the end of the pavement. There were no lights in the adjoining church. There was one street light on the other side of the street, near the middle of the block. The next closest street light was in the block behind the plaintiff. These street lights were 44 and 67 yards, respectively, from the place where the plaintiff fell, and neither of them cast any appreciable light upon the sidewalk at that point. A tree grew near the curb between the point of the fall and the street light to the south. Its exposed roots ran across the dirt sidewalk, just beyond the driveway. These roots did not contribute to the plaintiff's fall.

The sidewalk had been in this general condition for several years. Construction work upon an addition to the church throughout the preceding 12 months had caused a considerable amount of truck

passage from Jackson Street over the driveway across this dirt portion of the sidewalk where the plaintiff fell. This had caused additional wear upon and erosion of the driveway across the dirt portion of the sidewalk.

The main business district of the city is on Roanoke Avenue, which is one block from Jackson Street. Jackson Street is heavily traveled both day and night.

Nicholas Long and Banzet & Banzet for defendant appellant.

Allsbrook, Benton, Knott, Allsbrook & Cranford for plaintiff appellee.

LAKE, J. The basis upon which a city or town may be held liable for damages to a pedestrian injured by a fall while walking upon its sidewalk is thus stated by Parker, J., now C.J., speaking for the Court in *Smith v. Hickory,* 252 N.C. 316, 113 S.E. 2d 557:

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

To the same effect, see: *Mosseller v. Asheville,* 267 N.C. 104, 147 S.E. 2d 558; *Faw v. North Wilkesboro,* 253 N.C. 406, 117 S.E. 2d 14; *Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799; *Bailey v. Winston,* 157 N.C. 252, 72 S.E. 966; *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309.

It is the duty of the city to exercise a reasonable and continuing supervision over its streets and sidewalks, including the inspection thereof in a manner and with a frequency reasonable in view of the location, nature and extent of the use of such street or walk. *Mosseller v. Asheville, supra; Revis v. Raleigh,* 150 N.C. 348, 63 S.E. 1049; *Jones v. Greensboro,* 124 N.C. 310, 32 S.E. 675. The city is, of course, charged with notice of any condition upon its side-

walks or streets which such an inspection would have disclosed to it. *Faw v. North Wilkesboro, supra.* However, it is not every defect or inequality in the level of a sidewalk which will render the city liable to a person who falls as a result thereof. *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424; *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571. The city is not liable for an injury sustained by such a fall unless a reasonable person, observing the defect prior to the accident, would have concluded that it was of such a nature and extent that, if it were allowed to continue, an injury to some person using the walk in a proper manner could reasonably be anticipated. *Mosseller v. Asheville, supra; Fitzgerald v. Concord, supra.* It is not sufficient to absolve the city that the condition be one not likely to cause injury in the daytime. The sidewalk must be reasonably safe for use at night under such light as the city provides, or causes to be provided. *Bunch v. Edenton,* 90 N.C. 431; McQuillin, Municipal Corporations, 3rd ed., § 54.12.

Proof that a condition, from the continuance of which a likelihood of injury to someone using the sidewalk in a proper manner might reasonably be foreseen, had existed for so long a time that inspection of the sidewalk at reasonable intervals would have brought it to the knowledge of the city fixes the city with notice of the existence of that condition. *Bailey v. Winston, supra; Fitzgerald v. Concord, supra.* Once the city has notice, actual or constructive, of the existence of such condition upon its sidewalk, it is not instantaneously subject to liability for subsequent falls, but the city must then act with due diligence and due care to remove the danger. *Mosseller v. Asheville, supra.*

To survive a motion for judgment of nonsuit, the plaintiff must introduce evidence sufficient to support these findings by the jury: (1) She fell and sustained injuries; (2) the proximate cause of the fall was a defect in or condition upon the sidewalk; (3) the defect was of such a nature and extent that a reasonable person, knowing of its existence, should have foreseen that if it continued some person using the sidewalk in a proper manner would be likely to be injured by reason of such condition; (4) the city had actual or constructive notice of the existence of the condition for a sufficient time prior to the plaintiff's fall to remedy the defect or guard against injury therefrom.

If the plaintiff's evidence, considered in the light most favorable to her, together with inferences in her favor which may reasonably be drawn therefrom, is sufficient to permit a finding of each of these things, the motion for judgment of nonsuit should be overruled, so far as the question of the city's negligence is concerned. So considered, the plaintiff's evidence in this record is sufficient to permit,

though not to require, the jury to find each of the above elements of the plaintiff's right to recover.

The motion for judgment of nonsuit could be sustained on the ground of contributory negligence by the plaintiff only if the plaintiff's evidence, construed most favorably to her, establishes so clearly that no other conclusion can reasonably be drawn therefrom that the plaintiff, as she walked upon this sidewalk, failed to exercise the care which a reasonable person would have exercised in so walking at that time and place. *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536. So considered, the plaintiff's evidence does not compel that conclusion. Consequently, there was no error in overruling the motion for judgment of nonsuit.

We are not to be understood as holding that there was a duty upon the city to pave the sidewalk in question or that a city is liable, as a matter of law, to one who, while walking upon an unlighted and unpaved sidewalk, falls as the result of an inequality in the level of the sidewalk surface. We hold only that in this instance the evidence is sufficient to permit the submission of the issues of negligence and contributory negligence to the jury under proper instructions as to the legal principles involved. They were so submitted and the jury answered them in favor of the plaintiff.

We find no merit in the defendant's exceptions to the admission of testimony by the plaintiff which located the point of the fall with reference to the principal business district of the city and with reference to the Colonial Store, or to the admission of the testimony by the plaintiff to the effect that Jackson Street was heavily traveled both day and night. Such testimony was relevant upon the question of the frequency of inspection required of the city concerning the condition of the sidewalk at this point.

The defendant's exceptions to the admission of testimony concerning the difference between the level of the paved walk from which the plaintiff stepped and the level of the dirt portion of the walk 18 inches beyond the end of the pavement are likewise without merit. While the plaintiff's testimony indicates that her last step forward did not carry her as far as 18 inches from the paved portion of the walk, the condition of the unpaved portion of the walk throughout this vicinity was competent upon the question of whether the condition of the sidewalk was such, in nature and extent, as to put the city upon notice that injury to one using the walk at night could be foreseen if this condition were allowed to remain.

There is also no merit in the city's exception to testimony by the plaintiff's witness as to the comparative levels of the paved portion of the walk and various points upon the unpaved portion of the

walk within 18 inches of the end of the pavement. The witness testified that he made these measurements by laying one measuring rule upon the surface of the pavement, its end projecting out over the unpaved walk, and, with another rule, measuring the distance from the under edge of the first rule down to the surface of the dirt sidewalk. One does not need to be an expert surveyor or engineer to make or to testify concerning such measurements. Any intelligent adult person could make them and in testifying thereto would be testifying as to facts, not stating opinions and conclusions drawn by him from the facts. The defendant could have, if it had seen fit, offered evidence in conflict with this testimony and the credibility of the witnesses would be for the jury to determine. These measurements required no greater skill than would any other measurements of distances and depth.

No error.

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

APEX TIRE AND RUBBER COMPANY, A CORPORATION, v. MERRITT TIRE COMPANY, INCORPORATED, A CORPORATION; J. H. MERRITT AND WIFE, JANE N. MERRITT; AND J. P. PUGH AND WIFE, SUE W. PUGH.

(Filed 12 April, 1967.)

1. Evidence § 42—

Where an expert testifies from his personal examination of the material sold by plaintiff and from tests run by the witness on the material just as it came from plaintiff, the facts testified to by such expert are based upon his personal knowledge and he may testify directly as to his opinion as to defects in the material, and is not restricted to testimony upon hypothetical questions as to such defects.

2. Evidence § 43—

Where a court permits an expert to testify within the field of his competency as an expert, it will be assumed that the court found the witness to be an expert in such field, and the failure of the court to make a specific finding that the witness is an expert is not fatal.

3. Same—

Even though the court states that he will not grant the request of the party that his witness be heard as an expert, the fact that the court thereafter permits the witness to testify fully within the field of his competency, amounts to a holding by the court that the witness is an expert in such field, and the prior statement of the court is not prejudicial.

4. Appeal and Error § 20—

When the court's limitation of the amount of damages is technically inexact in unduly restricting the purchaser's recovery, such technical error cannot be prejudicial to the seller, and, the purchaser not having appealed, the seller may not complain.

APPEAL by plaintiff from *McLean, J.*, September 19, 1966 Schedule B Jury Session, MECKLENBURG Superior Court.

The plaintiff, a corporation, instituted this civil action to recover from the corporate defendant and from the individual defendants, guarantors, the sum of $1500, balance due on account for tire recapping rubber sold and delivered to the defendant corporation.

The corporate defendant, by answer to the amended complaint, alleged it received from the plaintiff 15,606 lbs. of recapping rubber which the plaintiff knew the defendant intended to use in recapping automobile and truck tires for its customers. The defendant, after using 10,469 lbs. of the rubber, discovered the same was defective and worthless as recapping material. After the discovery, the defendant returned to the plaintiff the unused portion of the rubber, amounting to 5,137 lbs. and received credit for $1,695.24 on the account. In the meantime, the defendant had paid on the account the sum of $1,910.41. The defendant refused the plaintiff's demand to pay the remaining $1500 claimed by the plaintiff.

As a further defense and counterclaim, the defendant alleged: (1) the plaintiff knew the purpose for which the material was bought and intended to be used and warranted it as suitable for that use. The material was actually worthless. The difference in value of the material as represented and as delivered was $3,410.41; (2) the plaintiff, knowing of the intended use the parties had in contemplation, such damages as the use in recapping would obligate the defendant to pay in order to make good its customers' damages. The evidence disclosed the defendant used the material in recapping 650 automobile and 150 truck tires. The defendant's customers returned 370 automobile and 77 truck tires as defective and on these claims the defendant paid, in cash, $2,620. The individual defendants, by separate answer, admitted they executed a guarantee to pay defendant's account to the plaintiff, but that by reason of the defects, nothing was due.

The parties stipulated the plaintiff sold to the corporate defendant recapping rubber for $5,105.65; that defendant paid the plaintiff $1,910.41 in cash and returned rubber and received credit for $1,695.24, leaving a balance of $1500 on the original bill. By this action the plaintiff seeks to recover judgment for $1500, contending that nothing is due on the counterclaim. The parties further stipulated that

only two issues should be submitted to the jury; (1) was the material furnished to the defendant wholly unsuitable for recapping tires as represented by the plaintiff; (2) if so, what amount, if any, is the defendant entitled to recover?

The defendant's evidence on the counterclaim tended to show and was sufficient to support the finding that defendant used the product bought from the plaintiff in recapping 650 automobile and 150 truck tires, but that 370 automobile and 77 truck tires were returned as defective and had to be replaced by the defendant at a cost of $2620. The defendant's witness, Paul Pugh, experienced in the use of recapping automobile and truck tires, testified that he examined the material sold by the plaintiff to the defendant, which consisted of tread stock to which was attached a layer of cushion gum which, when applied to the carcass of the tire, bonded the tread stock to the carcass. The defects which developed by use of the tires were caused by the separation of the gum cushion from the tread stock. This joinder or attachment had been made by the plaintiff before delivery.

The defendant's witness, Alvy, who had 19 years of experience with Oliver Rubber Company and at the time was an employee of the plaintiff, ran tests in the defendant's recapping plant and testified: "The ethics of recapping (in the defendant's shop) were pretty good." He testified the cushion gum would not separate from the tread when put on right. In his opinion the separation of the cushion gum from the tread resulted from the incompatability of the cushion gum and the tread stock.

The plaintiff's employee and witness, John C. Bolt, Jr., testified in his opinion the separation of the cushion gum from the tread was caused by improper heat in the defendant's shop during the recapping process.

The jury answered the first issue YES and in answering the second issue, fixed the defendant's damages at $2620. The parties, having stipulated that plaintiff was entitled to a credit of $1500 on any amount awarded on the counterclaim, the Court entered judgment on the counterclaim for $1120. The plaintiff excepted and appealed.

Clayton, Lane and Helms by H. Parks Helms, for plaintiff appellant.

Ruff, Perry, Bond, Cobb & Wade by Wm. H. McNair, for defendant appellees.

HIGGINS, J. The plaintiff, as ground for a new trial, places its reliance on two assignments of error: (1) (a) Without finding them

qualified as experts, the Court permitted the defendant's witnesses Pugh and Alvy to testify that the defects in the recapping resulted from the separation of the gum cushion from the tread stock and not from a separation of the gum cushion from the carcass; and (b) the Court's failure to find the plaintiff's witness Bolt to be an expert. (2) The Court gave erroneous instructions as to the measure of damages.

The defendant's witnesses Pugh and Alvy were shown to have had long experience in the sale and the use of materials in recapping motor vehicle tires. They ran tests using the defendant's equipment and the materials bought from plaintiff. While the Court did not specifically find they were experts and able to testify as such, nevertheless the Court permitted them to testify as to the tests they ran and to express opinions as to the cause of the failures which developed. The admission of testimony is the subject of plaintiff's Assignment of Error No. 1.

In discussing the evidence of the witnesses Pugh and Alvy, it should be remembered they had examined the material as it came from the plaintiff's plant; they ran tests using defendant's equipment and the material just as it came from the plaintiff. They were not answering hypothetical questions but testifying as to the results of these tests. Their experience was such as to qualify them to run the tests, and to testify as to the results. "When facts upon which an expert bases his opinion are within his own knowledge he 'will be permitted to testify directly as to what in his opinion caused a particular occurrence or condition, and is not restricted, as in case of answers to hypothetical questions, to stating what might or could have caused it.' " *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9, and 38 A.L.R. 2d, Opinion Evidence, Page 39. The Court, over objection, permitted the witness to testify, giving his findings and conclusions. Implicit in this admission is a holding the witness was qualified to express the opinion. "(T)he rule with us is that the failure of a trial judge to specifically find that a witness is an expert before allowing him to give expert testimony will not sustain a general objection to his opinion evidence . . . if there is evidence in the record upon which the court could have based the finding . . . it will be assumed that the court found the witness to be an expert. . . ." *Teague v. Duke Power Co.*, 258 N.C. 759, 129 S.E. 2d 507. The Court did not commit error by permitting the witnesses to testify in the manner disclosed by the record.

The plaintiff offered John C. Bolt, Jr. as a witness. He testified that for the past 4 years he had been employed by the plaintiff as supervisor of its "sales and business in the southern region". He described in detail the process employed by the plaintiff in the fab-

rication of its tread stock and method of attaching the cushion gum thereto. He had experience in recapping. Plaintiff's counsel made this request of the Court: "I'd like to tender this man as an expert witness." The Court replied: "No sir, it is a matter for the jury to decide what credit they will give to his testimony." Counsel moved the Court to declare the witness to be an expert without limitation as to the field of his expert knowledge. The Court denied the motion. However, the Court permitted the witness to testify in great detail about the materials and techniques involved in recapping, including the various steps in preparing the materials. He gave as his opinion the separation of the tread stock from the gum cushion resulted from overheating or uneven heating in the recapping process and that this took place in the defendant's plant. While the Court did not announce its finding the witness was an expert (without limitation as to field), nevertheless the witness was permitted to run the entire scale of materials and steps in the recapping process and gave his opinion as to the cause of the defects which developed. By admitting the evidence, the Court held in effect that the witness was an expert in the field covered by his testimony. Such is the holding in *Teague v. Duke Power Co., supra.* That case is authority applicable both to the plaintiff's and the defendant's expert testimony. The Court permitted the witnesses for both parties to testify upon equal terms. Nothing was excluded.

Finally, the plaintiff finds fault with the Court's charge on the measure of damages. Ordinarily, the measure of damages in breach of warranty cases is the difference in the value of the article as warranted and as actually delivered.

The defendant, on the counterclaim, alleged (1) it agreed to pay $3,410.41 for the materials which were actually worthless and it is entitled to judgment for that amount, plus interest; (2) as special or consequential damages, defendant is entitled to recover $2,620 actually returned to its customers by reason of the defects which developed in the recapped tires. In this case, however, the defendant actually bought and retained recapping materials for 650 automobile tires and 150 truck tires. Before the defects developed the defendant paid $1,910.41 on the account. After the defects developed a part of the material was returned to the plaintiff and the defendant's account credited, leaving a balance of $1500 unpaid. Defects developed in 370 of the automobile tires and 77 of the truck tires. The defendant was actually required to expend the sum of $2,620 to make good these defects. Whether the other 290 automobile tires and 73 truck tires were defective is not disclosed. Further complaints may or may not come in as to them. "For a breach of contract the injured party is entitled as compensation therefor to be

placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed." *Service Co. v. Sales Co., supra; Tillis v. Cotton Mills, Inc.,* 251 N.C. 359, 111 S.E. 2d 606. Judge McLean seems to have concluded the defendant may not recover more than his consequential damages and actual loss in paying refunds, and instructed the jury it could not award more than $2,620 on the counterclaim. The Court gave the instruction that if the jury answered the second issue, the answer could in no event exceed $2,620.

The Court's limitation of recovery to the loss resulting from the defects in 370 automobile tires and 77 truck tires does not take into account any additional losses which may yet show up in other tires. Conceding the charge on the measure of damages on the counterclaim was not exactly in accordance with the proper rules, in that it limited defendant's recovery to its actual out-of-pocket expenses paid on refunds, nevertheless the limitation on recovery is not shown to be prejudicial to the plaintiff. The defendant, not having appealed, cannot complain. Prejudice to the appellant is not shown. Technical error is not sufficient. It must be shown to be harmful to the appellant. *Dinkins v. Booe,* 252 N.C. 731, 114 S.E. 2d 672; *Ray v. Membership Corp.,* 252 N.C. 380, 113 S.E. 2d 806.

After careful review, we conclude error prejudicial to the defendant is not shown.

No error.

W. L. WOODARD AND M. B. MOREY, ON BEHALF OF THEMSELVES SEVERALLY AND JOINTLY AND ALL OTHERS SIMILARLY SITUATED, v. CARTERET COUNTY, NORTH CAROLINA; A. B. COOPER, CHAIRMAN, GEORGE D. PHILLIPS, MOSES HOWARD, E. W. DOWNUM AND STATON MOORE, THE BOARD OF COUNTY COMMISSIONERS OF CARTERET COUNTY; RAYMOND T. EDWARDS, CHAIRMAN, FRANK A. CASSIANO AND CLIFFORD R. TILGHMAN, CONSTITUTING THE BOARD OF ELECTIONS OF CARTERET COUNTY, NORTH CAROLINA; AND THOMAS WADE BRUTON, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA.

(Filed 12 April, 1967.)

1. Declaratory Judgment Act § 1—

The Uniform Declaratory Judgment Act affords an appropriate method for the determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute.

2. Pleadings § 12—

The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be reasonably deduced therefrom, construing the pleading liberally with a view to substantial justice between the parties, but the demurrer does not admit legal inferences or conclusions. G.S. 1-151.

3. Declaratory Judgment Act § 1—

If the complaint in a proceeding under the Declaratory Judgment Act states a justiciable controversy and all persons who have a substantial and legal protectible interest in the subject matter of the litigation are made parties, a demurrer should not be sustained, even though plaintiffs may not be entitled to the relief sought, since in such instance the court is not concerned with whether plaintiffs have a right to the relief demanded but only whether plaintiffs are entitled to a declaration of their rights with respect to the matters alleged.

4. Elections § 2— Complaint held to state cause of action under Declaratory Judgment Act to determine validity of apportionment for election of county commissioners.

Plaintiffs, citizens and residents of the county, brought this action for a declaratory judgment on behalf of themselves and all similarly situated against the county and the county board of commissioners, the county board of education, the individual members of the said boards, and the Attorney General, to have declared unconstitutional Chapter 1043 of the Session Laws of 1963 and Chapter 723 of the Session Laws of 1965, alleging that the Acts were unconstitutional in that the division of the county into districts for the purpose of nominating candidates for the office of commissioner were so unequal as to constitute improper apportionment and unequal representation, and that the provisions of the 1965 statute extending the terms of office of the members of the board of county commissioners exceeded the constitutional authority of the General Assembly, and prayed that the court direct primary and general elections be held immediately to elect county commissioners in the county. *Held:* The complaint states a justiciable controversy in which all necessary persons were made parties, and demurrer was improvidently sustained.

APPEAL by plaintiffs from a judgment entered by *Parker (Joseph W.), J.*, at the June 1966 Civil Session of CARTERET, sustaining a demurrer to the complaint and dismissing the action with the costs to be paid by plaintiffs. Docketed and argued as Case No. 115, Fall Term 1966. Docketed as Case No. 123, Spring Term 1967.

This is an action brought by plaintiffs, citizens and residents of Carteret County, on behalf of themselves severally and jointly and on behalf of all others similarly situated, under the provisions of the North Carolina Declaratory Judgment Act. G.S. 1-253 *et seq.*

Defendants are Carteret County, the members of its Board of County Commissioners, the members of its Board of Elections, and the Attorney General of the State of North Carolina, who was made a party pursuant to the provisions of G.S. 1-260.

Plaintiffs seek to have declared unconstitutional two Acts of the North Carolina General Assembly, to wit: Ch. 1043 of the Session Laws of 1963 entitled, "An Act to Provide for the Nomination and Election of the Board of County Commissions *(sic)* of Carteret County," and Ch. 723 of the Session Laws of 1965 entitled, "An Act to Amend Chapter 1043, Session Laws of 1963, Relating to the Nomination and Election of the County Commissioners of Carteret County," and for an order of court declaring the present Board of County Commissioners of Carteret County to be unlawfully and improperly constituted, and further for an order of court directing primary and general elections to be held immediately to elect five County Commissioners from Carteret County pursuant to law. The relief demanded is based upon the Fourteenth Amendment to the United States Constitution, which guarantees to plaintiffs due process of law and equal protection under the law.

Ch. 1043 of the 1963 Session Laws is entitled, "An Act to Provide for the Nomination and Election of the Board of County Commissions *(sic)* of Carteret County." The Act established four political districts in Carteret County and provided for the election of five members of the Board of County Commissioners. It became effective beginning with the 1964 primary. Under its provisions, candidates are nominated in the primary by the qualified voters of their respective districts. At the general election, the vote is county-wide. The term of office established by the Act was two years, to begin the first Monday in December, 1964. The complaint alleges in substance: Pursuant to the provisions of this Act, the defendants herein designated the "Board of County Commissioners of Carteret County" were nominated in their respective districts and elected in the general election following, and assumed the office of County Commissioners in December, 1964.

The complaint alleges that the Board of County Commissioners of Carteret County procured the enactment by the General Assembly of North Carolina of Ch. 723 of the 1965 Session Laws to amend Ch. 1043 of the 1963 Session Laws. It made certain changes in the geographical boundaries of the political districts established by the 1963 Act, changed the term of office of members of the Board of County Commissioners of Carteret County from two to four years, effective as of the 1968 general election, and extended the terms of office of the members of the Board elected in 1964 for two additional years.

Plaintiffs allege that under the provisions of the above Acts, according to the last official United States Census, District 1, which is authorized two Commissioners, has a population of 13,556 or 43.81 per cent of the total county population, District 2 has a pop-

ulation of 4,429 or 14.31 per cent of the county population, District 3 has a population of 7,219 persons or 23.33 per cent of the county population, and that District 4 contains 5,736 persons or 18.54 per cent of the county total. They allege that this is improper apportionment under which the vote of a resident of District 2 is 1.63 times greater than that of a resident of District 3. Plaintiffs' complaint is directed to the alleged unequal representation or improper apportionment resulting from the above two Acts of the General Assembly, thereby allegedly depriving them of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution, and further to the extension of the terms of office of the members of the Board of County Commissioners.

Paragraph 12 of the complaint alleges:

> "That an action was instituted by the plaintiffs herein in the United States District Court for the Eastern District of North Carolina against the defendants herein named for causes as hereinabove set forth, said action being predicated upon the Federal Declaratory Judgment Act, 28 U.S.C. 2201-2202, to which complaint the defendants County Commissioners and County Board of Elections answers and did file, as an element of their answer, a resolution of the County Board of Commissioners adopted at their regular meeting on the first Monday in February, 1966, which resolution, in effect, found that the previous apportionment of commissioner districts in Carteret County were denied equal representation on the Board of County Commissioners and that, further, said defendants, County Board of Commissioners, redistricted said county, creating new districts. That said resolution has been made a part of the minutes of the defendants, County Board of Commissioners, which minutes are, by reference, incorporated herein and made a part hereof."

The alleged minutes are not in the record before us.

Paragraph 13 of the complaint alleges:

> "That the said Commissioners as named herein are still holding office and, despite the fact that they have found themselves to have been elected under improperly created districts, they are still attempting to hold office accordingly."

On motion of the defendants, with the exception of the Attorney General of North Carolina, Bone, J., struck out paragraph 14 of the complaint, which alleges:

"That the said action filed in the United States District Court for the Eastern District of North Carolina has resulted in an opinion and order by the Hon. John D. Larkins, Jr., District Judge, copy of which is attached hereto and, by reference, made a part hereof and marked "Exhibit A," and that the said Judge has directed to be placed before the Superior Court of Carteret County, North Carolina, for a determination in accordance with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, this cause. The Court further ordered that the Court shall retain jurisdiction until such time as a final order can be entered in the State court system (North Carolina). Therefore, the status of the defendants, County Commissioners, has not been determined and is still undetermined."

Plaintiffs did not except to Judge Bone's order.

Defendants, other than the Attorney General, filed a demurrer to plaintiffs' complaint. At the June, 1966 Session of the Superior Court for Carteret County, the court entered an order sustaining the demurrer without stating any ground upon which his ruling was based, dismissing the action and taxing plaintiffs with the costs. Plaintiffs appealed.

Wheatly & Bennett by Thomas S. Bennett for plaintiff appellants.

Hamilton, Hamilton & Phillips by Luther Hamilton, and Harvey Hamilton, Jr., for defendant appellees.

PARKER, C.J. G.S. 1-264 states:

"This article [Uniform Declaratory Judgment Act] is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered."

G.S. 1-254 states in relevant part:

"Any person . . . whose rights, status or other legal relations are affected by a statute . . . , may have determined any question of construction or validity arising under the . . . statute . . . , and obtain a declaration of rights, status or other legal relations thereunder."

The courts have on numerous occasions stated that the Uniform Declaratory Judgment Act furnishes a particularly appropriate

method for the determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute. 22 Am. Jur. 2d, Declaratory Judgments, § 25; 26 C.J.S., Declaratory Judgments, §§ 45, 46, 47.

In *Chronicle & Gazette Pub. Co. v. Attorney General,* 94 N.H. 148, 48 A. 2d 478, 168 A.L.R. 879, the Court said:

> "A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein."

In *Allison v. Sharp,* 209 N.C. 477, 184 S.E. 27, the Court held that the Uniform Declaratory Judgment Act affords a means of testing the validity of a statute requiring persons presenting themselves for registration to prove to the satisfaction of the registrar their ability to read and write any section of the Constitution, plaintiffs and all the people of the State being vitally affected by the statute.

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 office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences as may be reasonably deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440.

It appears that all necessary persons have been made parties to this action by plaintiffs. Considering the allegations in the complaint, according to the established rule, they disclose the existence of a real and justiciable controversy between the parties who have a substantial and legally protectible interest in the subject matter of the litigation, and that the plaintiffs would be adversely affected by the enforcement of the challenged Acts, and that all the people of Carteret County are vitally affected by the challenged Acts as to the following questions: (1) Whether the "one man—one vote" principle announced by the United States Supreme Court in *Baker v. Carr,* 369 U.S. 186, 7 L. Ed. 2d 663, and in *Reynolds v. Sims,* 377 U.S. 533, 12 L. Ed. 2d 506, applies to representation on the Board of County Commissioners; (2) if so, whether the apportionment accomplished in Carteret County by the 1963 and 1965 Acts meets the general standards suggested in *Roman v. Sincock,* 377 U.S. 695, 12 L. Ed. 2d 620, and other United States Supreme Court

decisions; (3) whether the North Carolina General Assembly was constitutionally authorized to extend the terms of office of members of the Board of County Commissioners of Carteret County; and (4) whether the court should direct primary and general elections to be held immediately to elect five Commissioners from Carteret County.

Sharp, J., said for the Court in *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654:

> "This appeal, however, is from an order of the Superior Court sustaining a demurrer to the complaint. When a complaint alleges a *bona fide* controversy justiciable under the Declaratory Judgment Act, and it does not appear from the complaint that necessary parties are absent from the suit, a demurrer to the complaint should be overruled. The parties are entitled to a declaration of their rights and liabilities and the action should be disposed of only by a judgment declaring them."

To the same effect, *Walker v. Charlotte,* 268 N.C. 345, 150 S.E. 2d 493; 26 C.J.S., Declaratory Judgments, § 141; 22 Am. Jur. 2d, Declaratory Judgments, § 91. See *Hubbard v. Josey,* 267 N.C. 651, 148 S.E. 2d 638, which was a civil action for a declaratory judgment to determine the rights of the parties in a 20-foot-wide strip of land known as Hawthorne Lane in Irving Park in Greensboro, North Carolina. At the close of plaintiffs' evidence, the Court dismissed the action by a judgment of nonsuit. The Court in its decision set aside the judgment of nonsuit and remanded the case for a trial *de novo* and for an adjudication of the respective rights of the parties.

This is said in 22 Am. Jur. 2d, Declaratory Judgments, § 91:

> "The use and determination of demurrers in declaratory judgment actions are controlled by the same principles that apply in other cases. Nevertheless, it has frequently been stated that a demurrer is rarely an appropriate pleading for a defendant to file to a petition for declaratory judgment. Where the plaintiff's pleading sets forth an actual or justiciable controversy, it is not subject to demurrer since it sets forth a cause of action, even though the plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint; that is, in passing on the demurrer, the court is not concerned with the question whether plaintiff is right in a controversy, but only with whether he is entitled to a declaration of rights with respect to the matters alleged."

The judgment entered below sustaining the demurrer and dismissing the action, with the costs to be taxed against plaintiffs, is reversed. The case is remanded to the Superior Court of Carteret County to the end that defendants may answer within 30 days after the receipt of the certificate from the Supreme Court, G.S. 1-131, and that thereafter the Superior Court of Carteret County will by judgment adjudicate the rights, status or other legal relations of the parties under the provisions of our Uniform Declaratory Judgment Act. On the demurrer we take the case as made out by the complaint. What position the defendants will take and whether or not *bona fide* controversies justiciable under our Uniform Declaratory Judgment Act will be raised by the answer, we do not know at this stage of the proceeding.

Reversed and remanded.

EDWARD W. WEGNER v. DELLY-LAND DELICATESSEN, INC., A CORPORATION.

(Filed 12 April, 1967.)

1. Negligence § 37b—

The rule that the proprietor of a business owes his customers the duty to use reasonable care to keep the premises in a reasonably safe condition within the scope of the invitation extends to a proprietor of a restaurant or other establishment serving meals for compensation.

2. Same— Employer may be held liable for assault committed by employee when employer fails to exercise due care in selection of employee.

The proprietor of a restaurant may be held liable for an assault committed by his employee upon a customer if the proprietor knew, or in the exercise of reasonable care in the selection and supervision of his employee should have known, that the employee would be likely to commit an assault upon a customer by reason of past conduct, bad temper, or otherwise, even though the particular assault was not committed within the scope of the employment; but when there is no evidence of any express or implied knowledge on the part of the proprietor of such propensity on the part of the employee, or that any officer or other employee of the proprietor failed to act promptly to restrain the employee committing the assault after difficulties arose, the evidence is insufficient to invoke this rule.

3. Master and Servant § 33—

The employer is liable to third persons for an assault committed by an employee if the act of the employee occurs while the employee is engaged in doing something he is employed or authorized to do for the employer,

notwithstanding the act is unauthorized or even prohibited, but if the act of the employee is committed to accomplish a personal purpose of the employee after the employee had departed, however briefly, from his duties, and such purpose is not incidental to the work he is employed to do, the employer is not liable.

4. Same— Evidence held insufficient to show that assault by employee was committed by him while engaged in duties of his employment.

Plaintiff's evidence was to the effect that he was a customer in defendant's restaurant, that defendant's bus boy had removed dirty dishes from the table and had brought a clean glass to plaintiff as requested, but slammed the clean glass down on the table and, after beginning duties at another table, returned to plaintiff and menaced him with a fork, was restrained by employees of the corporation who took the fork away from the bus boy, that the bus boy suddenly pulled away and assaulted plaintiff by hitting him in his face with his fists and kicking him in the side and stomach. *Held:* The evidence discloses an unjustified and unprovoked assault by the bus boy for some undisclosed and personal motive, but fails to show that the assault was committed while the bus boy was doing anything related to the duties of his employment, and the employer's motion to nonsuit was properly allowed.

HIGGINS, J., dissents.

APPEAL by plaintiff from *Hasty, J.*, at the 31 October 1966 Schedule D Civil Session of MECKLENBURG.

The plaintiff sues for damages alleged to have been sustained as the result of an assault and battery upon him by one Billy Johnson, in the scope of Johnson's employment by the defendant in its restaurant, the plaintiff being a customer therein at the time of the alleged assault. The answer admits that the plaintiff and his young son entered the restaurant, took seats at a table and placed an order, that Johnson was an employee of the defendant and that Johnson struck the plaintiff, the remaining material allegations of the complaint, including the allegation that Johnson so acted within the scope of his employment, being denied.

At the close of all of the evidence, a judgment of nonsuit was entered. The plaintiff assigns as error the granting of the motion for such judgment and certain rulings upon the admission of evidence.

The evidence introduced by the plaintiff may be summarized as follows:

The plaintiff, 49 years of age, and his nine year old son went to the defendant's restaurant, where the plaintiff had previously eaten on several occasions. On this occasion, he took a seat at a table and gave to a waitress his order for food and milk for himself and his son. The waitress brought two cartons of milk and two clean

glasses, placing these upon the table, on which there were dirty dishes left by a previous customer.

Johnson, employed by the defendant as a bus boy, then came from a back room and began picking up dirty dishes from an adjoining table. The plaintiff had never seen or spoken to him before. The plaintiff requested him to remove the dirty dishes from his table. Johnson came over and picked them up, taking also one of the clean glasses which the waitress had just brought. The plaintiff told Johnson the clean glass was his and requested Johnson to bring him another clean glass. In response to this request, Johnson returned to the table in two or three minutes with a clean glass, slammed it down upon the table and walked over to another table to remove dishes therefrom. He looked over at the plaintiff and said, "You didn't like that, did you?" The plaintiff replied, "Well, I didn't think it was too funny." Nothing else whatever was said by the plaintiff to Johnson. Johnson immediately returned to the plaintiff's table with a fork in his hand and asked the plaintiff if he wanted his eyes cut out. The plaintiff sat still and made no reply. A customer at the next table called the son of the president of the defendant corporation, both the president and the son being also employed in the restaurant. The son came, took the fork away from Johnson and began to walk Johnson toward the back of the restaurant.

Thereupon, the plaintiff said to his own son, "Let's get out of here," and pushed his chair back preparatory to leaving. Before he could arise, Johnson pulled away from his fellow employee, who was seeking to restrain him, hit the plaintiff in the face with his fist and kicked him in the side and stomach. At no time did the plaintiff strike or kick Johnson or attempt to do so. At no time did he say anything to Johnson except as above quoted. He sustained pain and injuries as the result of the blows and kicks which he received. He did not at any time refer to Johnson's race or address him by any derogatory term.

Peter H. Gerns for plaintiff appellant.

Carpenter, Webb & Golding by James P. Crews for defendant appellee.

LAKE, J. When the evidence is considered in the light most favorable to the plaintiff, as it must be in reviewing the judgment of nonsuit, it shows a well-behaved invitee in a restaurant, the proprietor of which holds itself out as serving the public, assaulted, without justification or provocation, by an employee of the restaurant owner and severely beaten and injured. The plaintiff attacks

the judgment of nonsuit upon two grounds: (1) The evidence is sufficient to support a finding that the defendant, itself, violated a duty owed to its invitee; (2) the evidence is sufficient to support a finding that the defendant is liable for the wrongful act of its employee.

It is elementary that the proprietor of a business establishment owes to those who enter upon the premises in response to his invitation, express or implied, for the purpose of purchasing the goods or services which the proprietor represents himself as offering to sell or to render, the duty to use reasonable care to keep the premises in a safe condition for such use by such invitee. *Hedrick v. Tigniere,* 267 N.C. 62, 147 S.E. 2d 550, and cases there cited. This duty extends to the proprietor of a restaurant or other establishment serving meals for compensation. *Sledge v. Wagoner,* 248 N.C. 631, 104 S.E. 2d 195. As a corollary to or application of this rule, proprietors of such establishments have been held liable to invitees therein assaulted by an employee of the establishment whom the proprietor knew, or in the exercise of reasonable care in the selection and supervision of his employees should have known, to be likely, by reason of past conduct, bad temper or otherwise, to commit an assault, even though the particular assault was not committed within the scope of the employment. See: *Brittingham v. Stadiem,* 151 N.C. 299, 66 S.E. 128; Annot., 40 A.L.R. 1212, 1215; Annot., 114 A.L.R. 1033, 1041. This basis for imposing liability upon the proprietor for an assault by his employee is, however, the negligence of the proprietor, himself, in the selection or supervision of his employee.

In *Robinson v. Sears, Roebuck & Co.,* 216 N.C. 322, 4 S.E. 2d 889, Seawell, J., dissenting, was of the opinion that the more extensive duty imposed upon a common carrier of passengers for the protection of such passengers from assaults while in the carrier's conveyance, should be imposed upon all corporate proprietors of business establishments. This suggestion was, however, not adopted by the majority of the Court and the view so taken by the majority is in accord with decisions in other jurisdictions. *Rahmel v. Lehndorff,* 142 Cal. 681, 76 P. 659; *Davidson v. Chinese Republic Restaurant Co.,* 201 Mich. 389, 167 N.W. 967.

In the present case, the complaint does not allege, and there is no evidence whatever tending to show, a breach by the defendant of its duty to keep its premises in a reasonably safe condition for use by its invitees. There is nothing to indicate that the defendant should have known that its employee was a high tempered, quarrelsome or dangerous man. There is neither allegation nor evidence that this employee had engaged in any affray or attack upon an-

other person prior to this occurrence. There is no evidence to show that he had been in the employ of the defendant prior to the day on which this occurrence took place, or that the defendant failed to make reasonable investigation of his suitability for the position of bus boy prior to his employment.

There is no evidence to support a finding that any officer or other employee of the defendant failed to act promptly to restrain Johnson when the difficulty arose. On the contrary, the evidence supports the statement in the plaintiff's brief that, "taking this evidence most strongly against the defendant, the entire incident took but seconds from the time of the first verbal contact between plaintiff and the bus boy to the final blow administered by the latter."

Considering the evidence in the light most favorable to the plaintiff, it fails, therefore, to show any act or omission by the defendant, itself, which would constitute a breach of its duty to its invitee.

It is equally elementary that an employer is liable to a third person injured by the wrongful act or neglect of his employee if, but only if, such act or omission occurred in the course of the employment; that is, while the employee was engaged in doing something he was employed, or otherwise authorized, to do for the defendant employer. *Duckworth v. Metcalf,* 268 N.C. 340, 150 S.E. 2d 485; *Hinson v. Chemical Corp.,* 230 N.C. 476, 53 S.E. 2d 448; *Dickerson v. Refining Co.,* 201 N.C. 90, 99, 159 S.E. 446. If the servant was engaged in performing the duties of his employment at the time he did the wrongful act which caused the injury, the employer is not absolved from liability by reason of the fact that the employee was also motivated by malice or ill will toward the person injured, or even by the fact that the employer had expressly forbidden him to commit such act. *Hammond v. Eckerd's,* 220 N.C. 596, 18 S.E. 2d 151; *Dickerson v. Refining Co., supra; West v. Woolworth Co.,* 215 N.C. 211, 1 S.E. 2d 546. See also, Annot., 34 A.L.R. 2d 372, 396. On the other hand, it is not sufficient to hold the employer liable that the wrongful act occurred while the employee was at his post of duty during the hours of work. *Robinson v. McAlhaney,* 214 N.C. 180, 198 S.E. 647; *Snow v. DeButts,* 212 N.C. 120, 193 S.E. 224. Likewise, it is not enough to render the employer liable that the employee did the wrongful act for the purpose of benefiting the employer. *Hammond v. Eckerd's, supra.* If the act of the employee was a means or method of doing that which he was employed to do, though the act be wrongful and unauthorized or even forbidden, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his

duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do. *Long v. Eagle Store Co.*, 214 N.C. 146, 198 S.E. 573; *Dickerson v. Refining Co., supra; Robinson v. McAlhaney, supra.*

These well known principles govern the liability of an employer for an assault committed by his employee upon a third party. *Hoppe v. Deese,* 232 N.C. 698, 61 S.E. 2d 903; *Robinson v. Sears, Roebuck & Co., supra; Robinson v. McAlhaney, supra; Long v. Eagle Store Co., supra; Snow v. DeButts, supra; Munick v. Durham,* 181 N.C. 188, 106 S.E. 665. As stated by Barnhill, J., speaking for the Court in *Robinson v. McAlhaney, supra,* "If an assault is committed by the servant, not as a means or for the purpose of performing the work he was employed to do, but in a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own, then the master is not liable."

Applying these principles, this Court in *Long v. Eagle Store Co., supra,* held the employer liable for false arrest of a suspected shoplifter by the assistant manager of the employer's store on the ground that the assistant manager was employed to protect the goods in the store from theft, and his act was a means of carrying out and for the purpose of carrying out that duty. However, in *Snow v. DeButts, supra,* though the assault occurred on the premises of the employer, and though the quarrel grew out of a conversation relating to testimony of the plaintiff in litigation concerning the employer, the employer was held not liable for the assault because it had no relation to the work the attacking employee was employed to do.

Similarly, in other jurisdictions, the employer has been held liable for assaults by employees having responsibility for the collection of the price of goods sold or services rendered, or for the adjustment of complaints by customers, or for the maintenance of order upon the premises, the assault being thought to have been committed for the purpose of carrying out such duty. *Dilli v. Johnson,* 71 App. D. C. 139, 107 F. 2d 669; *Crum v. Walker,* 241 Iowa 1173, 44 N.W. 2d 701; *Schutlz v. Purcell's, Inc.,* 320 Mass. 579, 70 N.E. 2d 526; *Bryce v. Jackson Diners Corp.,* 80 R.I. 327, 96 A. 2d 637; *Anderson v. Covert,* 193 Tenn. 238, 245 S.W. 2d 770. See also, Annot., 34 A.L.R. 2d 372, 380, 414-421. However, owners of restaurants have been held not liable for assaults by waitresses upon patrons, the assault having no relation to the duty of the employee except that it was the culmination of remarks exchanged while the waitress was proceeding with her work and the customer waiting for or consuming his meal. *Fisher v. Hering,* 88 Ohio App. 107, 97

N.E. 2d 553; *Norris v. China Clipper Cafe* (Tex. Civ. App.), 256 S.W. 2d 664.

In *Norris v. China Clipper Cafe, supra,* the facts were somewhat similar to the defendant's version of those before us. The waitress in an eating establishment had some difficulty in taking the orders of a wedding party, some members of which had apparently been consuming numerous toasts to the bride. At her request, the manager assigned a different waitress to this party and she turned her attention to customers at other tables nearby. In serving them, she was obliged to pass and repass the table at which the wedding party sat. As she did so, she and the bride exchanged various comments relating to their respective appearances, hairdos, figures and appropriate zoological classifications. These conversations were brought to an abrupt end when the waitress lifted the bride from her seat by her hair, slapped her and deposited her on the floor of the cafe. The owner of the cafe was held not liable for the reason that the assault was not a means of performing any duty for which the waitress was employed and so was not in the course of her employment.

In the present case, the employee who committed the assault was a bus boy. He had no managerial responsibilities. He was not employed to take orders for food, serve them or collect the bills. His job was to collect and remove dishes, carry trays, and the like. Whatever the source of his animosity toward the plaintiff may have been, he did not strike the plaintiff as a means or method of performing his duties as bus boy. A different situation would be presented if the glass which he "slammed down" upon the table had shattered and injured the plaintiff, for there the employee would have been performing an act which he was employed to do and his negligent or improper method of doing it would have been the act of his employer in the contemplation of the law. However, the assault, according to the plaintiff's testimony, was not for the purpose of doing anything related to the duties of a bus boy, but was for some undisclosed, personal motive. It cannot, therefore, be deemed an act of his employer and this basis for attacking the judgment of nonsuit also fails.

It is not necessary to determine the correctness of rulings upon the admission of evidence, which the plaintiff assigns as error, since neither the admission of that which was excluded nor the exclusion of that which was admitted would have affected the correctness of the judgment of nonsuit.

Affirmed.

HIGGINS, J., dissents.

NOEL C. MACKAY v. CALLIE C. McINTOSH.

(Filed 12 April, 1967.)

1. Appeal and Error § 21—

An exception to the judgment presents for review only whether error of law appears on the face of the record.

2. Appeal and Error § 49—

Where the findings of fact by the court, in a trial by the court under agreement of the parties, support the judgment, an exception to the judgment cannot be sustained.

3. Appeal and Error § 22—

An exception that the findings of fact by the trial court are not supported by evidence, without an exception to any particular finding, is broadside and ineffectual.

4. Cancellation and Rescission of Instruments § 4; Brokers and Factors § 3— Mutual mistake of purchaser and seller's broker warrants rescission.

Defendant's evidence was to the effect that he signed the contract for the purchase of the property in question in reliance upon the representation of plaintiff's real estate agent that the property was zoned for business purposes, and that both defendant and the agent acted pursuant to their mistaken belief that this representation was true when in fact it was false. *Held:* The evidence supports rescission of the contract for mutual mistake, since it would be unconscionable to allow plaintiff to profit by defendant's reasonable reliance upon the unintentional false representations made by plaintiff's agent in her negotiations in his behalf with defendant. Whether the unauthorized representation of the broker could be the basis of an action for damages against plaintiff is not presented.

5. Evidence § 27; Contracts § 26—

The parol evidence rule does not preclude parol evidence that the parties entered into the contract because of a mutual mistake of fact, since such evidence does not seek to contradict the writing or to enforce a parol agreement but only to show the existence of a mutual mistake of fact precluding a meeting of the minds and the formation of a contract.

APPEAL by plaintiff from *Hasty, Special Judge,* July 11, 1966 Civil Session of MECKLENBURG.

Plaintiff seeks to compel defendant to purchase property at 3004 Commonwealth Avenue, Charlotte, N. C., consisting of a lot "approx. 65 feet by 205 feet" and the brick building thereon, and to pay therefor as purchase price the sum of $21,600.00 upon the terms set forth in a written contract (Exhibit A) dated October 4, 1965, or, if defendant is unable to comply with her said contract, that plaintiff be awarded damages "for loss of profits."

Answering, defendant admitted the execution of said contract;

otherwise, she denied plaintiff's essential allegations. For a further defense, she alleged in substance: Prior to signing said contract, she advised plaintiff's agent her only reason for purchasing the property was "to use same for her retail business (dress shop) known as Callie's House of Maternity"; and that plaintiff's agent advised her the property was zoned "for business purposes" when in fact the use thereof for business purposes was not permitted by the zoning ordinance.

A stipulation filed in this Court shows the parties waived trial by jury and agreed that the cause, as to both facts and law, be tried by the court.

Plaintiff's evidence consists of the adverse examination of defendant, and of the testimony of plaintiff. Defendant's evidence consists of the testimony of Mrs. Sarah C. Cooper, who, as agent of plaintiff, conducted the negotiations leading up to defendant's execution of said contract.

The court made findings of fact in substance, except where quoted, as follows: "(I)t was the intention of the plaintiff's agent to sell land to the defendant which was zoned for business." It was "the defendant's intention to only purchase land zoned for business." The subject land "was in fact not zoned for business." The contract was entered into by defendant as a result of the misrepresentation made by plaintiff's agent to the effect the property was zoned for business and defendant's acceptance and reliance upon such representation.

Upon said findings of fact, the court entered judgment providing that plaintiff recover nothing of defendant; that defendant is discharged from liability to plaintiff on account of matters alleged in the complaint; that the contract between plaintiff and defendant is rescinded; and that defendant recover of the plaintiff her costs.

The record shows the judgment is dated July 15, 1966, and was filed November 10, 1966. On November 18, 1966, plaintiff excepted thereto and notice of appeal therefrom was waived. Appeal entries signed and filed on November 21, 1966, set forth that plaintiff "objects to the findings of fact in the judgment entered in the cause on November 10, 1966, and . . . requests that said findings of fact be stricken on the grounds that they are not supported by the evidence," and objects "(t)o the signing and entry" of said judgment.

John E. McDonald, Jr., for plaintiff appellant.
Hedrick, McKnight & Parham for defendant appellee.

BOBBITT, J. The only question presented by plaintiff's exception to the judgment is whether error of law appears on the face of

the record proper. 1 Strong, N. C. Index, Appeal and Error § 21. Since the court's factual findings with reference to mutual mistake support the judgment, this exception is without merit.

Plaintiff's remaining exceptions consist of the objections set forth in the appeal entries to the effect that the findings of fact are not supported by the evidence. Upon waiver of jury trial, the court's findings of fact, if supported by competent evidence, have the force and effect of a verdict. *Insurance Co. v. Lambeth,* 250 N.C. 1, 108 S.E. 2d 36; *Priddy v. Lumber Co.,* 258 N.C. 653, 129 S.E. 2d 256.

"An exception that the evidence is insufficient to support the findings of the trial court, without exception to a particular finding, is . . . broadside and ineffectual." 1 Strong, N. C. Index, Appeal and Error § 22. While this deficiency in plaintiff's exceptions is sufficient ground for dismissal thereof, we have elected to consider whether the evidence is sufficient to support the court's factual findings.

At the trial before Judge Hasty, no objection to the admission of evidence was interposed by plaintiff. Indeed, the adverse examination of defendant, whose testimony as to Mrs. Cooper's representations and her reliance thereon strongly supports the court's factual findings, was offered in evidence by plaintiff.

The writing (Exhibit A) consists of an offer addressed by defendant to Florida Realty Company "as agent." A condition thereof is that "the owners" be able to convey a good and marketable title, and that the property be "free and clear of all encumbrances except: zoning, restrictive covenants, easements of record and utility rights of way, if any"; etc. The quoted excerpts are printed portions of a form used by Florida Realty Company. The signature of plaintiff appears below that of defendant and after the word "Accepted." Plaintiff's name does not appear in the body of the contract. Appended to said contract is a receipt issued October 7, 1965, signed in the name of Florida Realty Company by Sarah C. Cooper, acknowledging the payment by defendant of the sum of $100.00 as a deposit and part payment on the purchase price of the property. To the left and below Mrs. Cooper's signature on said receipt these words appear: "Bill C. McKeon, Co-operating broker."

Plaintiff testified the offer signed by defendant was brought to him by McKeon; that he read it and signed it; that the subject of zoning was not mentioned; that he did not know defendant and had no direct dealings with her; that both Mrs. Cooper and McKeon were employees of Florida Realty Company; and that he had signed an agreement to pay each of these real estate agents one thousand dollars as commission for the sale of the property.

There is evidence that McKeon drafted the contract (filled in

the blanks) and obtained defendant's signature thereto; that plaintiff knew the property was not zoned for business; that he thought the property was zoned O-6; that in fact it was zoned R-9MF (multiple family) and was being used for an office building in violation of the applicable zoning restriction; that the building was separated by a parking lot from property zoned for business and being used for business purposes by "a Burger King"; and that the fair market value of the subject property, if it were zoned for business, would be substantially more than its fair market value when zoned R-9MF. (Note: It is stated in the case on appeal that plaintiff later sold the subject property for $14,388.58.)

There was ample evidence to support Judge Hasty's factual findings that defendant's sole interest in the subject property was for use by her for a retail store and that defendant so advised Mrs. Cooper; that defendant was induced to sign the writing by Mrs. Cooper's representation that the property was in a zone where use thereof for a retail store was permitted; and that both Mrs. Cooper and defendant acted pursuant to their mistaken belief that this representation was true when in fact it was false.

Under "Assignments of Error," plaintiff contends (1) "there was nothing to indicate that the real estate agent had any authority beyond the normal restrictive powers of a real estate agent," and (2) "the written contract clearly showed that the zoning was not guaranteed by the seller and was not a condition of the contract." It is well established that "(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; *King v. Snyder,* 269 N.C. 148, 151, 152 S.E. 2d 92, 94. Apart from this procedural deficiency, we find no merit in these contentions.

Plaintiff's testimony establishes clearly that he had appointed McKeon and Mrs. Cooper as his agents to sell the subject property, and that the negotiations with defendant were conducted on behalf of plaintiff by Mrs. Cooper. Nothing in the offer signed by defendant indicates any restriction upon Mrs. Cooper's authority as agent for the seller. Nor does plaintiff's testimony indicate that he attempted to place any restriction upon her authority to act for him.

All statements and declarations "made by the agent within the scope of his employment and with the actual or apparent authority of the principal are binding upon the principal and he is responsible therefor. A principal cannot repudiate statements made by his agent in the course of the employment, and fairly within the line of his real or apparent authority, and he is bound by the agent's material representations of fact to the same extent as if he had

made them himself." 3 Am. Jur. 2d, Agency § 264. As to the applicability of this rule to real estate agents, see Restatement (Second) of Agency § 258, comment b (1958). Whether unauthorized representations made by Mrs. Cooper could be enforced *against* plaintiff is not presented. In the present factual situation, it would be unconscionable to allow plaintiff to profit by defendant's reasonable reliance upon the unintentional false representations made by his agent in her negotiations in his behalf with defendant.

Plaintiff contends an oral agreement in conflict with the writing should be disregarded. This contention is based on a misconception of defendant's position.

"The parol evidence rule presupposes the existence of a legally effective written instrument. It does not in any way preclude a showing of facts which would render the writing inoperative or unenforceable. Thus it may be proved that . . . there was such mistake as to prevent the formation of a contract or make it subject to reformation or rescission." Stansbury, N. C. Evidence (Second Edition), § 257. "(P)arol evidence is admissible to show a mutual mistake as to the existence of the subject matter of an agreement which prevents the formation of a contract." 17 Am. Jur. 2d, Contracts § 144, p. 492.

Defendant does not seek to contradict the writing or to enforce a parol agreement. She contends that, since both Mrs. Cooper and defendant negotiated and acted in the honest but mistaken belief the subject property was in fact zoned for business, no contract, either written or oral, resulted; and that, there being no agreement, she is not obligated to purchase property which cannot be used for a retail store.

"The formation of a binding contract may be affected by a mistake. Thus, a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. Furthermore, a defense may be asserted when there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem*. Generally speaking, however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the *sine qua non*, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties." 17 Am. Jur. 2d, Contracts § 143.

In our opinion, and we so hold, whether the subject property

was within the boundaries of an area zoned for business is a factual matter; and, under the evidence, the mutual mistake as to this fact related to the essence of the agreement.

We have considered *Josefowicz v. Porter,* 32 N.J. Super. 585, 108 A. 2d 865, a decision cited and relied upon by plaintiff. The decision is factually distinguishable, and no allegations or evidence as to misrepresentations or mutual mistake were involved.

The conclusion reached is that the evidence fully supports Judge Hasty's findings and judgment. For the reasons stated, the judgment of the court below is affirmed.

Affirmed.

EMMA KIDWELL TAMBOLES v. SALVATORE P. ANTONELLI.

(Filed 12 April, 1967.)

Automobiles § 44— Evidence held insufficient to raise issue of contributory negligence in following too closely and stopping without signal.

Defendant's evidence was to the effect that the car he was following suddenly stopped without warning, that he unavoidably collided with the rear of this car and knocked it into the rear of plaintiff's car. Defendant alleged plaintiff was following too closely the vehicle in front of her and that plaintiff suddenly reduced speed and attempted to stop without first seeing that such movement could be made in safety and without giving the statutory signal, but defendant's testimony was to the effect that the allegations of contributory negligence were predicated upon mere assumptions, since defendant could not see plaintiff's car because of the intervening vehicle. *Held:* The evidence is insufficient to raise the issue of contributory negligence and the court committed error in submitting such issue.

APPEAL by plaintiff from *Cohoon, J.,* October 17, 1966 Civil Session, NASH Superior Court.

The plaintiff, Emma Kidwell Tamboles, instituted this civil action against Salvatore P. Antonelli for personal injuries resulting from a rear end automobile collision. The allegations in her complaint, briefly summarized, disclosed the following: On July 6, 1964, about 11:30 a.m., she was driving a 1961 Corvair south on U. S. Highway #301, near Rocky Mount. The highway at the time was 24 feet wide with a dividing line down the middle separating the two traffic lanes. The west lane was for southbound traffic and the east lane for northbound traffic. The motor vehicle traffic south was

heavy, moving in a single line about 40 miles per hour. The plaintiff testified:

> "I was going south on 301 when all of a sudden a car in front of me stopped without a signal or warning. I was compelled to put on my brakes to avoid hitting the car. In doing so, another car crashed behind me, which threw me against the steering wheel. . . . The car ahead of me was five or six car lengths from the front of my car when I stopped. After I stopped, not very far. It was just about a yard. I almost hit him.
>
> * * *
>
> It was almost immediately after I stopped when I felt this blow in the rear. . . ."

The plaintiff's evidence further disclosed that a 1964 model Chevrolet, driven by Mrs. Ellen, struck the rear of plaintiff's Corvair. Mrs. Ellen had seen the plaintiff's brake light flash and immediately jammed her brakes. However, she saw she had more time and distance than first appeared; consequently, she released them and applied the brakes more gently and stopped a few feet behind the plaintiff's Corvair. She was immediately hit from behind by the defendant's Mercury, and her vehicle was driven into the rear of the plaintiff's Corvair. The plaintiff introduced medical and other evidence of her injuries resulting from the collision.

The defendant, by answer, denied all allegations of his negligence and pleaded contributory negligence as a bar to the plaintiff's right to recover. Because of its importance on the appeal, the full text of the plea of contributory negligence is here quoted:

> "AND AS A FURTHER ANSWER AND DEFENSE, THE DEFENDANT SAYS:
>
> The defendant was following in a line of traffic on Monday, July 6, 1964, and sometime around 11:30 to 12:00 o'clock in the morning, was traveling south on U. S. Highway No. 301, just north of Rocky Mount. At this place, the highway was two-laned, one lane for northbound traffic and the other lane for southbound traffic. The posted speed limit was 45 miles an hour, but these cars were traveling through the open countryside. The car in front of defendant was observed to reduce speed, and the defendant likewise reduced his speed. The car ahead then resumed its normal speed, as did the defendant. Suddenly and without any warning whatsoever, the car in front of the defendant slammed on brakes, and before the defendant could stop, he had run into the forward car (the forward car being driven by a Mrs. Ellen).

If the defendant was negligent upon the occasion of this accident, which is denied, but if the defendant was negligent, then the plaintiff herself was careless and negligent in that:

She was following too closely the vehicle in front of her;

She abruptly reduced speed and attempted to stop, without first seeing that such movement could be made in safety;

On abruptly reducing speed and attempting to stop, she failed to give a signal of her intention to stop, plainly visible to the drivers of vehicles following her;

She failed to keep a careful lookout, and to keep her car under the control that was required by the existing traffic conditions.

This conduct on the part of the plaintiff was one of the contributing causes of this accident, and such contributory negligence is expressly pleaded as a bar to plaintiff's right to recover herein."

The defendant, Mr. Antonelli, testified: "This is how the accident happened: . . . (W)ithout warning the car in front of me, her taillight come on, a screech of brakes, I hollered to my wife, 'Look out,' I hit my brakes and all of a sudden it was bang-bang. . . . There were skid marks under Mrs. Ellen's car, and skid marks also under my car." These marks in each instance were 3 to 5 feet long.

On cross examination the defendant, with reference to his plea in bar, said: "I read the paragraph before I signed it. I stated Mrs. Tamboles was careless and negligent and that she was following too closely the vehicle in front of her, because I assume that's why she had to make a sudden stop. . . . At the time I signed the Answer, I assumed, . . . she had to have a sudden stop. . . . (S)o I assumed she did not signal . . . I could not see where she was, whether she could or could not . . . there was a car between. I know this car is in front of me but whether they were able to signal all the way back I don't know."

At the conclusion of the evidence the plaintiff tendered issues of defendant's negligence and plaintiff's damage. The Court refused to submit the plaintiff's issues, and over plaintiff's objection submitted three issues: (1) defendant's negligence, (2) plaintiff's contributory negligence, and (3) damages. The jury returned affirmative answers to the issues of negligence and contributory negligence. From the judgment dismissing the action, the plaintiff appealed, assigning the errors.

Don Evans, for plaintiff appellant.

Battle, Winslow, Scott & Wiley by J. B. Scott and Samuel S. Woodley, Jr., for defendant appellee.

HIGGINS, J. The only serious controversy arising on this appeal involves the plea of contributory negligence. The plea in its entirety is quoted in the preliminary statement. The first paragraph sets forth the ultimate facts "the car in front of defendant was observed to reduce speed and the defendant likewise reduced his speed. The car ahead then resumed normal speed, as did the defendant. Suddenly and without any warning whatsoever the car in front of the defendant slammed on brakes and before the defendant could stop, he had run into the forward car (the forward car being driven by Mrs. Ellen)." In these factual allegations there is not a single reference to any act or failure to act on the part of the plaintiff. The facts alleged refer only to the defendant and to Mrs. Ellen, who is not a party to the action.

After the factual recitals above quoted, the defendant set forth further allegations: (1) plaintiff was following too closely; (2) she abruptly reduced speed without first seeing if the move could be made in safety; (3) she failed to give a plainly visible signal of her intention to stop; and (4) she failed to keep a careful lookout and her car under control. If we assume the above numbered parts of the plea are allegations of fact, nevertheless the plea is without any support in the evidence. For that reason, it was error to submit the issue to the jury. *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785; *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326.

The defendant admitted his allegations of plaintiff's contributory negligence were based, not on his knowledge, but on his suppositions. He admitted the Ellen Chevrolet was between him and the plaintiff's Corvair, and that he did not see or observe the movement of her vehicle and did not know of her failure to act properly in its operation. The defendant's wife, who was his only witness, testified: "I was not really paying attention to anything. He just said 'watch out' and I tightened up my arm on the seat and when I turned around we were hit." All other witnesses testified for the plaintiff. Their evidence was insufficient to permit a finding of any negligent acts or omissions on her part. Contributory negligence (if properly alleged) is not supported by evidence and hence fails as a defense. *Boykin v. Bennett*, 253 N.C. 725, 118 S.E. 2d 12; *Skipper v. Cheatham*, 249 N.C. 706, 107 S.E. 2d 625.

The Court committed error in submitting the issue of contributory negligence. We need not consider the plaintiff's assignment of

error as to the charge on that issue since it was not properly before the jury. By reason of the Court's error in submitting the issue of contributory negligence, the plaintiff is entitled to and is awarded a New trial.

STATE OF NORTH CAROLINA v. BOBBY JR. WHITE.

(Filed 12 April, 1967.)

1. Assault and Battery § 14—

Evidence tending to show that defendant committed an apparently unprovoked assault upon the prosecuting witness, using a knife some seven inches long, inflicting wounds about the head, face and neck, one of which extended from the back of the neck to the point of his chin and was some one-half inch deep at places, *is held* sufficient to show that the knife was a deadly weapon, notwithstanding the absence of evidence of the length of the blade, and to show that the knife was used with intent to kill, and that defendant inflicted serious injury not resulting in death, G.S. 14-32, and nonsuit of the felony charge was properly denied.

2. Criminal Law § 86—

A defendant who is a prisoner and against whom a detainer had been filed requesting that he be held to answer the pending charge is entitled under the provisions of G.S. 15-10.2, to trial within eight months after he has sent written notice to the solicitor of the place of his confinement and request for final disposition of the criminal charge, but defendant may not claim the benefit of this statute when defendant gives notice to the clerk of the Superior Court and not to the solicitor, and the solicitor receives no notice of defendant's request.

APPEAL by defendant from *Martin, S.J.*, January 1967 Session, WATAUGA Superior Court.

The defendant, Bobby Jr. White, was indicted by the Watauga County Grand Jury at the January 1965 Term. The bill of indictment charged that on September 19, 1964 the defendant committed a felonious assault on Joe Bost with a deadly weapon, to wit, a knife, with intent to kill, inflicting serious injury not resulting in death.

Upon a showing of indigency, the Court appointed Mr. J. E. Holshouser, Sr. to represent the defendant.

The Court records show this case was continued until the January 1967 Session, when it was tried. The evidence disclosed that during a dance at the Ski Lodge, the defendant struck the prosecuting witness, Joe Bost, with metallic knucks, knocking him down.

The defendant followed up his apparently unprovoked attack by assaulting Bost with a knife, described by a witness as 7 inches long. The defendant ran from the scene. The knife wounds were about the head, face and neck. Some of the wounds were ½ inch deep. The injuries required hospitalization and 64 stitches to close the wounds.

The jury returned a verdict of guilty as charged. The Court imposed a prison sentence of 7 years, to begin at the expiration of a sentence of 10 years for housebreaking imposed by Judge Gambill at the September 1965 Session of Rowan Superior Court. The defendant excepted and appealed.

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

J. E. Holshouser, Sr., for defendant appellant.

HIGGINS, J. The defendant has raised a number of objections to the trial. For example, he contends the knife with which the cutting wounds were inflicted was not shown to be a deadly weapon; and the evidence was insufficient to show intent to kill. The evidence disclosed the knife was 7 inches long. While the blade length is not given, one of the wounds extended from the back of the neck to the point of the chin. It was ½ inch deep at places. This wound was of sufficient depth, seriously to have endangered the victim's life. The evidence was sufficient to support the finding the knife was a deadly weapon. Likewise, the evidence was sufficient to support the finding the defendant used it with intent to kill and that he inflicted serious injuries not resulting in death. Motion for nonsuit of the felony charge was properly denied. G.S. 14-32; *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1.

Counsel for defendant, realizing his objections to the trial are technical and not too impressive, urgently insists, however, that the defendant is entitled to his release because of failure of the State to bring him ". . . to trial within eight (8) months after he shall have caused to be sent to the solicitor of the court in which said criminal charge is pending, by registered mail, written notice of his place of confinement and request for final disposition of the criminal charge against him, . . ." as provided in G.S. 15-10.2.

The defendant offered evidence tending to show, and the Court found, that after the bill of indictment was returned the Court caused to be filed with the prison authorities a detainer requesting the defendant, then a prisoner, be held to answer the charge then pending in Watauga County. On January 8, 1966 the defendant wrote to the Clerk of the Superior Court of Watauga County requesting

he be returned to that county for trial as provided in G.S. 15-10.2. The Court's Finding of Fact No. 7 is here quoted:

> "That defendant has never sent to the Solicitor of this District, by registered mail, a written notice, pursuant to G.S. 15-10.2; and never had sent a certificate from the Director or Prisons to the Solicitor of this District, pursuant to G.S. 15-10.2."

The primary purpose of G.S. 15-10.2 is to provide a prisoner with a means by which he may require the State to try all the criminal charges against him to the end that he and the authorities may know the full extent of his debt to society for his criminal activities; and that he may plan for his release when the debt has been satisfied. The presence of a detainer in his prison files jeopardizes his chances for parole, for proper good behavior credits, and for work release.

The defendant did not follow the requirement of the statute by making his demand upon the Solicitor by registered letter. The Solicitor lived in a distant county. He did not receive the notice. A registered letter is required to the end that the situation here described may be avoided.

The record does not warrant interference with the verdict and judgment.

No error.

C. A. PENNINGTON v. WARREN L. STYRON, T/A MOREHEAD CITY YACHT BASIN.

(Filed 12 April, 1967.)

1. Boating; Bailment § 1—

An agreement under which one party stores the boat of another and looks after it during the winter creates a bailment.

2. Boating; Bailment § 3—

A party keeping and looking after a boat during the winter months under agreement with the owner is not an insurer but is liable for injury to the chattel as a result of ordinary negligence; but the fact that he does not return the boat to the owner at the end of the term or returns it in damaged condition makes out a *prima facie* case of actionable negligence.

3. Bailment § 3—

If the bailee agrees to store the chattel in a definite place and breaches the agreement by moving the chattel to some other place, the bailee

assumes absolute liability for damage to the chattel occurring at the place he removed it, irrespective of the question of negligence.

4. Same; Boating—

The evidence tended to show that plaintiff left his boat with defendant under an agreement that defendant would keep it and look after it during the winter months. There was conflicting evidence as to whether defendant had the right under the agreement to remove the boat from one of defendant's slips to another, and the evidence disclosed damage to the boat while it was in a slip to which defendant had removed it. *Held:* The bailee was absolutely liable, regardless of negligence, if the removal of the boat was in breach of contract, and an instruction making defendant's liability in such instance dependent on negligence to any degree, must be held for error.

5. Customs and Usages—

In order for evidence of a custom to be admissible in evidence, the party relying on the custom must show that the other party had actual knowledge of the custom or that the custom was so general that the other party is presumed to have had knowledge of it.

APPEAL by defendant from *Mintz, J.*, at October 1966 Civil Term, of CARTERET Superior Court.

The plaintiff C. A. Pennington was the owner of a 34-foot yacht called the "Bob Cat." During the winter of 1964-65 he used the facilities of defendant Styron to store his yacht, it being the duty of the defendant to keep it tied up, pump rain water out of it, and generally to protect it during the winter. During that winter the defendant moved the yacht from one slip to another as the demands of his business required. Some slips would accommodate larger boats than others, and some had covers or roofs over them, while others were open.

About the first of October, 1965, the plaintiff again took his boat to the defendant's yacht basin and it was placed in an open slip which he said he had rented, with the lines exposed for tying up the boat. It was identified by a little tag with plaintiff's name on it. The plaintiff left Morehead City about 4 October, telling the defendant he was not finally storing the boat for the winter, but expected to come back to do some Fall fishing. Within a day or so a yacht came to the defendant's basin which was too large to be berthed in a covered slip, and the defendant then moved the plaintiff's yacht into a covered slip so as to leave the open berth available for the larger boat.

On 7 October, 1965, a heavy rain, accompanied by high gusts of wind, caused the cover of the slip to which plaintiff's boat had been moved to fall in, doing substantial damage to the boat.

The plaintiff offered evidence tending to show that the roof

over the slip had a considerable "swag"; that the roof was in a straight plane; it had a sway similar to the curvature of a rocking chair rocker * * * "For several days after it rained the wind would continue blowing water off the roof. The swaying condition ran the full depth and the full length of the trusses. At least two of the trusses that ran fore and aft of the building did have a 'swag'. Several days after we had a rain the water that would run off the roof would keep running off the roof like it was still raining * * * it would come down in quite a sheet when a gust of wind would come along. Mr. Styron pointed out to me (the plaintiff) where the area collapsed * * * and he told me my boat was under the very spot where the roof caved in * * * part of the roof was still hanging down in the area in the place where my boat was. I noticed that the center piling had sunk about 3 feet and that was evidently the place it broke in two that was on the boat * * * (The piling) that I stated had settled was definitely a roof support. It had settled approximately 3 feet in the very center of the place where it had collapsed. Mr. Styron told me the water could not get off the roof and it did not stand the weight, and that is what collapsed the building."

On cross-examination he said: "The BOB CAT stayed under the covered shed of Morehead City Yacht Basin practically all of the winter preceding the collapse of the shed. It stayed there at my request. When it stayed under the shed during the preceding winter, I did not pay any more rental than I would have paid had the vessel stayed out in the open dock. I had had to beg Mr. Styron for several months to get permission to put it under this shed and he left the boat under the shed as a favor to me. I told him I wanted to put it in the shed because I wanted to work on it, and he did not charge any extra price and allowed me to put it under the shed."

The defendant's evidence was to the effect that a marine contractor had gone to the defendant's place of business and replaced pilings as they were needed * * * when they became worn for the last several years * * * that Mr. Styron had the contractor in about every year or two to inspect the piling and determine which ones should be replaced, and authorized him to go ahead and replace them.

The defendant testified: "I have never agreed with Mr. Pennington or anyone else to maintain the same slip for the boats. There was a name on the slip by Mr. Pennington's boat which I put there. It was a little plastic tag a couple of inches long. The main purpose for that is that on a weekend we have boats out fishing, and we might have 15 boats out and we have people coming from New

Bern and Washington, and we try not to use somebody else's slip when they are out fishing because some slips are available, and sometimes we have boats at Cape Lookout that won't be in that night, and then I use the man's slip as he is not there, taking it for my own benefit. * * * Practically every boat on the dock has been in practically every slip on the dock."

The plaintiff sued to recover for damages to his boat and the jury answered the issues as follows:

"1. Was the plaintiff's boat, the BOB CAT, damaged by the negligence of the defendant as alleged in the complaint?
A: Yes.
"2. If so, how much damage is the plaintiff entitled to recover? A: $1,500.00."

Judgment was signed upon the verdict, and the defendant appealed.

George H. McNeill for plaintiff appellee.
Wheatly & Bennett for defendant appellant.

PLESS, J. The plaintiff and the defendant agree that the plaintiff stored his boat with the defendant, and that the defendant was to keep it tied up, pump the rain water out of it, and generally to protect it during the winter. This arrangement created the relation of bailor and bailee between plaintiff and defendant. *Nothing else appearing,* the contract did not constitute defendant an insurer of the safety of plaintiff's boat. The relationship merely imposed upon defendant the duty to exercise ordinary care to protect plaintiff's boat against loss, damage, or destruction, and to return it in as good condition as when he received it. Liability for any damage to the boat while in defendant's possession would depend upon the presence or absence of ordinary negligence on the part of defendant. *Electric Corp. v. Aero Co.,* 263 N.C. 437, 139 S.E. 2d 682.

"A *prima facie* case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition." *Insurance Co. v. Motors, Inc.,* 240 N.C. 183, 185, 81 S.E. 2d 416, 418.

There was a definite conflict in the pleadings and evidence of the parties as to the conditions under which the plaintiff left his

yacht with the defendants, and as to the circumstances under which the boat was moved from an open slip to a covered one where it was damaged. The plaintiff had alleged that he left the BOB CAT under the defendant's exclusive care and control as a bailee for hire, and the defendant had denied it. The plaintiff testified that he had not given consent to the defendant to move the boat and did not know it was over there until the defendant called him and told him the shed had fallen in. However, the evidence of the defendant is to the contrary, as set forth in the statement of facts.

If the jury should find there was either an express or implied understanding between plaintiff and defendant that plaintiff's boat could be moved from one slip to another at defendant's convenience, defendant's duty remained one of ordinary care, and he would be liable only for failure to exercise such care. If, however, it should find that defendant had agreed to keep plaintiff's boat in a particular place, that is, in the slip in which plaintiff had left it, and that defendant had no authority to move the boat, defendant would be liable for the damage to it irrespective of negligence.

> "It is generally held that if the bailee, without authority, deviates from the contract as to the place of storage or keeping of the property, and a loss occurs which would not have occurred had the property been stored or kept in the place agreed upon, he is liable, even though he is not negligent. This rule regards the bailee as assuming, by his breach of contract, the risk of any injury which would not have resulted had he not committed such breach, even though the place to which he moves the goods is equally safe and proper for the purpose. Where his contract is to keep the property in a particular place, the bailee's liability has been held to be the same notwithstanding he was compelled by force of circumstances to place it elsewhere and in so doing was not guilty of any negligence. In such a case the view has been taken that it is the bailee's duty to notify the bailor and to obtain his consent to the change if he is to avoid liability." 8 Am. Jur. 2d, Bailments § 191.

An unauthorized deviation would therefore make the defendant's liability absolute, and the plaintiff would not be required to prove negligence of any type or degree.

Under the bailor-bailee theory ordinary negligence is the test. We therefore hold that the following excerpts from the charge were not applicable and were likely to be confusing to the jury, which entitles the defendant to a new trial.

In the charge the court said: "The defendant obligated himself when he moved the boat to a greater degree of care than he would have in compliance with the original contract, that is, keeping the boat in the open * * * he put himself in the position of a bailee for his own benefit * * * thus *slight negligence* (emphasis ours) on his part could not relieve him of liability, or, to put it in other words: from the time he moved the boat he was required to use *extraordinary care* (emphasis ours) to see that the subject of the bailment was not damaged."

The defendant sought to show his custom of moving the boats from one slip to another, but the court properly excluded this evidence since no foundation had been laid for it. To be admissible in evidence "a custom must be shown to have been so general that a contracting party will be presumed to have had knowledge of it, in order to make it a part of the contract, in the absence of evidence that he had actual knowledge of it." 8 Am. Jur. 2d, Bailments § 126 (1963). A fuller discussion will be found in *Oil Co. v. Burney,* 174 N.C. 382, 387, 93 S.E. 912.

New trial.

GEORGE E. LAMICA AND WIFE, LOUISE W. LAMICA, ANTHONY J. VUCIC AND WIFE, JULIA M. VUCIC, VIRGINIA W. DIXON, WIDOW, J. F. HOWARD AND WIFE, RUBY HOWARD, DONALD E. WALKER AND WIFE, SYLVIA D. WALKER, VINCENT J. LINDENSCHMIDT AND WIFE, LILLIAN D. LINDENSCHMIDT, C. H. McKEITHAN AND WIFE, KATHLEEN M. McKEITHAN, v. JOHN HENRY GERDES, JR.

(Filed 12 April, 1967.)

1. Deeds § 19—

Since encroachments of businesses and changes in condition outside the development are irrelevant to the question of the validity and enforceability of restrictive covenants within the development, allegations of encroachments outside the area are properly stricken on motion.

2. Same—

Building restrictions are in derogation of the fee and are to be strictly construed, but such restrictions are not impolitic and may be enforced when reasonable and incidental to the enjoyment of the estate conveyed, are not contrary to public policy or in restraint of trade, and do not tend to create a monopoly.

3. Same—

Whether restrictive covenants are personal to the grantor or are a servitude on the land, enforceable by owners of property in the develop-

ment, is to be ascertained on the facts of each particular case in accordance with the intent of the grantor and grantee.

4. Same—

When the deed expressly provides that the restrictive covenants therein contained should run with the land and should be enforceable by any person owning or purchasing real estate situate within the development, the covenants are enforceable by the owners of the lots in the development as third party beneficiaries, irrespective of the existence of a general scheme of development, the intent of the parties that the covenants should be a servitude on the land being clear.

5. Same—

The presence of restrictive covenants in any deed constituting a link in a party's chain of title is notice to such party of the existence of such covenants, and the covenants are binding upon him even though the immediate deed to him does not contain the restrictions; therefore, where the developer sells a lot subject to restrictions and thereafter the lot is reconveyed to him, and, in turn, is conveyed by him by deed not containing the covenants, the land remains subject to the covenants.

BOBBITT, J., dissents.

APPEAL by defendant from *Parker, J.*, 16 January 1967 Civil Session of NEW HANOVER.

Civil action by plaintiffs to obtain a permanent injunction to prevent defendant from building a dental and medical building on Lot 18 of Sherwood Forest subdivision in New Hanover County.

Richard A. Shew developed a subdivision in Wilmington known as Sherwood Forest, and sold lots within the subdivision. By deed recorded in Book 678, at page 481, Registry of New Hanover County, Shew and his wife conveyed Lot 18 within the subdivision to Hilda G. Stanley as trustee for Ethel S. Wrublewski. The deed was the usual warranty deed, and contained the following pertinent restrictions:

"1. All lots to be used for residential purpose and not to be used for commercial purposes, and no dwelling shall be erected on any lot other than one detached single family dwelling, not to exceed two and a half stories in height and a one or two car garage."

"7. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them until January 1, 1981, at which time said covenants shall be automatically extended for successive periods of ten years, unless by vote of the majority of the then owners of the lots it is agreed to change the said covenants in whole or in part.

"8. If said parties thereto, or any of them or their heirs and assigns, shall violate or attempt to violate any of the cov-

enants herein, it shall be lawful for any other person or person(s) owning any real property situate in said development or subdivision to prosecute any proceeding at law or in equity against the person or persons violating or attempting to violate any such covenant, and either to prevent him or them from so doing to recover damages or other dues for such violation."

Lot 18 was reconveyed to Shew by Hilda Stanley, Trustee, and the Wrublewskis by deed of record in Book 719, at page 392, Registry of New Hanover County, which deed contained the following provision:

"This conveyance is made subject to certain restrictive covenants as to the use of said property which said restrictions are contained in said deed recorded in Book 678 at page 481, reference to which is hereby made for a full and complete list of same, and which are herein incorporated by reference and made a part hereof."

Thereafter, Shew, by warranty deed, conveyed this same property to defendant. The only restriction contained or referred to in this deed was that building plans should first be submitted to and approved by the grantor, Shew.

The allegations and admissions in the pleadings disclose that all of the property in said subdivision was used solely for residential purposes. The developer had sold twenty lots and portions of two others, and one of the lots and a portion of another lot were sold unrestricted. Further, that developer retained the remaining unsold portions of the subdivision free of any restrictions.

Defendant began construction of a dental-medical building on Lot 18, at which time this action was brought by plaintiffs, all residents and owners of real property within the subdivision. Issues submitted to the jury were, in substance, whether developer conveyed Lot 18 in the subdivision by deed which was one of the links in defendant's chain of title and contained restrictions set out above, and as to whether plaintiffs owned real property situate in the subdivision. All issues were answered by the jury in favor of plaintiffs and judgment was entered thereon, from which defendant appeals.

Lloyd S. Elkins, Jr., for plaintiffs.
Marshall & Williams for defendant.

BRANCH, J. We find no merit in appellant's contention that the court erred in striking from his answer allegations as to changed

conditions and zoning. This Court has heretofore stated that, " 'It is generally held that the encroachments of business and changes due thereto, in order to undo the force and validity of the restrictions, must take place *within* the covenanted area.' " Also, " 'A valid restriction on the use of real property is neither nullified nor superseded by the adoption or enactment of a zoning ordinance, nor is the validity of the covenant thereby affected.' " (Emphasis ours) *Tull v. Doctors Building, Inc.*, 255 N.C. 23, 120 S.E. 2d 817.

Appellant's primary contention is that the restrictions are unenforceable by plaintiffs because there is no general plan or scheme of development and because the covenants are personal to the original developer. Without determining whether the instant facts show existence of a general plan or scheme of development within the subdivision, we are at the outset faced with the question whether plaintiffs need prove that such plan existed in order to enforce the restrictions imposed.

This Court has long held that restrictive covenants "are in derogation of the full and unfettered use of land" and are to be strictly construed. *Callaham v. Arenson*, 239 N.C. 619, 80 S.E. 2d 619. However, it has been repeatedly recognized in this jurisdiction that:

> "The courts have generally sustained covenants restricting the use of property where reasonable, not contrary to public policy, not in restraint of trade and not for the purpose of creating a *monopoly* — and building restrictions have never been regarded as impolitic. So long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated such restrictions are valid. Subject to these limitations the court will enforce its restrictions and prohibitions to the same extent that it would lend judicial sanction to any other valid contractual relationship." *Sheets v. Dillon*, 221 N.C. 426, 20 S.E. 2d 344.

The restrictions imposed in the instant case do not come within the above prohibitions and their validity is not otherwise questioned.

This case exemplifies a large number of situations wherein the grantor has conveyed property within a subdivision subject to restrictions, without imposing similar restrictions on property retained by him. This Court, in *Reed v. Elmore*, 246 N.C. 221, 98 S.E. 2d 360, recognized that in such cases it must be determined whether the grantor *intended* to create a negative easement benefiting all the property, or whether he imposed the restrictions for his personal benefit, and evidence regarding a uniform plan is admitted as an expression of the grantor's intentions. Considering restrictive covenants in the *Reed* case, the Court stated:

". . . Where the grantor has, by uniformity of the conditions imposed with respect to a given area, evidenced his intention to create mutual servitudes and benefits, the restrictions are held to be covenants running with the land. Where there is absence of uniform pattern, the intention is not established; hence, the covenants or restrictions or conditions are held to be personal to the grantor. . . . Uniformity of pattern with respect to a development furnishes evidence of the intent of the grantor to impose restrictions on all of the property and when the intent is ascertained it becomes binding on and enforceable by all immediate grantees as well as subsequent owners of any part of the property; *but the fact that there is an absence of uniformity in the deeds does not prevent the owner of one lot from enforcing rights expressly conferred upon him by his contract.* 'Contractual relations do not disappear as circumstances change.' . . . (Emphasis ours)

. . . . .

"Plaintiff, when he purchased, heeded the warnings of Justice Connor and caused to be inserted in the deed to him this provision: 'This restriction shall likewise apply to Lot No. 4, retained by the grantor, said Lot No. 4 being adjacent to lands hereby conveyed.' Note the restriction is not on the grantor. It is imposed on the land of grantor. It was a *creation of a servitude* on the land irrespective of ownership. *There is no need to search for grantor's intent. It is clearly and distinctly expressed.*" (Last emphasis ours)

The application of the principles of law enunciated by this Court regarding restrictive covenants is, of course, governed by the factual situation of the particular case. *Ingle v. Stubbins,* 240 N.C. 382, 82 S.E. 2d 388. Factually, the instant case differs from *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918, and other cases relied on by appellant, in that here it is expressly provided by deeds appearing in defendant's chain of title that the covenants are to run with the land, and the deed specifically gives the developer's grantees, the owners of lots in the subdivision, the right to enforce the covenants *inter se.*

Considering the effect of covenants in a purchaser's chain of title, the Court in *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661, said:

"Furthermore, covenants limiting the use of land may be enforced against a subsequent purchaser who takes title to the land with notice of the restrictions. *Davis v. Robinson,* 189 N. C. 589, 127 S.E. 697. The law contemplates that a purchaser of land will examine each recorded deed or other instrument in

his chain of title, and charges him with notice of every fact affecting his title which such an examination would disclose. In consequence, a purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed. *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Bailey v. Jackson, supra.*"

Whether covenants imposed on land by a grantor are a servitude on the land, enforcible by plaintiffs, or merely a personal obligation to developer, is answered by ascertaining the intention of the grantor and the grantee when the sale and purchase was consummated. Ordinarily this is done by interpreting the language which the parties chose to express that intention. If doubt exists as to the meaning of the language used, it is proper to consider the situation of the parties and the situation dealt with. *Reed v. Elmore, supra.* In the case of *Cejka v. Korn,* Mo. App., 127 S.W. 2d 786, the Court held:

". . . We have in mind that restrictive covenants in a deed to be enforceable by a third party must be shown to have been put on defendant's property for the benefit of the land owned by plaintiff, and in determining this question we must endeavor to arrive at the party's intention who originally created the restrictions. *Toothaker v. Pleasant,* 315 Mo. 1239, 288 S.W. 388; *Coughlin v. Barker,* 46 Mo. App. 54."

Here, there is no need to search for the grantor's intent. The developer clearly and distinctly expressed an intention to impose the restrictions on the land, and to allow any person or persons owning any real property situate in said development or subdivision to enforce the restrictions *inter se.* If there were any ambiguity in the language of the grantor as to whether the developer intended to impose restrictions for his personal benefit, it is dispelled by his outright grant to his grantees of the right to enforce the restrictions.

"*Sometimes restrictive covenants expressly provide that they may be enforceable by any owner of property in the tract. Where such is the case, the right of an owner to enforce the same is, of course, clear.* Similarly, where the agreement declares that the covenant runs with the land for the benefit of other lots or other owners, it may be so enforced." 20 Am. Jur., 2d, § 292, p. 857. (Emphasis ours).

The grantor expressly made the plaintiff and other owners of property in the subdivision third party beneficiaries of the con-

tractual provisions contained in conveyances in defendant's chain of title. "A third party may sue to enforce a valid contract made for his benefit even though he is a stranger to the contract and to the consideration, and it is not necessary that he be the sole beneficiary, provided the contract was entered into for his direct benefit and the benefit to him is not merely incidental to the agreement." Strong: N. C. Index, Vol. 1, Contracts, § 14, p. 586. See also *Pickelsimer v. Pickelsimer,* 255 N.C. 408, 121 S.E. 2d 586, and *Trust Co. v. Processing Co.,* 242 N.C. 370, 88 S.E. 2d 233.

It makes no difference in the instant case that the property was repurchased by the grantor before being sold to the defendant. In *Higdon v. Jaffa, supra,* all the original deeds contained the following provisions: "Nothing herein contained shall be held to impose any restrictions on or easements in any land of the Stephens Company not hereby conveyed." Considering this, the Court, *inter alia,* said:

> ". . . It (the developer) sold every lot in the subdivision subject to restrictive covenants limiting its use to residential purposes. In so doing, the Stephens Company rendered the stipulation in question wholly nugatory. It did not revive this clause by repurchasing Lots Nos. 1, 2, and 3 of Block 11-D. This is necessarily so because its re-acquirement of those lots was under chains of title subjecting them to the restrictive covenants. . . ."

Plaintiffs' action is not dependent on a general plan for the development of the property, but is based upon express covenants appearing in defendant's recorded chain of title which specifically grant to the plaintiffs the right to enforce the restrictions.

No error.

BOBBITT, J., dissents.

CAROLINA PLYWOOD DISTRIBUTORS, INC., v. DAVE MCANDREWS AND WAYNE EDWARD COURVILLE.

(Filed 12 April, 1967.)

1. Process § 15—

The statute providing for service of summons on a nonresident automobile owner by serving a copy on the Commissioner of Motor Vehicles and the forwarding of such copy to the nonresident by registered mail is

constitutional, but its provisions are in derogation of the common law, and G.S. 1-89 and G.S. 1-105 must be construed together and the provisions of both statutes strictly complied with.

2. Same—

The summons in this action commanded the sheriff to summon the Commissioner of Motor Vehicles as a process agent for named nonresidents, and a copy thereof was duly mailed by the Commissioner to the named nonresidents with return receipt requested. *Held:* The nonresidents were not summoned, and, in the absence of a general appearance by them, the summoning of the Commissioner of Motor Vehicles is of no avail. The question of amendment is not apposite since there was no error in identifying the person summoned.

APPEAL by plaintiff from *Cohoon, J.*, November 1966 Civil Session of WILSON.

Civil action growing out of a motor vehicle collision between plaintiff's tractor-trailer truck operated by plaintiff's employee, and a tractor-trailer truck owned by the defendant, Dave McAndrews, and being operated at the time by the defendant Wayne Edward Courville. The accident occurred on 26 November 1965 while plaintiff's truck was being operated in a westerly direction along U. S. Highway Interstate 85 in Orange County. Neither of the defendants reside in North Carolina, McAndrews having an address in Iowa, and Courville's address being unknown.

Summons dated 3 March 1966 was served on A. Pilston Godwin, Jr., Commissioner of Motor Vehicles for the State of North Carolina. The summons read, in pertinent part, as follows:

> "To the Sheriff of Wake County — GREETING:
> YOU ARE HEREBY COMMANDED TO SUMMON Commissioner of Motor Vehicles of the State of North Carolina, as Process agent for Wayne Edward Courville, Hotel Cascade, Cascade, Iowa, and Dave McAndrews, Bernard, Iowa, the defendants, above named, ..."

Pursuant to G.S. 1-105, the Commissioner forwarded the summons and copy of the complaint to the defendants by registered mail — return receipt requested. Thereafter, a return receipt, signed by McAndrews and dated 12 March 1966, was delivered to the Commissioner by postal authorities, showing delivery of the summons and complaint to McAndrews. The return receipt on the letter to Courville was returned to the Commissioner marked: "Unknown At Address." Thereafter, on 13 April 1966, plaintiff caused another summons to be issued. This summons was served on the Commissioner and was exactly like the previous one except that a new address was supplied for Courville. This summons and attached com-

plaint were forwarded by the Commissioner to Courville at his last known address. On 2 May 1966 the papers mailed to Courville were returned with the following notation: "Moved, Left No Address."

On 13 September 1966 plaintiff filed affidavit of compliance pursuant to G.S. 1-105, and upon its motion the Clerk of Superior Court of Wilson County entered judgment by default and inquiry.

On 8 November 1966 defendant filed a motion and specially appeared, praying that the judgment entered against them be set aside and declared null and void. Hearing was duly held before Cohoon, J., at the November 1966 Civil Session of Wilson. By order and judgment dated 22 December 1966 the court determined that no jurisdiction of the persons of defendants had been acquired, and thereupon set aside the judgment by default entered in this cause. Plaintiff appealed.

Lucas, Rand, Rose, Morris & Meyer, by Bobby F. Jones, for plaintiff.

Gardner, Connor & Lee for defendants.

BRANCH, J. The question presented for decision by this appeal is whether the court acquired jurisdiction of the persons of the defendants.

G.S. 1-105 provides that when a nonresident uses the public highways of this State, his acceptance of this privilege and right is deemed equivalent to his appointing the Commissioner of Motor Vehicles as his lawful attorney, upon whom summons may be served in actions against the nonresident growing out of his use of such roads. The statute further provides in pertinent part:

"Service of such process shall be made in the following manner:

> "(1) By leaving a copy thereof, with a fee of one dollar ($1.00), in the hands of the Commissioner of Motor Vehicles, or in his office. Such service, upon compliance with the other provisions of this section shall be sufficient service upon the said nonresident.
>
> "(2) Notice of such service of process and copy thereof must be forthwith sent by registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. . . . If the registered letter is not delivered to the defendant because it is unclaimed, or because he

has removed himself from his last known address and has left no forwarding address or is unknown at his last known address, service on the defendant shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles.

"(3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause."

The constitutionality of this statute was upheld in *Ashley v. Brown,* 198 N.C. 369, 151 S.E. 725; *Bigham v. Foor,* 201 N.C. 14, 158 S.E. 548; and *Davis v. Martini,* 233 N.C. 351, 64 S.E. 2d 1. The provisions thereof are in derogation of the common law and must be strictly complied with. *Propst v. Trucking Co.,* 223 N.C. 490, 27 S.E. 2d 152. It has been recognized by this Court that when the procedural requirements are strictly complied with, the process and pleading are subject to amendment in accordance with general rules. *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559.

Other courts recognize the necessity for strict compliance with the provisions of comparable statutes. The court in the case of *Harris v. Bates,* 364 Mo. 1023, 270 S.W. 2d 763, considering a similar statute, stated: "Actual notice, given in any manner other than that prescribed by statute cannot supply constitutional validity to the statute or to service under it." A similar statute providing for service on nonresident motorists was construed by the Delaware Court in the case of *Webb Packing Co. v. Harmon,* 39 Del. 22, 196 Atl. 158, and the Court held: "Due process of law, as applied to notice of proceedings resulting in judgment, means notice directed by the statute itself and not a voluntary or gratuitous notice resting in favor of discretion."

G.S. 1-105 provides a statutory and artificial method by which duly issued process may be served on nonresident motorists. It does not in any way change or amend the law governing the commencement of actions or the contents of a summons. It is elementary that all civil actions are commenced by the issuance of summons, except as provided by G.S. 1-98 and G.S. 1-104, and in cases of controversy without action or confession of judgment without action. G.S. 1-88. The issuance of a valid summons as provided in G.S. 1-89

was necessary for there to be compliance with the provisions of G.S. 1-105. Therefore, G.S. 1-89 and G.S. 1-105 must be construed together and the provisions of both strictly complied with.

G.S. 1-89 provides, *inter alia:*

> "Contents, return, seal. — The summons must run in the name of the State, be signed by the clerk or deputy clerks of the superior court having jurisdiction to try the action, and be directed to the sheriff or other proper officers of the county or counties in which the defendant or any of them reside or may be found. It must be returnable before the clerk *and must command the sheriff or other proper officer to summon the defendant, or defendants,* to appear and answer the complaint of the plaintiff within thirty (30) days after its service upon defendant, or defendants; . . ." (Emphasis ours)

The case of *Russell v. Manufacturing Co.,* 266 N.C. 531, 146 S.E. 2d 459, involved the validity of a judgment against Bea Staple Manufacturing Company, Inc., where the original summons commanded the sheriff "to summon Clayton Eddinger, Kearns Warehouse, 518 Hamilton Street, High Point, North Carolina, local agent for Bea Staple Manufacturing Company, Incorporated, defendant(s) above named." The Court held that such service did not constitute service of process upon Bea Staple Manufacturing Company, Incorporated, and stated through Parker, J., (now C.J.):

> "For a court to give a valid judgment against a defendant, it is essential that jurisdiction of the party has been obtained by the court in some way allowed by law. When a court has no authority to act, its acts are void. It appears from the face of the record proper that the court has obtained no jurisdiction over Bea Staple Manufacturing Company, Incorporated, because no service of summons has been had upon it, and the corporation has made no general appearance. It made only a special appearance for the purpose of a motion to vacate the judgment by default final entered on 9 April 1965. Consequently, the judgment by default final entered against Bea Staple Manufacturing Company, Incorporated, on 9 April 1965 is void and a pure nullity."

In reaching its decision in the *Russell* case the Court relied on *Plemmons v. Southern Improvement Co.,* 108 N.C. 614, 13 S.E. 188, as being directly in point, and quoted therefrom as follows:

> " 'The summons commanded the sheriff to summon "A. H. Bronson, President of the Southern Improvement Company,"

> and it was so served. This is legally a summons and service only upon A. H. Bronson individually. *Young v. Barden,* 90 N.C. 424. The superadded words "President of the Southern Improvement Company," were a mere *descriptio personæ,* as would be the words "Jr.," or "Sr.," or the addition of words identifying a party by the place of his residence, and the like.'

"The Court held that this did not make Southern Improvement Company a party to the case."

Jones v. Vanstory, 200 N.C. 582, 157 S.E. 867, holds that where individual directors of a corporation are served with summons as trustees, it is not effectual service on the corporation, but only on the individuals named.

Appellant relies on *Bailey v. McPherson, supra.* This case related to a summons issued against M. H. Winkler Manufacturing Company, Inc., Baton Rogue, Louisiana. The return receipt was signed by M. H. Winkler, and the evidence showed that he was the person who operated M. H. Winkler Manufacturing Company as the sole proprietor. The Court held that the trial court in its broad discretionary power could allow an amendment to correct a misnomer or mistake in the name of a party, *provided it does not amount to a substitution or change of parties. Bailey v. McPherson* is distinguishable from the instant case in that there the sheriff was commanded to summons the proper defendant and the description of the person was in error. In the instant case the sheriff was not commanded to summons the defendants at all. The summons commanded the sheriff to summons the Commissioner of Motor Vehicles of the State of North Carolina only.

Appellant also cites the case of *Sink v. Schafer,* 266 N.C. 347, 145 S.E. 2d 860, as one of the principal authorities sustaining its position. The Court in its opinion in that case unequivocally stated: "The Commissioner of Motor Vehicles mailed the process to Forrest J. Schafer, Jr., who seeks to quash the service upon the *sole ground* that the suffix, Jr., was omitted in the caption of the summons," (Emphasis ours), and held: "The suffix, Jr., is no part of a person's name. It is a mere *descriptio personæ.*" It is apparent that *Sink* was decided on the basis of immaterial variance in the name of the defendant, and that the question presented in the instant case was not considered. Neither was it considered in the other authorities cited by appellant.

Appellant further contends, and rightly so, that G.S. 1-105 authorizes service of summons upon the Commissioner of Motor Vehicles in certain cases. However, the summons must command the sheriff or other proper officer to summons the defendant or defend-

ants. Here the sheriff was not commanded to summons Dave McAndrews and Wayne Edward Courville. They did not make a general appearance, and summoning the Commissioner of Motor Vehicles was of no avail. Thus the court obtained no jurisdiction of the persons of defendants.

The judgment entered below is

Affirmed.

A. Y. MILLER v. LILLIAN VANDERBURT HENRY AND DAVID PATRICK HENRY.

(Filed 12 April, 1967.)

1. Automobiles § 33—

A pedestrian has the same rights and responsibilities as a motorist in regard to the right of way at an intersection controlled by automatic traffic signals.

2. Negligence § 21—

Defendant is not required to prove lack of negligence on his part, but the burden is on plaintiff to show affirmatively and by the greater weight of the evidence that defendant was negligent and that such negligence proximately caused the injury.

3. Automobiles § 41—

Plaintiff's evidence was to the effect that he attempted to cross a street at an intersection controlled by automatic traffic signals when the light was red for traffic along the street he was crossing. Defendant's evidence was to the effect that she drove into the intersection with the green traffic light when traffic along the street plaintiff was attempting to cross was in motion. *Held:* The conflicting evidence raises an issue for the jury, and in the absence of error in the trial, the verdict of the jury is final.

4. Trial § 38—

If a party desires fuller or more specific instructions on a particular aspect of the case he should make a special request therefor prior to verdict.

APPEAL by plaintiff from *Froneberger, J.*, at 21 November, 1966, "A" Civil Session of MECKLENBURG Superior Court.

This is a civil action in which plaintiff seeks to recover a money judgment for personal injuries allegedly sustained by reason of the negligence of the defendants.

The accident from which this action arose occurred at the intersection of the Plaza and 36th Street in the city of Charlotte, at approximately 12:30 P.M., on 4 June, 1964. The Plaza is a four-lane street running generally in a northerly and southerly direction,

and 36th Street runs in an easterly and westerly direction, and dead-ends at the western edge of the Plaza.

The plaintiff presented evidence tending to show that he undertook to cross on foot from the east side of the Plaza to the west side just north of the intersection at a time when the traffic signals were red for the traffic on the Plaza. Defendant was driving her family purpose automobile in a northerly direction on the inside lane of the Plaza, at a speed of 45 to 50 miles an hour. She ran the red light and struck the plaintiff with the front of her automobile while he was crossing her lane of traffic.

The defendant's evidence, however, tended to show she was traveling at a speed of 20 miles per hour; that as she approached the intersection of 36th Street with the Plaza she observed the traffic signal and it was green for her, and that traffic was moving in both directions along the Plaza. She proceeded through the intersection and just as she was about through it she felt a thud and discovered that plaintiff had hit her right rear fender. She introduced photographs showing that the damage to her automobile was to the right rear fender.

The jury answered the issue of negligence in favor of the defendant and the plaintiff appealed, assigning exceptions to the charge.

A. A. Bailey, Gary A. Davis for plaintiff appellant.
Carpenter, Webb & Golding for defendant appellees.

PLESS, J. The crucial question in this case was "Who had the green light?" In *Hyder v. Battery Co.*, 242 N.C. 553, 89 S.E. 2d 124, the Court went fully into the subject of traffic lights. "It is the duty of the driver of an automobile approaching a street intersection, when faced with a municipally maintained traffic signal showing red, to stop before entering. It is also true that if faced with a green light the driver is warranted in moving into the intersection, unless the circumstances are such as to indicate caution to one of reasonable prudence. 'A green traffic light permits travel to proceed and one who has a favorable light is relieved of some of the care which otherwise is placed on drivers at intersections, since the danger under such circumstances is less than if there were no signals. However, a green or "go" light or signal is not an absolute guarantee of a right to cross the intersection solely in reliance thereon without the necessity of making any observation and without any regard to traffic conditions at, or other persons or vehicles within, the intersection. A green or "go" signal is not a command to go, but a quali-

fied permission to proceed lawfully and carefully in the direction indicated. In other words, notwithstanding a favorable light, the fundamental obligation of using due and reasonable care applies. 60 C.J.S. 855.' 'The fact that the operator of a motor vehicle may have a green light facing him as he approaches and enters an intersection where traffic is regulated by automatic traffic control signals, does not relieve him of the legal duty to maintain a proper lookout, to keep his vehicle under reasonable control * * * *Cox v. Freight Lines, supra.*' The driver of an automobile is under no duty to anticipate negligence on the part of others in the absence of anything which should give notice to the contrary, and the law does not impose on a driver facing a green light the duty to anticipate that one approaching along the intersecting street facing a red light will fail to stop."

While the above deals with the operation of motor vehicles, a pedestrian has the same rights, or responsibilities as the case may be, as a driver.

Upon the conflicting evidence of the parties the case became one for the jury to determine.

The plaintiff, an aged man, testified that he started across the Plaza when the traffic light was red for the automobile traffic on the Plaza, and, necessarily, green for him. That the defendant, driving 45-50 miles per hour and ignoring the red light as she proceeded north on the Plaza, struck him with the front of her car and caused serious personal injuries.

The defendant's evidence was in direct contradiction. It tended to show that the traffic light was in her favor, and that as she traversed the intersection at 20 miles per hour she heard a thud at the rear of her car; that she had almost gotten through the intersection at the time in question and, in effect, the plaintiff had walked into the rear of her car. She introduced pictures in support of her evidence that showed a dent at the top of her rear fender. The plaintiff offered no evidence of damage to her car at any other place.

Both parties offered evidence in support of their respective positions, but the determination devolved upon what the jury found to be the truth of the matter under investigation. In such case the one with the burden of proof must discharge it. The defendant is not required to prove a lack of negligence — the plaintiff must affirmatively, and by the greater weight of the evidence, prove that the defendant was negligent and that it proximately caused him injury. "Neither negligence nor proximate cause is presumed from the mere fact of an accident and injury. Indeed, in the absence of evidence to the contrary it will be presumed that defendant exercised due care.

And the burden rests upon plaintiff to prove both negligence and proximate cause by the greater weight of the evidence." Strong's Index, Vol. 3, Negligence, Sec. 21.

The evidence and parts of the charge related to whether the plaintiff was attempting to cross the highway at a crosswalk. While we find no error in this regard the fact remains that whoever had the green light had the superior right to traverse the intersection and to assume that the other would recognize it and conduct himself accordingly. A pedestrian at a crosswalk acquires no additional rights against a red traffic light, nor is the motorist absolved solely because the pedestrian is not at a crosswalk.

The judge fully and correctly charged the jury upon negligence and proximate cause, dealing with the duty of the driver of a car to keep a proper lookout; keep the car under control; operate at a lawful rate of speed and one that is reasonable and prudent; to yield the right of way when faced with a red traffic light, and to exercise due care.

The plaintiff complains that the court did not deal with alleged reckless driving, but we consider that unnecessary under this evidence. The plaintiff apparently did, too, at the trial, for the record shows no request that it be included in the charge. "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; 53 S.E. 225.

The jury, upon seriously disputed contentions and evidence, found that the plaintiff had failed to substantiate his claims. We can find no real substance in the plaintiff's contentions, and hold that the trial was free from substantial error.

No error.

BRYANT B. AYSCUE, ADMINISTRATOR OF THE ESTATE OF FRANCIS LARRY AYSCUE, DECEASED, v. N. C. STATE HIGHWAY COMMISSION.

(Filed 12 April, 1967.)

1. Highways § 9—

The State Highway Commission can be sued in tort for negligent injury only insofar as that right is conferred by the State Tort Claims Act, and that Act permits recovery only for injuries resulting from negligent acts of identified employees of the Commission and does not authorize recovery for injuries resulting from negligent omissions to act.

2. Same— Evidence held insufficient to show act of negligence so as to support recovery under Tort Claims Act.

Plaintiff's evidence was to the effect that his intestate, driving a tractor, attempted to make a left turn from a paved highway onto the paved portion of the intersecting highway, that the intersecting highway was paved on one but not the other side of the intersection, that traffic had thrown and rains had washed dirt and gravel from the unpaved portion onto the paved intersection, and that the tractor skidded on the dirt and gravel and turned over, resulting in fatal injury to intestate. *Held:* The failure of the Highway employees to remove the dirt and gravel from the intersection was not a negligent act on the part of its employees but, at most, a negligent failure to act, and the denial of a claim under the Tort Claims Act was proper.

3. Same—

In a proceeding against the State Highway Commission under the Tort Claims Act it is required that the affidavit identify the employee of the Commission alleged to have committed the negligent act, and mere allegation that a named person was the Commission's road maintenance supervisor at the point of the accident, where the highway was allegedly defective, fails to meet this requirement.

APPEAL by plaintiff from *Johnson, J.*, at the December 1966 Civil Session of VANCE.

The plaintiff filed with the North Carolina Industrial Commission his claim for damages on account of the death of his intestate, Larry Ayscue, a boy 13 years of age. In his affidavit of claim he alleges that Larry was driving a farm tractor on Lynbank Road in Vance County, came to the intersection of that road with Watkins Township Road, attempted to turn left onto Watkins Township Road, and was killed when the tractor skidded upon an accumulation of gravel and loose stones upon the pavement in the intersection, turned over and fell upon him. The affidavit further alleges that the State Highway Commission "negligently maintained the intersection * * * in a dangerous and hazardous condition," and that this negligence was the proximate cause of the death.

The Highway Commission filed answer denying all of the material allegations of the affidavit of claim, and pleading contributory negligence both by the deceased boy and by his father, who, as executor, is the plaintiff in this proceeding.

It was stipulated that both roads, and the intersection thereof, were maintained by the defendant at the time of the accident and that the accident resulted in Larry's death, he being then 13 years of age. Evidence introduced by the plaintiff tended to show:

Larry was assisting his father in the work of operating the family farm and was driving the tractor in the course of that activity, it being a medium sized farm tractor with four wheels and being in

good operating condition. He had been driving such tractors for over three years and was a capable, careful driver.

On one side of the intersection the Watkins Township Road is paved. On the other side of the intersection it is not paved. The Lynbank Road is paved on both sides of the intersection and the intersection itself is paved. At the time of the accident, 75% of the intersection itself was substantially covered with loose gravel of the type used in road construction, the individual stones varying in diameter from a quarter of an inch to one inch, the depth of the accumulation on the pavement being one inch. The surface of the intersection and the accumulated gravel were dry. The gravel had been accumulating upon the surface of the intersection for several months prior to the accident. It came from that portion of the Watkins Township Road which is not paved. It was brought or thrown into the intersection by the movement of vehicles coming into the intersection from the unpaved portion of the Watkins Township Road and by washing as the result of heavy rainfall.

Larry approached the intersection at a speed of from 10 to 20 miles per hour on the Lynbank Road. He reduced the speed of the tractor and, upon entering the intersection, began a left turn so as to go onto the paved portion of the Watkins Township Road. While he was in the process of making this left turn, the tractor skidded on the gravel in the intersection, overturned and killed him.

The Hearing Commissioner made findings of fact and conclusions of law and ordered the payment of damages to the plaintiff. The defendant appealed to the full Industrial Commission. The full Commission reviewed the matter and entered its order containing its finding of fact, "There was no negligent act on the part of a named employee of defendant," and its conclusion of law, "No named employee of the defendant committed a negligent act at the time complained of." The full Commission thereupon ordered that the plaintiff's claim for damages be denied. On appeal by the plaintiff, the superior court affirmed the order of the full Commission. From that judgment this appeal was taken.

Perry, Kittrell, Blackburn & Blackburn for plaintiff appellant.

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

PER CURIAM. No action, or other proceeding, may be maintained against the State Highway Commission to recover damages for death or other injury caused by its negligence or other tort, except insofar as that right is conferred by the Tort Claims Act. *Teer Co. v. Highway Commission,* 265 N.C. 1, 9, 143 S.E. 2d 247. That

act provides that the Industrial Commission shall determine whether such claim arose as the result of "a negligent act" of an officer, employee, involuntary servant or agent of the State under circumstances such that if the State were a private person it would be liable to the claimant. G.S. 143-291. The act permits recovery only for negligent acts of employees of the Highway Commission, not for their negligent omissions or failures to act. *Wrape v. Highway Commission,* 263 N.C. 499, 139 S.E. 2d 570; *Flynn v. Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571.

It is necessary to recovery that the affidavit filed in support of the claim and the evidence offered before the Commission identify the employee alleged to have been negligent and set forth the specific act or acts of negligence relied upon. *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703. The affidavit filed with the Commission in this instance does not comply with either of these requirements. It alleges that J. B. Harris is the defendant's road maintenance supervisor for Vance County, but it does not allege any act done by him and there is no evidence of any act by this employee.

The plaintiff's evidence shows that the gravel was not placed upon the intersection by any employee of the defendant. The failure of the defendant's employees to remove it cannot be basis for an award under the Tort Claims Act. The Industrial Commission found as a fact that, "There was no negligent act on the part of a named employee of defendant." There is no evidence in the record to support a contrary finding. Therefore, the record would not support an order for the payment of damages to the plaintiff.

It is not necessary to consider exceptions by the plaintiff to the exclusion of evidence offered by him since, had all of this evidence been admitted, it would not have supplied any proof of the above mentioned prerequisite to a right of recovery in the plaintiff.

There is no evidence in the record which would support a finding of negligent construction of either of these roads, as the plaintiff contends in his brief. The mere showing that gravel accumulated upon the intersection is not evidence of negligent construction.

Affirmed.

STATE v. JOSEPH DANIEL BLACKNELL.

(Filed 12 April, 1967.)

1. Indictment and Warrant § 14—

By pleading to a warrant in a court having jurisdiction of the offense, defendant waives any defect incident to the authority of the person is-

suing the warrant, and motion to quash thereafter made is addressed to the discretion of the trial court.

2. Automobiles § 3—

A warrant charging that the named defendant did unlawfully and wilfully operate a motor vehicle on public streets or highways while his license was suspended, sufficiently charges defendant's violation of G.S. 20-28 without specific reference to the statute.

APPEAL by defendant from *Johnson, J.*, October 1966 Regular Criminal Session of FRANKLIN.

Thomas Wade Bruton, Attorney General; William W. Melvin, Assistant Attorney General; T. Buie Costen, Staff Attorney, for the State.

Hubert H. Senter for defendant.

PER CURIAM. Defendant was first tried in the Mayor's Court of Franklinton upon a warrant which charged: "On Fri. the 11 day of Sept., 1964, at 4:45 P.M. in Franklin County in the vicinity of Franklinton (1 M E) on RP 1211, Joseph D. Blacknell did unlawfully and willfully operate a motor vehicle upon the public streets or highways . . . (X) By driving while license has been suspended." The warrant purports to have been issued by M. O. Perry, Deputy Clerk of the Franklinton Court. See N. C. Priv. Laws 1905, ch. 92; N. C. Sess. Laws 1947, ch. 1095; N. C. Sess. Laws 1953, ch. 333; N. C. Sess. Laws 1959, ch. 750. The jury returned a verdict of guilty as charged; the Mayor imposed a prison sentence of six months; and defendant appealed to the Superior Court, where he was tried *de novo*.

Evidence for the State tended to show: Three or four days before September 11, 1964, defendant took a letter which had been mailed to him by the North Carolina Department of Motor Vehicles to Maylon Kearney, a police officer of the Town of Franklinton, and asked him what the letter meant. Mr. Kearney explained to defendant that it was notice to him that his driver's license had been revoked for the period specified therein. On September 11, 1964, State Highway Patrolman E. M. Roberts encountered defendant driving a 1963 Ford truck on Rural Paved Road 1211, which runs from Franklinton to Louisburg. The patrolman arrested defendant for driving while his license was suspended and took from him temporary permit #079647.

The State introduced in evidence a certified copy of defendant's "official record of convictions for violations of motor vehicle laws and departmental actions." G.S. 20-42(b); *State v. Corl*, 250 N.C. 258, 108 S.E. 2d 615. This document showed, *inter alia*, that de-

fendant's operator's license was "suspended April 24, 1964, to April 24, 1965." It also contained this additional information: "Mailed — June 11, 1964 — Pick up notice served Stp. 11, 1964. Pfc. Roberts, Rec. on file in dept." On cross-examination, Patrolman Roberts testified in answer to defense counsel's questions that defendant's license had been suspended because he had accumulated twelve points; that the quoted entry meant that the Department of Motor Vehicles had received defendant's license by mail on June 11, 1964, and that "pick up notice served Spt. 11, 1964" had reference to the temporary license which he himself had taken from defendant on that date and mailed to the department.

Defendant, as his only witness, testified that prior to September 11, 1964, he had never received a revocation notice from the Department of Motor Vehicles; that the license which Patrolman Roberts took from him on that date was not a temporary license; and that he had never gone to the police station to talk to Mr. Kearney about any letter. Defendant also said, "The driver's license that I have now is the same license that I showed Trooper Roberts."

The jury's verdict was "guilty as charged." From a judgment of imprisonment, defendant appealed.

After having twice pled to the warrant in courts having jurisdiction of the offense charged, at the conclusion of the State's evidence, defendant moved to quash the warrant. The record does not disclose what grounds, if any, he then specified as a basis of the motion. He now contends that M. O. Perry was not a person authorized to issue warrants. Defendant's motion came too late. This Court has consistently held that by pleading to the warrant a defendant waives any defects "incident to the authority of the person who issued the warrant." *State v. Wiggs*, 269 N.C. 507, 510, 153 S.E. 2d 84, 86. A motion to quash made after plea is addressed to the discretion of the trial court. 2 Strong, N. C. Index, Indictment and Warrant § 14 (1959).

Defendant further contends that the warrant will not support the judgment because it fails to charge a violation of G.S. 20-28, which provides in pertinent part:

> "Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently . . . who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor. . . ."

One violates this section if he operates a motor vehicle on a public highway *while* his operator's license is in a state of suspension.

State v. Sossamon, 259 N.C. 374, 130 S.E. 2d 638. The warrant sufficiently charges a violation of G.S. 20-28, and the State's evidence was plenary to overrule defendant's motion for nonsuit.

In the trial we find

No error.

LLOYD M. TYNDALL, PLAINTIFF, v. MURIEL T. TYNDALL, DEFENDANT, AND GOLDSBORO SAVINGS AND LOAN ASSOCIATION, GARNISHEE.

(Filed 12 April, 1967.)

1. Divorce and Alimony § 23—

Allegations that plaintiff husband paid certain sums to his wife under court order solely for the support of the children of the marriage, that the wife failed to use the money for the support of the children but used a part of it for her sole benefit and had deposited the balance in a savings account in her name, fails to state a cause of action, irrespective of allegations of fraud, since the facts alleged would give rise to a cause of action for the benefit of the children, but not a cause of action in favor of plaintiff to recover for his own benefit the moneys paid for the support of the children.

2. Pleadings § 19—

Where plaintiff's allegations affirmatively disclose that the cause of action he attempted to allege is fatally defective, the court properly dismisses the action upon demurrer.

3. Pleadings § 24—

A motion to be allowed to amend after trial is begun is addressed to the discretion of the trial court, and the denial of the motion will not be disturbed in the absence of a showing of abuse.

4. Attachments § 1—

Where the allegations of the complaint affirmatively disclose that the cause of action attempted to be alleged is fatally defective, the incidental attachment of plaintiff's property must be dissolved.

APPEAL by plaintiff from *Copeland, Special Judge,* December 1966 Civil Session of WAYNE.

Summons was issued and complaint filed on November 1, 1966. Simultaneously therewith levy was made, in ancillary attachment proceedings, on a savings account of $1,380.62 in the name of defendant in Goldsboro Savings and Loan Association.

The complaint alleges in substance, except when quoted, the following: Plaintiff and defendant, formerly husband and wife, were divorced on March 4, 1963. A consent judgment entered in the di-

vorce action obligated plaintiff to pay to defendant $200.00 a month for the support of their two children and to make mortgage payments of $75.00 per month. Plaintiff complied therewith until October 6, 1966, "when said judgment was modified." In addition, plaintiff paid to defendant or to others "for her benefit and the benefit of the two children" large sums, averaging in excess of $100.00 each month, in reliance on defendant's representations to him each month that "she was broke," and that the children would "go hungry" and "go lacking," if he did not furnish support money "over and above the amounts required in the consent judgment." In this manner defendant "wilfully and intentionally tricked the plaintiff out of $2,880.00," and "practiced fraud and deceit upon him, thereby obtaining his money when she would not have done so by a truthful representation of the facts." Since August 1, 1963, defendant has diverted $2,880.00 paid to her "for the children's benefit," placed it in a savings account in her name in Goldsboro Savings and Loan Association and made withdrawals from time to time for her sole benefit. The balance in said savings account is $1,380.62. Plaintiff first became aware of the fraud and deceit practiced upon him by defendant in October 1966, when plaintiff, "because of the defendant's addiction to the excessive use of alcohol and her resulting inability to care for the plaintiff's children," made a motion "for a modification of the consent support judgment previously entered." Plaintiff alleges defendant is indebted to him in the sum of $2,880.00.

Plaintiff does not allege in what manner the 1963 consent judgment was modified on October 6, 1966.

The ground for attachment stated in plaintiff's affidavit therefor is that "the defendant has secreted, and intends to continue secreting, a certain savings account in the amount of $1,380.62 at Goldsboro Savings and Loan Association, Goldsboro, North Carolina, for the express and specific purpose of defeating such judgment as the plaintiff might obtain in this action."

Defendant demurred and moved (1) to dissolve the attachment and (2) to dismiss the action.

The court, being of the opinion the complaint fails to state a cause of action and that the affidavit for attachment fails to comply with G.S. 1-440.3, entered judgment sustaining the demurrer, dissolving the attachment and dismissing the action. Prior to the entry of said judgment, the court, in its discretion, had denied motions by plaintiff for leave to amend his complaint and his affidavit for attachment.

Robert H. Futrelle for plaintiff appellant.
Herbert B. Hulse for defendant appellee.

PER CURIAM. Plaintiff knew his children would not "go hungry" if the two hundred dollars per month he paid in compliance with the consent judgment were used for their support. Moreover, he knew his children would "go lacking" in some respects if he did not make additional payments for their support. Whatever the status of defendant's personal financial affairs the gravamen of the complaint is that defendant failed to use money paid to her for the support of the children for that purpose, but used part of it for her sole benefit and now has the balance in a savings account.

Conceding plaintiff's allegations are sufficient to establish $2,880.00 was paid by plaintiff to defendant for use solely for the support of the two children, her failure to use the money for that purpose would give rise to a cause of action for the benefit of the children, to be prosecuted in their behalf, not to the cause of action plaintiff has attempted to allege, namely, a cause of action to recover for his own benefit a judgment against defendant in the amount of $2,880.00.

It would seem plaintiff's allegations affirmatively disclose the cause of action he attempts to allege is fatally defective. If so, this was sufficient ground for sustaining the demurrer and dismissing the action. *Parrish v. Brantley,* 256 N.C. 541, 124 S.E. 2d 533. Be that as it may, plaintiff's present allegations, particularly with reference to fraud, are fatally defective; and it was proper to sustain the demurrer on this ground. Moreover, since the court, in its discretion, denied plaintiff's motion for leave to amend the complaint, a dismissal of the action was proper. There is nothing in the record tending to support plaintiff's assertion that the court abused its discretion in denying his motion for leave to amend.

Under these circumstances, independent of considerations relating to the sufficiency of the affidavit for attachment, the order of attachment was properly dissolved. *Knight v. Hatfield,* 129 N.C. 191, 39 S.E. 807. Hence, the judgment of the court below is affirmed.

Affirmed.

BARBARA F. CURRIN AND B. H. CURRIN v. HOBART C. SMITH, G. C. (BOB) SMITH, JR., HIDDEN VALLEY BUILDERS, INC., A CORPORATION, AND HOBART SMITH CONSTRUCTION COMPANY, A CORPORATION.

(Filed 12 April, 1967.)

Injunctions § 13; Appeal and Error § 3—

In an action against the purchasers of the remaining undeveloped lots in a subdivision to recover damages and to restrain further violation of a

restrictive covenant specifying the minimum square feet of heated floor area for each dwelling in the subdivision, order dissolving the temporary restraining order theretofore entered in the cause is not reviewable in the absence of a showing of abuse of discretion, since it is an interlocutory order which does not affect a substantial right of plaintiffs in view of the fact that in the event plaintiffs prevail upon the final hearing and it should be determined that they are entitled to equitable relief in addition to damages, they would have the remedy of mandatory injunction. G.S. 1-500.

APPEAL by plaintiffs from *Froneberger, J.*, 9 January 1967 Schedule "B" Civil Session of MECKLENBURG.

Plaintiffs filed complaint in Superior Court of Mecklenburg County, alleging, in substance, the following: That Spangler Construction Company acquired a tract of land in Mecklenburg County in 1959 and subdivided the land into residential lots, to be known as Lansdown Subdivision; thereafter, on 19 August 1959 Spangler Construction Company entered into a restrictive covenant agreement with all persons, firms or corporations subsequently acquiring any of the lots in said development, the restrictive covenants to run with the land for thirty years. The restrictive covenant agreement was duly recorded in the office of the Register of Deeds of Mecklenburg County. The pertinent restrictions in said agreement are as follows:

> "(G) No single-family dwelling, one story in height, shall be erected or maintained on any of said lots, with a square foot heated floor area of less than 1,700 square feet; provided, that if there is a garage attached to a side of the residence, the square foot heated floor area of the dwelling shall be not less than 1,600 square feet. . . ."
>
> "(O) If the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate any of the said covenants herein, it shall be lawful for any other person or persons owning any real property situated in said development or subdivision subject to similar restrictions to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant and either to prevent him or them from doing so or to recover damages or other dues for such violation."

After partially developing the subdivision, Spangler Construction Company sold the remaining lots to defendants herein, and defendants began to sell lots on which they had constructed dwellings. The deed from Spangler to defendants provided that grantor would "warrant and defend the said title to the same against the lawful

claims of all persons whomsoever, except easements, *restrictions* and 1963 taxes." Thereafter, defendants by warranty deed sold plaintiffs a lot within the subdivision, said deed containing these words of limitation: "subject to restrictions and easements of record."

Plaintiffs complain that defendants have laid a brick foundation for a one-story dwelling, without garage, which when completed would contain less than 1,600 square feet of heated floor space. Plaintiffs prayed for money damages in the amount of $10,000, and for a mandatory injunction to remove dwellings not complying with the covenants. They also prayed for a temporary restraining order, pending final hearing, restraining defendants from further constructing any dwelling on any of said lots in violation of the restrictive covenants or from conveying any lots on which dwellings have been constructed in violation of said covenants.

Upon filing complaint on 30 December 1966, Falls, J., entered a temporary restraining order, restraining defendants from continuing to construct any dwelling in said development which had less than 1,700 square feet of heated floor space, particularly the dwelling being constructed on lot 17 in Block 16 of said subdivision. Defendants were ordered to appear on 12 January 1967 to show cause why the order should not be continued to final determination of this action. Hearing was held during the 9 January 1967 Schedule "B" Civil Session of Mecklenburg before Judge Froneberger on the complaint, affidavits of both parties, and oral arguments of counsel. By judgment dated 13 January 1967 Judge Froneberger vacated and dissolved the restraining order entered by Judge Falls. Plaintiffs appealed.

Don Davis and Beverly H. Currin for plaintiffs.
Levine, Goodman & Murchison for defendants.

PER CURIAM. G.S. 1-500 provides:

> "Restraining orders and injunctions in effect pending appeal; indemnifying bonds. — Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in term, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the Supreme Court, reversing the judgment of the lower court, then in such case the original restraining order

granted in the case *shall in the discretion of the trial judge* be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the Supreme Court." (Emphasis ours)

The dissolution of the restraining order was in the discretion of the trial judge. Such order is not reviewable by this Court except in cases of abuse of discretion. This record reveals no abuse of discretion on the part of the trial judge. G.S. 1-500; *Clark v. McQueen,* 195 N.C. 714, 143 S.E. 528.

". . . Ordinarily, an appeal will lie only from a final judgment. *Perkins v. Sykes,* 231 N.C. 488, 57 S.E. 2d 645. An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Steele v. Hauling Co.,* 260 N.C. 486, 133 S.E. 2d 197.

Plaintiffs seek monetary damages, and should they be entitled to the additional equitable relief, there will be no injury to appellants if not granted before final judgment, since, if it is determined that the dwelling violates restrictive covenants, plaintiffs would have a remedy of mandatory injunction to compel defendants to conform the structure to the covenants. *Ingle v. Stubbins,* 240 N.C. 382, 82 S.E. 2d 388.

For reasons stated, plaintiffs' appeal is

Dismissed.

STATE OF NORTH CAROLINA v. BEAUFORD MERRILL HIGGS.

(Filed 12 April, 1967.)

1. Indictment and Warrant § 10—

A difference between the spelling of defendant's given names in the indictment and in defendant's birth certificate is not fatal, the names coming within the doctrine of *idem sonans* and there being no question of

identity, and defendant having made no objection or challenge during the trial.

2. Criminal Law § 154—

In the absence of any assignment of error in the record, the judgment must be sustained when no error appears on the face of the record.

APPEAL by defendant from *Johnson, J.*, September 12, 1966 Mixed Session of PERSON.

In each of two bills of indictment, defendant — under the name of Beauford Merrill Higgs —, Glen Carl Sheets, and David Arthur Sheets were jointly charged with the felonies of breaking and entering and larceny. One bill charged that, on July 2, 1966, these three men feloniously broke into and entered a building occupied by Turner Harris, and known as Turner's Steak House, with the intent to steal personal property located therein and did steal therefrom personal property of the value of $30.00. The other bill charged that, on July 5, 1966, the three feloniously broke into and entered a building occupied by Paul Edward Chambers with the intent to steal his personal property and did steal therefrom goods and money belonging to Paul Edward Chambers of the value of $75.00.

Defendant, through his counsel, pled not guilty to both indictments. Without objection, all charges were consolidated for trial. Glen Carl Sheets and David Arthur Sheets both pled guilty to the indictments and, as witnesses for the State, testified that they and defendant Higgs had committed the crimes charged in the bills of indictment. Defendant, offering no other witnesses in his behalf, testified that he had been with the Sheets boys in the early part of the nights of July 2nd and July 5th but that he was not with them at the time they entered Turner's Steak House and Chambers' place. On cross-examination, defendant admitted that he had previously served a prison term for breaking and entering and larceny and, in addition, had been committed to training schools four or five times. On three occasions he has escaped.

The jury's verdict was guilty as charged in both bills of indictment. Concurrent sentences of five to seven years were imposed on each count, and defendant appealed.

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

S. B. Davis, Jr., for defendant.

PER CURIAM. The case on appeal contains no assignment of error, and the transcript reveals that not a single objection was made or exception entered during the trial. Notwithstanding, after

being informed by the court that he was entitled to appeal as a matter of right at the expense of the State, defendant gave notice of appeal, and counsel was appointed to bring up the case.

In preparing the case on appeal, counsel included a birth certificate which had not been introduced in evidence at the trial. It shows, *inter alia,* that a white male named Burford Murril Higgs was born in Person County on June 22, 1950. In this court, counsel moves in arrest of judgment for that defendant had been charged and tried under the wrong name. The motion is overruled. Even if we assume that the inserted birth certificate is defendant's, it can avail him nothing. He was tried under the name of Beauford Merrill Higgs without objection or challenge, and he was sentenced under the same name. On the trial, no point was made of the slight variance between the given names of *Beauford* and *Burford* and of the slight variance in the spelling of the middle name, and defendant will not now be heard to say that he is not the man named in the bill of indictment. "Where defendant is tried without objection under one name, and there is no question of identity, he will not be allowed on appeal to contend that his real name was different." 2 Strong, N. C. Index, Indictment and Warrant § 10 (1959). Furthermore, the names *Beauford* and *Burford* sound enough alike to come within the rule of *idem sonans,* as do the names *Merrill* and *Murril. State v. Vincent,* 222 N.C. 543, 23 S.E. 2d 832.

When the case on appeal contains no assignments of error, the judgment must be sustained, unless error appears on the face of the record. *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447. An examination of the record proper reveals

No error.

POLLY SOUTHERN RING v. LAWRENCE DEWITT RING.

(Filed 12 April, 1967.)

Divorce and Alimony § 21—

Allegations that defendant had wilfully refused to make subsistence payments as directed by prior judgment of the court, G.S. 50-16, supports plaintiff's motion that defendant be attached for contempt, placing the burden on defendant to show facts constituting justification, and demurrer to the motion is improperly sustained when the motion does not allege facts affirmatively disclosing conduct relieving defendant of further obligations under the judgment, and its allegation of a temporary resumption of cohabitation induced by fraudulent misrepresentations *held* insufficient to establish such defense, which should be determined upon plenary hearing on return of the order to show cause.

APPEAL by plaintiff from *Gambill, J.*, January 31, 1967 Civil Session of FORSYTH.

The decision below sustained defendant's demurrer *ore tenus* to plaintiff's amended motion that defendant be attached for contempt for wilful failure to comply with the provision of a judgment entered in this cause on May 13, 1966, in which it was "ORDERED, ADJUDGED AND DECREED that the defendant pay into the Domestic Relations Court of Forsyth County the sum of $30 per week, beginning on Friday, the 20th day of May, 1966, and continuing thereafter on each and every succeeding Friday until the plaintiff, Polly Southern Ring, dies or remarries, said sum to be disbursed by said Court to Polly Southern Ring for her separate maintenance and support." The motion alleged that defendant was then in arrears in the amount of $410.00.

Plaintiff instituted this action on April 25, 1966, under G.S. 50-16, for subsistence and counsel fees. She alleged, *inter alia*, that she and defendant were married on October 1, 1955; that they lived together as husband and wife until on or about July 25, 1965, when defendant abandoned plaintiff "for another woman"; and that no children had been born of their marriage. No answer was filed by defendant. On May 13, 1966, by and with the consent of the parties and their counsel, the judgment containing the provision quoted above was entered.

Plaintiff's amended motion, which was filed December 28, 1966, asserts defendant made the payments of $30.00 a week as required by the judgment of May 13, 1966, "until on or about October 6, 1966, when he stopped." She asserts defendant, while in arrears in his payments, "begged the plaintiff to permit him to return home"; that he represented to her "that he wanted to come home and resume the marriage relation, and that he wanted to live with the plaintiff"; that, in fact, these representations and promises were false and fraudulent in that defendant "at no time intended to fulfill" said representations and promises and his only purpose and intent was to relieve himself of the burden of continuing to make payments as required by said judgment of May 13, 1966, for plaintiff's separate maintenance; that plaintiff, by reason of defendant's false and fraudulent representations and in reliance thereon, permitted defendant to return home "on a trial basis"; that, under these circumstances, he returned home on Wednesday, November 2, 1966, "and stayed two days, and then left, not to return"; that the two days that defendant spent with plaintiff, as a result of defendant's false and fraudulent representations, did not constitute a *bona fide* resumption of the marriage relation and did not relieve defendant of his obligations under said judgment of May 13, 1966. If it should

be held, contrary to her contentions, that defendant was relieved of further obligation to make payments as required by said judgment, plaintiff asserts alternatively the court should award to her "reasonable maintenance separately from the defendant, suit money, and counsel fees in a reasonable amount."

Defendant demurred *ore tenus* to said amended motion. The court entered judgment sustaining this demurrer and taxing "the costs of this action . . . against the plaintiff." Plaintiff excepted and appealed.

H. Glenn Pettyjohn for plaintiff appellant.
Hayes & Hayes for defendant appellee.

PER CURIAM. The record is silent as to the ground of objection interposed and considered in the court below as a basis for the demurrer. Defendant contends, in his brief, that the judgment for alimony was annulled "by his reconciliation and resumption of cohabitation with plaintiff."

The hearing below was on return of an order directing that defendant show cause why he should not be punished for contempt for wilful failure to pay $30.00 per week to plaintiff for her separate maintenance in accordance with said judgment of May 13, 1966. A motion for such an order need not allege facts with the particularity required when alleging a cause of action or an affirmative defense. The allegation that defendant had wilfully failed to make the payments required by the judgment and was in arrears in a substantial amount would seem a sufficient basis for the issuance of the show cause order.

Assuming defendant has wilfully failed to make the payments required by said judgment, it would be incumbent upon him to show facts constituting justification. Absent a hearing and findings of fact, the only question presented by this appeal is whether the facts alleged in plaintiff's amended motion affirmatively disclose such conduct as to relieve defendant from further obligation to pay for plaintiff's separate maintenance either as provided in said judgment or in accordance with any further order in this cause. When considered in the light most favorable to plaintiff, this question must be answered, "No." Accordingly, the judgment of the court below is vacated; and the cause is remanded for a plenary hearing on return of the order to show cause. From the evidence adduced at such hearing, the court will find the facts and enter judgment thereon.

Error and remanded.

MOLLIE PHILLIPS v. WHITE SWAN LAUNDRY, INC.

(Filed 12 April, 1967.)

Negligence § 37f—

Evidence tending to show that defendant slipped and fell to her injury on a thin sheet of ice over the sidewalk in front of the door leading to defendant's place of business, and that the fall occurred early on the morning after a snow and sleet storm, *held* insufficient to be submitted to the jury on the issue of defendant's negligence.

APPEAL by plaintiff from *Lupton, J.*, September, 1966 Session, WILKES Superior Court.

The plaintiff, Mollie Phillips, instituted this civil action against the defendant, White Swan Laundry, Inc., to recover damages for the personal injuries she sustained when she stepped and fell on a thin coating of ice over the sidewalk in front of the door leading into the defendant's laundry. The fall and injury occurred on the early morning of January 2, 1964 in the Town of Elkin. The plaintiff alleged the defendant was negligent in permitting a "thin and almost impossible to see" coat of ice to remain on the sidewalk, creating a dangerous and hazardous condition, at or near the entrance to its place of business.

The evidence disclosed that snow and sleet fell throughout the Elkin area on January 1. During the night the temperature was below freezing and as a result, ice froze on the sidewalk in front of the defendant's place of business, creating a condition hazardous to defendant's customers.

The defendant, by answer, denied negligence, alleging that because of the weather conditions streets and sidewalks were slick and dangerous all over town; that the sidewalk where plaintiff fell was kept and maintained by the Town of Elkin; that plaintiff could and should have taken precaution to avoid injury and her failure in that respect caused or contributed to her injury.

At the close of the evidence the Court entered judgment of involuntary nonsuit. The plaintiff excepted and appealed.

Charles M. Neaves, Moore & Rousseau by Larry S. Moore, for plaintiff appellant.

W. G. Mitchell, for defendant appellee.

PER CURIAM. The evidence disclosed that snow and sleet fell throughout the area the day before the plaintiff sustained her injury. During the night, freezing temperatures had caused the town's sidewalks to become coated with a thin sheet of ice. The evidence failed to show the defendant was in control of or responsible for the

condition of the weather or of the sidewalk where the plaintiff fell. In cases of the character here disclosed, liability for injury attaches only where responsibility of the defendant for the dangerous condition is shown by the evidence. Failure to show negligence on the part of the defendant required nonsuit. The judgment is

Affirmed.

LESLIE GAHAGAN v. KEITH GOSNELL AND WIFE, CHRISTINE D. GOSNELL; AND MILBURN GOSNELL AND WIFE, ANNIE SHELTON GOSNELL.

(Filed 19 April, 1967.)

1. Ejectment § 9—

Where it appears that a surveyor had surveyed the property and tied in with the description in plaintiff's deed, natural objects and well known corners found by him, and had prepared a map of his survey, the testimony of the surveyor that plaintiff's land lay to the west of a line drawn on the map is based upon his personal knowledge gained from his survey and the natural objects and corners found by him, and is not merely a statement of plaintiff's contentions.

2. Ejectment § 10—

Where plaintiff introduces *mesne* conveyances from the State to him and introduces evidence tending to fit the land claimed by him to each of the descriptions in the deeds constituting his chain of title, nonsuit is improvidently entered.

APPEAL by plaintiff from *Campbell, J.*, at August-September, 1966, Regular Civil Term of MADISON County Superior Court.

The plaintiff alleged he was the owner of a tract of land, which included among its calls "with the Agreement Line (made by the Laurel River Logging Company and the Gahagan and Brigman Heirs) to the Martin Shelton Sourwood Corner." That the defendants were trespassing on part of the lands; that he and his predecessor had held the lands under color of title, etc., for more than twenty years and more than seven years; that the acts of defendants constitute a cloud on his title and prayed that he be adjudged the owner of the lands in question and recover $300.00 damage resulting from defendants' trespass.

Defendants denied trespassing on plaintiff's lands saying they were the true owners of all the lands they had occupied.

While not started as a boundary proceeding under G.S. 38-1 *et seq.* the trial developed into a question as to where the east-west dividing line of the contesting parties was.

A surveyor was appointed to survey the lands and contentions of each party. The surveyor representing the plaintiff drew a map of his claims and testified in his behalf. At the conclusion of plaintiff's evidence the Court allowed defendants' motion for nonsuit and plaintiff appealed.

A. E. Leake, Attorney for the plaintiff appellant.
Riddle and Briggs by Bruce B. Briggs, Attorneys for defendant appellees.

PLESS, J. The plaintiff introduced a deed from Bonnie Gahagan to him dated August 17, 1964 and recorded in Deed Book 95, page 183, of Madison County Registry. It conveyed a tract of land with a number of calls, one of which was "the Agreement Line" referred to in the statement of facts. After the deed including the description had been read to the plaintiff in the presence of the jury, he said: "I can identify the property that is described in the Deed * * * It is a part of the America Brigman Gahagan land. It is the land described in my complaint. I call that particular tract of land the Bessie Holt Tract." In deeds going back over one hundred years, the plaintiff then offered a connected chain of title, concluding with a State grant in 1796, and as each description was read, he testified that it included what he called his "Bessie Holt Tract."

The plaintiff thus made out a *prima facie* case, meeting the requirements laid down by Justice Ervin in *Paper Co. v. Cedar Works,* 239 N.C. 627, 80 S.E. 2d 665, in which he said, *inter alia;*

> "The several methods of showing *prima facie* title to land in actions of ejectment and other actions involving the establishment of land titles are enumerated in the famous case of *Mobley v. Griffin* (104 N.C. 112, 10 S.E. 142) * * * The plaintiff proves a *prima facie* title to land by tracing his title back to the State as the sovereign of the soil. *McDonald v. McCrummen,* 235 N.C. 550, 70 S.E. 2d 703; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; *Caudle v. Long,* 132 N.C. 675, 44 S.E. 368; *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Mobley v. Griffin, supra; Graybeal v. Davis,* 95 N.C. 508. The plaintiff satisfies the requirements of this method of proving a *prima facie* title when his evidence shows a grant from the State covering the land described in his complaint and *mesne* conveyances of that land to himself. *Power Company v. Taylor, supra;* (196 N.C. 55, 144 S.E. 523); *Buchanan v. Hedden,* 169 N.C. 222, 85 S.E. 417; *Land Co. v. Cloyd,* 165 N.C. 595, 81 S.E. 752; *Deaver v. Jones,* 119 N.C. 598, 26 S.E. 156."

Mobley v. Griffin, supra, is probably the most used of all North Carolina authorities in the trial of land suits. In it, Judge Avery, speaking for the court, said:

> "The general rule is that the burden is on the plaintiff, in the trial of actions for the possession of land, as in the old action of ejectment, to either prove a title good against the whole world or good against the defendant by estoppel. *Taylor v. Gooch,* 48 N.C. 467; *Kitchen v. Wilson,* 80 N.C. 191.
>
> "The plaintiff may safely rest his case upon showing such facts and such evidences of title as would establish his right to recover, if no further testimony were offered. This *prima facie* showing of title may be made by either of several methods. Wait & Sedgewick on Trial of Title to Land, sec. 801; *Conwell v. Mann,* 100 N.C. 234; Malone Real Property Trials, 83.
>
> "1. He may offer a connected chain of title or a grant direct from the State to himself."

The other methods are not relevant here and are therefore omitted.

In *Sledge v. Miller,* 249 N.C. 447, 106 S.E. 2d 868, the court said: (The plaintiff) "could also carry the burden of proof by showing a connected chain of title from the sovereign to him for the identical lands claimed by him."

The plaintiff further fortified his case through the evidence of his surveyor, Birchard Shelton. Mr. Shelton testified that he had surveyed the questioned land and had drawn a map, which was admitted in evidence, showing the plaintiff's and defendants' claims. He said that the red line on his map running from A to B to C represented the line claimed by the plaintiffs, and that a blue line, 65½ feet to the east of it, represented the defendants' claims. The line appears to be about two-thirds of a mile long, so that a little more than five acres is involved.

Mr. Shelton testified, without objection, "The red line on the map indicates the agreement line between the Brigmans and the Gahagans on one side and the Laurel River Logging Company on the other side. According to the map, the red line from A to B to C represents the Plaintiff's contentions.

"The plaintiff's lands, the Gahagan lands, lie west of the line from A to B and north of the line from B to C. The lands of the defendant, Gosnell, lie to the east of the line from A to B and south of the line from B to C."

He also said, "Mr. Gahagan's land is on the west and north sides of this red line."

While this evidence is to some extent invading the province of

the jury and is far-reaching and all-inclusive, it is nevertheless in the record and without objection. Should the jury accept it, it would sustain a finding that the plaintiff is the owner of the land lying to the west of the red line, which is the result sought by the plaintiff and the sole subject of controversy in the case.

In *Berry v. Cedar Works,* 184 N.C. 187, 113 S.E. 772, the surveyor for the plaintiff testified that the land described in the complaint lay within the boundaries of the State grant, and the defendant excepted on the ground that the question involved one of the vital matters on which the parties were at issue, and that the answer assumed to determine an essential element of the verdict. The court held that this was evidence of a substantive fact which was not incompetent on the ground that the witness invaded the province of the jury.

In *Etheridge v. Wescott,* 244 N.C. 637, 94 S.E. 2d 846, the court said: "It is competent for a witness to state whether or not a deed or a series of deeds cover the lands in dispute when he is stating facts within his own knowledge. *McQueen v. Graham,* 183 N.C. 491, 111 S.E. 860; *Singleton v. Roebuck,* 178 N.C. 201, 100 S.E. 313."

As a part of his chain of title, plaintiff introduced an agreement dated November 30, 1920 between his predecessors in title, who at that time owned the lands in question, and the Laurel River Logging Company. It included the following provision:

> "That the line dividing the tracts claimed by the parties of the first part, or either of them, and the tract claimed by the party of the second part, known as the Little Laurel Tract, and shall be, and is as follows:
>
> "BEGINNING at a stake and white pine stump, said stake and stump standing South 85 deg. 30′ East 39 poles from a rock on the West bank of Little Laurel, at its mouth, corner of Will Cook Tract, and runs North 8 deg. West 236.72 poles to a stake and pointers; thence North 26 deg. 20′ West crossing Billy King Branch 15 poles from its mouth, and crossing Martin Branch 10 poles from its mouth, and crossing the public road which runs up Martin Branch 10 poles from the bank of Little Laurel Creek 343.11 poles to a stake and pointers; thence East to Will Cook and S. T. Gosnell's sourwood corner."

The last call in this agreement was Cook and Gosnell's sourwood corner, and Mr. Shelton refers to it several times in his testimony. "That southwest corner, identified on the map as point C, is the sourwood corner that was formerly the Martin Shelton sourwood corner and later the Will Cook and S. T. Gosnell sourwood corner.

It is the sourwood corner referred to in these deeds; the Martin Shelton sourwood corner. * * * The agreement line didn't give the measurement over to the sourwood. It gave the bearing but not the distance." He later said: "The sourwood at point C is a perfectly natural sourwood sprout on a sourwood stump. * * * The sourwood corner at point C is known and referred to in some of the deeds as Martin Shelton's sourwood corner. Martin Shelton was my grandfather. I had known of the sourwood corner for some time. It had been there the only sourwood of that size. I run my line there, started one part of it there and ran to B, as shown here on the map. I do know where the southwest corner is."

The survey did not exactly coincide with the calls of the dividing line described above, but the plaintiff calls attention to the fact that the line was established some forty-five years before the present survey, that surveying methods have changed, land was less valuable in 1920 than in 1965, and therefore less care would be used in a survey then, and further, that in this long period of time there would be a major declination of the magnetic bearing. Mr. Shelton testified that he wrote out the description for the Bonnie Gahagan deed in 1964, and that he arrived at it "by getting the book and page of each adjoining tract of land and then got the calls from the lines that adjoined the Bonnie Gahagan land. * * * I surveyed all the lines around the Bessie Holt Tract except from the forks of the creek down to the Beginning corner. This part of the line is in a permanent creek bed. I just platted it in with the creek. I surveyed those other lines. I took the lines of all the adjoining land owners and got the description from them. I took the lines of each tract of land adjoining this Bessie Holt tract and wrote this description."

From the above it appears that Mr. Shelton had surveyed the plaintiff's property, and in doing so had tied in the description with several natural objects and well-known corners such as the Martin Shelton (later known as the Will Cook and S. T. Gosnell) sourwood corner; the "big rock cliff at the mouth of the (Little Laurel) creek with red paint on it, and there was a tree stood close to it that also had red paint on it."

We are of the opinion that when the surveyor testified the Gahagan land is on the west of the red line and that "the plaintiff's lands, the Gahagan lands, lie west of the line from A to B," that it was based upon his knowledge of some of the natural objects and corners, as well as his survey, and was not merely a statement of the plaintiff's contentions.

Taken in the light most favorable to the plaintiff, as we must

upon a motion for nonsuit, the evidence is sufficient to withstand and repel it.

"It is elementary that upon such motion the evidence offered by the plaintiff is to be considered as true, and all reasonable inferences favorable to the plaintiff are to be drawn therefrom." *Supply Corp. v. Scott,* 267 N.C. 145, 148 S.E. 2d 1; 4 Strong's Index, Trial § 21.

The judgment of nonsuit is hereby

Reversed.

STATE OF NORTH CAROLINA v. CHARLIE LENTZ AND WILLIE LEON WILLIAMS.

(Filed 19 April, 1967.)

1. Criminal Law § 32—

Defendant does not have the burden of proving his defense of an alibi, but the burden remains on the State to prove his guilt beyond a reasonable doubt.

2. Criminal Law § 94—

When the conduct of a witness so requires, the court may admonish him not to argue with the solicitor but to answer the questions propounded by the solicitor.

3. Criminal Law § 43—

Where the prosecuting witness testifies that she fought with defendant in resisting armed robbery, photographs showing bruises and injuries to her face, even though made a week or so after the event, are competent for the purpose of corroboration, the time interval being explained to the jury.

4. Criminal Law § 82—

A witness who had identified defendant in her testimony may testify that she had told a third person that she was sure she was right in the identification, the testimony being of what the witness herself had said and therefore not hearsay, and it being competent for a witness to corroborate herself by testifying that she had made the same statement to another and as laying the foundation for corroborating evidence from such third party, even though the third party is not later called as a witness for the purpose of corroboration.

5. Criminal Law § 71—

A statement voluntarily made by defendant is competent when made after defendant had been advised of his constitutional right to remain silent, his right to have counsel present at the interrogation, and that, if he could not afford counsel, counsel would be appointed for him, and warned that anything he said could be used against him.

6. Criminal Law § 162—

In the absence of objection or motion to strike, the incidental remark of a witness, after stating that he knew the defendant, that he had not seen him "since he got back from the County Home" will not be held prejudicial, since persons other than criminals are sent to the County Home, and such statement is not rendered prejudicial upon its repetition in response to further question of the solicitor.

7. Criminal Law § 109; Robbery § 5—

Where all of the evidence discloses that the offense committed was that of armed robbery and the sole question is the identity of defendants as the perpetrators of the crime, it is not required that the court submit the question of defendants' guilt of less degrees of the offense charged.

APPEAL by defendants from *Brock, S.J.*, October 10, 1966 Criminal Term of FORSYTH Superior Court.

Charlie Lentz, Leon James Gwyn and Willie Leon Williams were convicted of armed robbery, and from prison sentences then imposed, Lentz and Williams appealed.

The State offered evidence tending to show that on September 2, 1966 at approximately 10:30 p.m., the three defendants entered the Mize Supermarket and stole at gun point $850.19 belonging to the owner, Edna Mize. The testimony of an employee, Mabelline Barringer, and a customer, Herman Stimpson, was offered to prove the identity of the defendants. Mrs. Edna Mize testified that she knew the defendants by appearance, as they had traded in her store, but did not know their names. She said that she fought with one of the defendants who was wearing a red ski hood. During the fight, she saw the lower portion of his face and also observed his eyes through the slits in the ski mask. She recognized him as a frequent customer to her store. Mrs. Mize also had an altercation with another one of the defendants who was wearing a blue stocking or bandana around his face. During the struggle, she pulled down the bandana when he was only about two feet away, and thus she was able to identify him.

The State also offered the testimony of the investigating officer, E. G. Cook. He testified concerning several conversations he had with Edna Mize concerning the facts about the robbery and the identity of the persons involved. Mabelline Barringer identified defendant Lentz in a line-up as being one of the robbers. On cross examination, Officer Cook stated that Mrs. Mize also viewed the same line-up but failed to identify Lentz.

Defendant Lentz offered the testimony of Victoria Carethers and James Carethers who testified, in substance, that Lentz remained at their home the entire night in question.

Leroy Lentz, the brother of defendant Charlie Lentz, also tes-

tified that he observed his brother at the Carethers' home that night.

Defendant Leon James Gwyn testified that he was drinking some wine with Charlie Lentz and another friend until about 8:30 that night at which time he felt himself getting high and went home.

Mary Rose Young and her two children testified that on that particular night the defendant Williams slept at their house. Mrs. Young testified that Williams laid down about six o'clock that night because he was drunk and that he did not awake until the following morning.

Upon verdict of guilty and judgments pronounced thereon, the defendants appealed.

Randolph and Drum, by Clyde C. Randolph, Attorneys for defendant appellant Charlie Lentz.

Booker and Sapp, by Robert H. Sapp, Attorneys for the defendant appellant Willie Leon Williams.

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

PLESS, J. The defendants have presented one case on appeal, but each has filed a separate brief.

The case largely depends upon the identity of the persons who robbed Mrs. Mize. All of the elements of armed robbery are present, and the only seriously contested issue was the question "who did it?" Mrs. Mize, Mabelline Barringer and Herman Stimpson identified the defendants, while the defendant Lentz offered as an alibi that he was at the home of Victoria Carethers at the time, while Mary Rose Young and her two children testified that the defendant Williams was at her home at the time of the robbery.

Even though a defendant offers evidence of an alibi, he is not required to prove it. The burden is still cast upon the State to prove his guilt beyond a reasonable doubt. *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844; *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867; *S. v. Sheffield,* 206 N.C. 374, 174 S.E. 105.

Lentz excepts to the admonishment of the Court that he answer the questions being propounded to James Carethers. The Court rather emphatically instructed the witness Carethers not to argue with the solicitor but to answer his questions. The Court has the right and the duty to require witnesses to answer the questions propounded, and in so doing there was no error. 88 C.J.S., Trial § 49(3).

Lentz also excepts to the admission of photographs of Mrs. Mize which showed the bruises and injury on her face. They were offered to illustrate the testimony of Mrs. Mize and were properly admitted for this purpose.

The defendant particularly complains that the picture showed the condition a week or so after the event rather than at the time of it. This point was made clear to the jury, and the Court was correct in its ruling. A witness may use a photograph to illustrate his testimony and make it more intelligible to the court and jury. *Simpson v. Oil Co.*, 219 N.C. 595, 14 S.E. 2d 638. "It will not necessarily be excluded because * * * it was not made at the time of the event to which the testimony relates." Stansbury, N. C. Evidence, 2d Ed. § 34.

The defendant Lentz further excepts to the evidence of Mrs. Mize that she had told Mabelline Barringer that she was sure she was right in identifying Lentz. This feature of Mrs. Mize's testimony was the subject of examination and of cross examination several times. It must be recalled that the witness was testifying as to what she had said rather than attempting to corroborate somebody else as to what the other person had said. There is a distinction, since the State may lay the foundation for corroborating evidence in this manner even though the latter is not offered or is excluded because it does not corroborate. ". . . it is settled by this Court that a witness can corroborate himself by testifying that he had made the same statement to other parties. *S. v. Maultsby*, 130 N.C. 664." *S. v. Journegan*, 185 N.C. 700, 117 S.E. 27.

The State offered the testimony of Officer E. G. Cook that Lentz told him that he went to his brother's home about 8:00 o'clock; that a party was going on; that he got intoxicated and laid on the sofa and slept there. This was offered to contradict the evidence offered for Lentz that he was at the Carethers' home at the time of the robbery. The exception is based upon the claim that there was no finding by the court that Lentz's statement was voluntary. However, Officer Cook had previously testified that when he first talked with Lentz and Williams he had advised them of their right to remain silent; that anything they said could be used against them in court; that they were entitled to counsel; that if they could not afford counsel the court would appoint counsel for them, and the defendants could have counsel present at the interrogation. There was no request for findings by the court and no contradiction of this evidence by the defendants. The defendants' rights were thus protected and the exception is not sustained.

Mrs. Mize also identified Williams as the person wearing the red ski hood which she pulled up and saw his face while he was striking her. Williams claimed that he became drunk at the home of Mary Rose Young, laid down about 6:00 o'clock and did not awake until the following morning. The jury accepted the evidence

for the State, and we now consider the exceptions raised in his behalf.

The defendant Gwyn, who was also convicted but did not appeal, testified that he knew that "I hadn't seen Leon Williams since he got back from the County Home." The solicitor then asked, "You say since he got back from the County Home?" — to which the witness replied, "That's right." The record merely shows that Gwyn made the above statements, which were apparently incidental, until it was repeated in response to the solicitor's question. While it is recognized that persons are sometimes sent to the county home to serve there instead of in prison, it is also true that county homes have paid employees and that persons are taken there because of ill health, old age, and poverty, and the court cannot assume the conditions under which Williams was at the county home. There was no objection or request to strike the first statement of the witness that Williams had been at the county home, and we cannot hold that this information, having been put before the jury without exception, becomes prejudicial when repeated.

Williams also excepts to the failure of the court to instruct the jury that he might be found "guilty of some lesser degree of the offense charged: common-law robbery, attempted robbery, assault with a deadly weapon or simple assault."

Upon the evidence of the State, which was uncontradicted as to the event, and questioned only as to the perpetrators, all of the elements of the offense of armed robbery were clearly shown, and there was no evidence to indicate that any person committing the acts alleged by the State was guilty of any lesser offense, and the exception is overruled.

Both the defendants were identified by several persons as the ones who robbed Mrs. Mize. The defendants denied their guilt and offered evidence of an alibi. It thus became a question for the jury to determine, and it has done so by its verdict of guilty as to both of the defendants. Upon consideration of the record and the exceptions noted by the defendants, we are of the opinion, and so hold, that in their trial there was

No error.

CLINARD JOHNSON, ADMINISTRATOR OF THE ESTATE OF PEGGY FAW JOHNSON, DECEASED, v. JACK EDWARD MCNEIL, CHELSIE M. MCNEIL AND PAUL GROCE, ORIGINAL DEFENDANTS, AND STEPHEN MICHAEL JOHNSON, ADDITIONAL DEFENDANT.

(Filed 19 April, 1967.)

Judgments § 13— Default judgment may not be entered against one tort-feasor during extension of time to answer granted other tort-feasors.

Plaintiff instituted this action for wrongful death against the driver and against the owner of the automobile which collided with the car in which intestate was riding as a passenger, alleging negligence on the part of defendant driver, and plaintiff also joined the driver of a third car as a joint tort-feasor, alleging that at the time this driver was engaged in an automobile race with the first defendant driver. Extension of time to answer was obtained at the instance of the first two defendants. *Held:* Judgment by default against the third defendant during the period of extension is error, since defendants were entitled to file a joint answer and all of defendants were entitled to the benefit of the extension in the absence of provision in the order limiting its application.

APPEAL by defendant, Paul Groce, from order of *Latham, S.J.*, denying motion to set aside judgment by default and inquiry entered against him on September 9, 1966.

Hayes & Hayes by Kyle Hayes, for defendant appellant.
John E. Hall, for plaintiff appellee.
McElwee & Hall, of counsel.

HIGGINS, J. The plaintiff's intestate sustained fatal injuries as a result of a collision between her husband's automobile, in which she was a passenger and a 1965 Ford automobile maintained for family purposes by Chelsie M. McNeil and driven by his minor son, Jack Edward McNeil, who was a member of the household. The plaintiff administrator instituted a civil action against both the owner and the driver, alleging the driver was negligent in that he was speeding 75 to 80 miles per hour on the public highway, lost control of his vehicle which skidded into the driving lane occupied by the Ford driven by Stephen Michael Johnson, husband of the plaintiff's intestate.

The plaintiff joined Paul Groce as a defendant, alleging that at the time of the collision the defendant Jack Edward McNeil and Groce were racing on the public highway and that both were jointly liable for the consequence of the fatal accident. *Mason v. Gillikin*, 256 N.C. 527, 124 S.E. 2d 537; *State v. Daniel*, 255 N.C. 717, 122 S.E. 2d 704; *Boykin v. Bennett*, 253 N.C. 725, 118 S.E. 2d 12. The action was instituted and the verified complaint filed on July 26,

1966 by McElwee & Hall, attorneys for the plaintiff. Summons and complaint were served on that day.

The Clerk entered this order extending the time to plead:

> "This cause coming on to be heard before the undersigned Clerk of the Superior Court of Wilkes County, upon petition of attorneys for defendants for an extension of time in which to file answer, demur, or otherwise plead; and it further appearing that the attorneys for the plaintiff have consented to said extension;
>
> IT IS THEREFORE, BY CONSENT, ORDERED, ADJUDGED AND DECREED That the defendant shall have until September 25, 1966, to file answer or otherwise plead in said cause.
>
> This the 25th day of August, 1966.
>
> CORA CAUDILL
> Clerk of Superior Court
> of Wilkes County.
>
> BY CONSENT:
> McElwee & Hall
> BY: John E. Hall
> Attorneys for Plaintiff."

The McNeils filed answer on August 31, 1966 denying that Jack Edward McNeil and Paul Groce were engaged in racing or that either of the McNeils was negligent in any respect which caused or contributed to the intestate's death. Other defenses not now material were set up in the answer.

On September 9, 1966 plaintiff obtained the Clerk's signature to what purported to be a judgment by default and inquiry against the defendant Groce because of his failure to file answer. At the next term of Wilkes Superior Court the defendant Groce, at the insistence of his insurance carrier, filed a verified motion before Judge Latham requesting the judgment by default and inquiry be set aside upon two grounds: (1) the Clerk's consent order entered on August 25, 1966 gave the defendant until September 25, 1966 in which to file answer or otherwise plead, and (2) that Groce's liability was alleged to have arisen because at the time of the fatal accident he and Jack Edward McNeil were racing on the highway and that two days after the suit was brought he was tried in the criminal court and acquitted of the charge and, he being inexperienced in such matters, concluded that the acquittal exonerated him from all liability, civil as well as criminal, and that his failure to answer was due to his excusable neglect, and that he has a meritorious defense in that he was not racing and not involved in the accident.

The Court found: (1) Groce was acquitted of the charge of rac-

ing on July 28, 1966; (2) he failed to notify the insurance carrier that civil process in this Court was served on him; and (3) the copy of the complaint served on Groce was not verified and did not show the original filed in the Clerk's office was verified. The Court concluded that Groce could not take advantage of the order extending time and that Groce had failed to show either excusable neglect or meritorious defense and denied the motion to set the default judgment aside.

The order of the Clerk extending the time to plead was not based upon a written motion. The only record is the order itself. It shows to have been entered "on petition of attorneys for defendants and the order granted to the *defendant* until September 25, 1966 to file answer or otherwise plead in said cause". The plaintiff had instituted the suit and charged the McNeils and Groce as being jointly responsible for intestate's death. The attorneys for the plaintiff signed the extension order. If they sought or intended to limit the extension of time to any one of the three defendants, they should have entered the limitation on the order. Not having placed any limitation, reasonable interpretation requires us to say that the extension was granted to each defendant. The plaintiff had elected to sue the defendants jointly. They had a right to file a joint answer at their election. Hence, the Court's finding that attorneys for the McNeils applied for the extension is without significance.

We hold the failure of the plaintiff to restrict or limit the extension order entitled each and all of the defendants to its benefits. The defendant Groce was entitled to rely on the order which extended the time to plead to September 25, 1966 and until that day passed the plaintiff, as a matter of law, could not take a default judgment against him for failure to answer. In failing to give the extension order this effect, Judge Latham committed error of law. Other assigned errors need not be discussed.

The cause is remanded to the Superior Court of Wilkes County with direction to vacate the judgment by default and inquiry entered against Groce on September 9, 1966 and allow Groce time to plead.

Reversed and remanded.

W. G. H. WEATHERMAN, ADMINISTRATOR OF THE ESTATE OF ARNOLD CLEVELAND WEATHERMAN, v. ERNESTINE STEELMAN WEATHERMAN, ADMINISTRATRIX OF THE ESTATE OF PAUL G. WEATHERMAN.

(Filed 19 April, 1967.)

1. Automobiles § 49—

Evidence that intestate continued to ride with an intoxicated and reckless driver for a number of hours although intestate had opportunity to alight from the car with safety at a filling station after the recklessness of the driver had become abundantly apparent, *held* sufficient to raise the issue of intestate's contributory negligence for the determination of the jury in plaintiff's action to recover for intestate's death in an accident resulting from the driver's recklessness.

2. Evidence § 26—

In an action based on the recklessness of the driver of an automobile, it is improper for counsel to ask a witness whether the witness had knowledge of previous convictions of the driver for violations of the motor vehicle statutes, since the questions put before the jury information or claims in violation of the best evidence rule.

3. Evidence § 28—

Answers of a witness to questions as to whether the witness had heard about prior convictions of a driver for violations of the motor vehicle statutes are incompetent as hearsay.

4. Evidence § 15—

Intestate was killed while riding as a passenger in an automobile driven by his brother. *Held:* Testimony of intestate's aunt tending to show her knowledge of the driver's reputation for recklessness is incompetent to show that intestate knew of such reputation when he voluntarily rode as a passenger in the car driven by his brother.

APPEAL by plaintiff from *Gambill, J.*, at November 7, 1966 Civil Session of the Superior Court of FORSYTH County.

The plaintiff's intestate, Arnold Weatherman, age 19, was riding with his brother, Paul, age 21, in Paul's 1964 Plymouth on May 19, 1965 about 11:25 p.m. Robert Thomas was also in the car — Paul was driving.

Arnold and Paul had been riding around together most of the evening and had stopped at several places.

Herman Foster testified that he was driving a 1964 Ford west on I-40 when Paul's car struck him from behind. It was struck so hard that the front seat was torn out, and it went some 500 feet from the point of impact before stopping. Robert Lee Anderson testified that Paul's car started to pass him at a speed of 80 to 90 miles per hour, that he believed a tire blew out on Paul's car as it was passing him, that it then ran into the rear of the Foster car, careened off, crossed

the median and struck a Mack truck which was going east on the other section of I-40.

All three of the boys in the Plymouth were killed instantly.

Arnold's administrator brought suit against Paul's administrator to recover for the death of the former. At the trial the defendant admitted Paul's negligence and stipulated that the jury should answer the first issue of negligence "Yes." The jury answered the issue of contributory negligence in favor of the defendant. Upon judgment signed, the plaintiff appealed.

Roberts, Frye & Booth, by Leslie G. Frye and Parks Roberts, Attorneys for the plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Grady Barnhill, Jr., and David A. Irvin; Allan R. Gitter, Attorneys for defendant appellees.

PLESS, J. There was sufficient competent evidence to sustain the jury's finding of contributory negligence as to the plaintiff's intestate.

Summarized, the evidence tended to show that Paul had been with Arnold for several hours prior to the wreck, during which time Paul was drinking, fussing, and attempting to start a fight. He had drawn a pistol on a crowd of boys, and in going from one drive-in to another, he was driving from 60 to 65 miles per hour in a 45-mile zone. Shortly before the fatal accident, Frank Edwards had been riding with Paul, and he testified that Paul was running from 70 to 90 miles an hour as he was making a right turn, that the car slid sideways and skidded into another turn. Edwards then asked Paul to take him back to Garner's Esso Station, that he didn't like the way Paul was driving. At the gas station Edwards got out of the car, but Arnold remained in it.

Paul's car had four forward speeds, a four-barrel carburetor, 426 cubic inch engine with a tachometer. Paul told the witness Bobbitt in Arnold's presence that it had a cam and lifters to make it run faster, and that it would run 120 to 130 miles per hour at the Stratford Ramp. He also told Bobbitt that he would like to race him some time.

Later, at the Triangle Drive-In, Paul jumped out of his car, waved a pistol in the air, and asked the boys there if they were looking for trouble, that he didn't care whether he lived or died. Arnold told B. S. Weinstein that Paul was drinking, and Weinstein testified that Paul didn't walk or talk normal. The three boys got back in the car, drove off, and the accident occurred just a mile from this place and two or three minutes later.

The following statement from *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162, is pertinent:

". . . one who voluntarily places himself in a position of peril known to him fails to exercise ordinary care for his own safety and thereby commits an act of continuing negligence which will bar any right of recovery for injuries resulting from such peril.

"A guest, entering an automobile, assumes the dangers incident to the known incompetency, inexperience and driving habits of the driver. 4 Blashfield, 331, and cases cited in notes. It is the general rule that a guest or passenger in an automobile takes the host with his defects of skill and judgment and his known habits and eccentricities in driving. 4 Blashfield, 197.

" 'When a guest enters an automobile with the knowledge that the driver is incompetent or inexperienced . . . he takes the chances of an accident, and, in case an accident occurs arising from such known incompetency, inexperience, or recklessness, he cannot recover against the driver; for in such case he assumes the risk of the accident by inciting the driver's predisposition to operate the vehicle in an irresponsible manner.' 4 Blashfield, 333, and cases cited. So, if a guest, with knowledge of the defective condition of the car and appreciation of the hazards involved, voluntarily assents to ride therein, he will be precluded from recovery for injuries in an accident resulting from the defects of which he has then been cognizant. 4 Blashfield, 336; *Cline v. Prunty,* 152 S.E. 201 (W. Va.); *Pawhowski v. Eskafski,* 244 N.W. 611 (Wis.); *Knipfer v. Shaw,* 246 N.W. 328 (Wis.).

"The guest cannot acquiesce in negligent driving and retain a right to recover against the driver for resulting injuries therefrom. 4 Blashfield, 194-195; *Lorance v. Smith,* 138 So. 871 (La.); *Royer v. Saecker,* 234 N.W. 742 (Wis.). The basis for charging the passenger with negligence in such case is simply that of his own personal negligence in thus relying entirely and blindly upon the driver's care. *Russel v. Bayne,* 163 S.E. 290 (Ga.); *Lambert v. Railway Co.,* 134 N.E. 340 (Mass.); *Heyde v. Patten,* 39 S.W. (2d) 813."

The *Bogen* case was decided in 1941, and since that time there have been many references to it and some revisions and qualifications; however, the sections quoted above have not been altered in any manner that would affect their application here.

Under these authorities we hold that the evidence stated above is sufficient to go to the jury upon the question of contributory negligence. However, we are of the opinion that the plaintiff's case was

substantially damaged by the admission of the following incompetent evidence.

Upon the theory that Paul and Arnold were brothers who were very close to each other and "ran around together" almost every evening, the Court admitted testimony from their aunt, Mrs. Shirley Ann Hise, upon the contention of the defendant that if the aunt knew about the record of Paul that Arnold would also. She was permitted to testify over plaintiff's objection as follows:

"Q. You knew that in March of 1964 he was convicted of reckless driving, didn't you?

MR. FRYE: Well, I object, if your Honor please.

THE COURT: OVERRULED. EXCEPTION No. 116.

A. Yes, I did.

"Q. And you knew that in March of 1964 he was convicted of driving after his license were revoked, didn't you?

MR. FRYE: I object. EXCEPTION No. 117.

A. No. No.

"Q. And you knew that he had been convicted of driving an automobile intoxicated, didn't you?

MR. FRYE: I object.

THE COURT: OVERRULED. EXCEPTION No. 118.

A. I don't remember. I remember that he was charged with reckless driving. I don't remember the other. I would be afraid to say.

"Q. All right. But you do know that in November 1962 he was convicted of driving intoxicated and his licenses were taken, don't you?

MR. FRYE: Objection. She said she didn't have any other knowledge other than reckless driving.

THE COURT: OVERRULED. EXCEPTION No. 119.

A. I'd be afraid to say.

"Q. Well, you had heard about it, hadn't you?

A. Hearing and knowing is two different things.

THE COURT: Just answer his question.

Q. You had heard about this?

A. I suppose so. He was my nephew, I knew his license were taken away from him.

"Q. You know that he got caught driving after his license were revoked?

MR. FRYE: I object.

THE COURT: OVERRULED. EXCEPTION No. 120.

A. (No answer)

"I had not heard about that. I know that he was caught

with reckless driving. That I know for sure. The other I will not say because I am not sure.

"Q. And at the time he was caught for reckless driving, he was traveling at a high rate of speed, wasn't he?

MR. FRYE: I object, if your Honor please.

THE COURT: OVERRULED. EXCEPTION No. 121.

A. I suppose so.

"Q. As a matter of fact, the speed was 90 miles an hour, wasn't it?

MR. FRYE: Now, I object.

A. I do not know.

THE COURT: OVERRULED. EXCEPTION No. 122."

This was prejudicial upon several theories. The questions themselves were incompetent, and even though objections to them had been sustained, they put before the jury information, or claims, about Paul's record that could not have been proven in that manner. Also, the questions and the answers violated the hearsay evidence rule in that the questions were not so framed as to show actual knowledge by Mrs. Hise of the facts sought to be elicited. Further, the fact that Mrs. Hise knew or had heard of the incidents would not necessarily imply that Arnold also had that information.

The questions and answers are incompetent and highly prejudicial. The plaintiff's exceptions are well taken, and he is entitled to a

New trial.

LOUISE EVANS, EMPLOYEE, v. TOPSTYLE, INC., EMPLOYER AND NEW AMSTERDAM CASUALTY COMPANY, CARRIER.

(Filed 19 April, 1967.)

1. Master and Servant § 70—

Expert testimony that, as a result of an accident arising out of and in the course of claimant's employment, claimant had suffered a twenty per cent permanent disability of her right hand, together with claimant's testimony that she had trouble with her right hand at all times since the injury but never before, *is held* sufficient to support an award for partial permanent disability, notwithstanding further testimony by the expert on cross-examination that the disability could have resulted from causes unrelated to the employment, since even contradictions in claimant's testimony go to its weight to be resolved by the fact finding body.

2. Master and Servant §§ 93, 94—

Findings of fact of the Industrial Commission which are supported by competent evidence are binding in the Superior Court and in the Supreme Court on appeal.

APPEAL by defendants from *Gwyn, J.*, December 5, 1966 Civil Session, FORSYTH Superior Court.

The plaintiff, Louise Evans, Employee, instituted this proceeding before the North Carolina Industrial Commission against Topstyle, Inc., Employer, and New Amsterdam Casualty Company, Carrier, for compensation resulting from an industrial accident.

The parties stipulated the jurisdictional facts that on September 9, 1964 the plaintiff claimant sustained an injury by accident arising out of and in the course of her employment by Topstyle, Inc.

Deputy Commissioner W. C. Deldridge conducted two hearings, at which the claimant testified with respect to the injuries to her right wrist. After two surgical operations and much loss of time from work, she was unable to carry on the former employment in which she sustained injury. Dr. Underdal testified to the two surgical operations incident to the treatment of her injury and that she had 20% permanent partial disability of her right hand. In consequence of her inability to carry on her former employment, he recommended that she seek another job. This she did without loss of compensation.

The Deputy Commissioner made specific findings as to the claimant's loss of time from her employment on account of the injury and awarded compensation for the loss and ordered the defendants to make payment accordingly, including the cost of treatment. He made an award after finding the plaintiff had sustained the 20% permanent partial disability to her right hand.

On review, the full Commission adopted the findings and conclusions of the Hearing Commissioner and approved the award. On appeal, Judge Gwyn sustained the Commission's findings of fact, conclusions of law, and affirmed the award. The defendants excepted and appealed.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by W. F. Maready and J. Robert Elster, for defendant appellants.

Deal, Hutchins and Minor by Fred S. Hutchins, for plaintiff appellee.

HIGGINS, J. By this appeal the defendants ask this Court to review and reverse the judgment entered in the Superior Court by Judge Gwyn approving the disposition of the proceeding made by the Industrial Commission. The scope of the review here was channeled in rather narrow limits by the stipulations entered into at the beginning of the inquiry before the Commission. In addition to the weekly wage and the facts showing jurisdiction of the Industrial Commission, the parties stipulated:

"2. On September 9, 1964, the claimant sustained an injury by accident arising out of and in the course of her employment;

* * *

5. Subsequent to the accident on September 9, 1964, the parties entered into an agreement for the payment of compensation for temporary total disability pursuant to which the claimant was paid compensation for a period of time;"

The only disputed issue before the Commission and before Judge Gwyn and now before us involves the award for permanent partial disability as a result of the accident. On this issue, two witnesses testified, the claimant and Dr. Robert G. Underdal, admitted to be a medical expert in the field of orthopedic surgery.

Dr. Underdal first saw claimant on September 14, 1964, five days after the accident. In the course of treating the claimant's injury, Dr. Underdal made many examinations and performed two surgical operations. He testified that in his opinion the claimant has a 20% permanent partial disability of her right hand. During his testimony he testified:

"There was a compression of the nerve . . . and of the tendons . . . that developed from the injury that we were attempting to correct by the operations. . . . It is my opinion that all of her complaints up to this time, April 26, 1966, are explainable by the sprain of the wrist sustained on 9-9-64."

On cross examination Dr. Underdal stated that when he began the treatment he did not expect the injury to run the course it has. "(S)ome of the symptoms have been rather perplexing . . . rheumatoid arthritis and lupus erythematosis (R. p. 27) could account for the trouble . . . these two things . . . could not come from the traumatic injury she had." Dr. Underdal could not say to a medical certainty that the trouble with her right hand came from the injury.

Claimant testified she has had trouble with her right hand at all times since the injury but never before. On cross examination, the medical expert qualified his opinion as to the cause of the permanent partial disability. Even contradictions in the testimony go to its weight, which, after all, is for the fact finding body — in this instance — the Industrial Commission.

Certainly the evidence of claimant and Dr. Underdal, the only witnesses to testify in the case, is sufficient to sustain the Commission's finding that permanent partial disability resulted from the industrial accident. "A finding by the Industrial Commission, if supported by competent evidence, is binding on the Superior Court

Judge who reviews the case and is likewise binding on this Court on appeal." *Osborne v. Ice Co.*, 249 N.C. 387, 106 S.E. 2d 573; *Blalock v. Durham*, 244 N.C. 208, 92 S.E. 2d 758; *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25; *Brooks v. Carolina Rim and Wheel Co.*, 213 N.C. 518, 196 S.E. 835.

The evidence before the Industrial Commission under the rules governing decision on appeals from the Commission, was sufficient to support its findings of and award for 20% permanent partial disability to the claimant's right hand. The judgment entered in the Superior Court of Forsyth County approving the award is

Affirmed.

CHARLES A. NEW AND WIFE, WILHELMINA NEW, v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., ORIGINAL DEFENDANT AND HAMLIN SHEET METAL COMPANY, INCORPORATED, AND NATION-WIDE MUTUAL FIRE INSURANCE COMPANY, ADDITIONAL DEFENDANTS.

(Filed 19 April, 1967.)

Parties §§ 4, 8; Insurance § 86—

Insurer who has paid part of the loss in suit to insured is a proper party to an action by the insured against the tort-feasor to recover the loss, and upon motion of the tort-feasor, supported by allegations of such payment by insurer, the trial court has the discretionary power to order that insurer be joined as an additional party. Insurer's demurrer to the joinder on the ground that the complaint did not state a cause of action against it is frivolous.

APPEAL by original defendant from *Johnson, J.*, July Non-Jury Civil Session of WAKE, docketed and argued at the Fall Term 1966 as Case No. 531.

Plaintiffs instituted this action against Public Service Company of North Carolina, Inc. (Service Company), to recover damages caused by a fire which occurred in an apartment building owned by them. They allege that defendant Service Company, pursuant to a contract with plaintiffs, installed gas-burning furnaces in each of the six apartments in the building; that these appliances were improperly installed; and that defendant Service Company's negligence (as specified in the complaint) proximately caused a fire, which damaged the apartments in the sum of $14,717.00 on March 4, 1963. Defendant Service Company answered and alleged as a "third further answer and defense and plea in bar" (1) that the

apartment building was insured against loss by fire by Nationwide Mutual Fire Insurance Company (Nationwide), which has paid plaintiffs $8,961.96 as "the full amount of loss and damage," and that the action should be dismissed because plaintiffs are not the real parties in interest; and (2) that even if Nationwide has not paid plaintiffs the full amount of their loss, it is "a proper party to this action because, to the extent of its payment, it is subrogated to plaintiffs' rights against defendant Service Company. Service Company further alleges that Nationwide has placed it on notice of its subrogation interest. In order that Nationwide's "rights and interest, if any, may be fully and finally determined in this action," Service Company prayed that its "third and further answer and defense" be considered a motion for an order making Nationwide a party to this action. This motion was heard by his Honor, Chester R. Morris, judge presiding at the May 1966 Non-Jury Session, who entered the following order:

> "THIS CAUSE coming on to be heard . . . and it appearing to the court that Nationwide Mutual Fire Insurance Company may have an interest in the subject matter of this action and whose presence is necessary to a complete determination of the rights of all persons who may have an interest in the result of the litigation, and therefore is a proper party to this action, it is now, therefore, in the discretion of the court,
>
> ORDERED
>
> that Nationwide Mutual Fire Insurance Company be and it is hereby made an additional party defendant to this action. . . ."

The order further directed that summons, together with copies of all pleadings filed in the cause, be served upon Nationwide requiring it to answer original defendants' allegations relating to it within thirty days after such service. Instead of answering, it demurred to the third further answer and defense and plea in bar for that defendant Service Company has stated therein no cause of action against Nationwide and seeks no relief from it.

Judge Johnson sustained the demurrer and dismissed Nationwide from this action. Defendant Service Company excepted and appealed.

Young, Moore & Henderson by J. Allen Adams for Public Service Company of North Carolina, Inc., original defendant appellant.

Dupree, Weaver, Horton, Cockman & Alvis for Nationwide Mutual Fire Insurance Company, additional defendant appellee.

SHARP, J. The judgment of the court below must be reversed upon the authority of *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231, wherein Ervin, J., speaking for the Court, said:

> "Since an insurance company which pays the insured for a part of the loss is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor to recover the total amount of the loss, it has a direct and appreciable interest in the subject matter of the action, and by reason thereof is a proper party to the action. . . . This being so, the insurance company in such case may be brought into the action by the court in the exercise of its discretionary power to make new parties at the instance of the insured or the tort-feasor either in the capacity of an additional plaintiff who has an interest in the subject of the action and in obtaining the relief demanded in it, or in the capacity of an additional defendant whose presence is necessary to a complete determination of the rights of all persons who may have an interest in the result of the litigation. . . . Undoubtedly the more effective procedure in such situation is for the party desiring to bring the insurance company into the action to move that it be made an additional party defendant and required to answer, setting up its claim arising through subrogation." *Id.* at 161-62, 72 S.E. 2d at 234.

That opinion further pointed out that, even in those cases in which the insurer, claiming to have paid the total loss, sues alone to enforce subrogation from the tort-feasor, the insured is a proper party-defendant. This is true because, until the verdict establishes the amount of the damage, it cannot be known "whether insurer is the sole or partial owner of the cause of action." *Id.* at 162, 72 S.E. 2d at 234. Similarly, the insurer is a proper party when its insured sues the alleged tort-feasor, who alleges that the insurer has paid the full amount of the loss and is the real party in interest. Obviously, in a situation such as this, the alleged tort-feasor cannot assert a cause of action for relief against insurer in the ordinary sense. The purpose of making the insurer a party is to determine *and to protect,* in one action, the rights of all who may have an interest in the litigation.

Nationwide is not a necessary party to this action, but it is a proper party. *Motors v. Bottling Co.,* 266 N.C. 251, 146 S.E. 2d 102; *Burgess v. Trevathan, supra.* Whether it should have been joined was a matter addressed to the sound discretion of the trial court which heard the motion. Judge Morris, after a hearing, made Na-

tionwide a party and his decision is not reviewable. "(O)rdinarily, an order allowing a motion for the joinder of an additional party is not appealable." *Burgess v. Trevathan, supra* at 159, 72 S.E. 2d at 232. *Accord, Simon v. Board of Education,* 258 N.C. 381, 390, 128 S.E. 2d 785, 792; *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669; 3 Strong, N. C. Index, Parties § 8 (1960).

Aware of the foregoing rule, no doubt, Nationwide excepted to the order making it a party and did not attempt the futility of a direct appeal from Judge Morris' order. Instead, it demurred to Service Company's third further answer on grounds which can only be characterized as frivolous. The judgment sustaining the demurrer and dismissing Nationwide from the action is

Reversed.

JANIS P. MILLER v. W. M. MILLER.

(Filed 19 April, 1967.)

1. Divorce and Alimony § 18—

In hearing a motion for alimony *pendente lite*, the court has the discretion to decide in what form he should receive evidence in his efforts to ascertain the truth, and the action of the court in limiting the evidence of both parties to affidavits is within his discretion and will not be disturbed in the absence of a showing of abuse.

2. Same—

Where plaintiff's complaint in a suit for alimony without divorce alleges that defendant had contributed nothing to her support since a specified date and that her earnings as a secretary are not sufficient to support her adequately and defray the costs of her suit, her complaint, treated as an affidavit, is sufficient to support the court's order for subsistence and counsel fees *pendente lite*, and defendant's contention that it affirmatively appeared from her allegations that she had ample income to meet her needs pending trial is not supported by the record.

3. Same—

In a hearing by the court of plaintiff's motion for subsistence and counsel fees *pendente lite*, it will be presumed that the court found facts from the conflicting affidavits and allegations of the pleadings, treated as affidavits, sufficient to support its order awarding subsistence and counsel fees *pendente lite*.

4. Same—

The amount of subsistence *pendente lite* is a matter resting in the sound discretion of the trial court.

5. Appeal and Error § 34—

The requirement of the amendment to Rule of Practice in the Supreme Court No. 19(1) is again brought to the attention of the Bar.

APPEAL by defendant from *Olive, E.J.,* February 19, 1967 Non-Jury Session of WAKE.

Action for alimony without divorce under G.S. 50-16. The following facts appear from the pleadings:

Plaintiff and defendant were married on October 5, 1963, and lived together as husband and wife until August 19, 1966. They have no children. Plaintiff has been gainfully employed as a secretary since her marriage, and, from January 1964 to February 1965, she supported herself and defendant while he was a student at North Carolina State University at Raleigh. She alleges that defendant, after having mistreated her throughout their marriage (in ways specified in the complaint), abandoned her and their home in Raleigh on August 19, 1966. On that day he moved to Misenheimer, where he has since lived, refusing to permit her to join him. Defendant denies abandoning plaintiff and alleges that they separated by mutual consent on September 4, 1966. She continues in possession of the household furniture, which the parties acquired during the time they lived together and on which there is a balance due of $80.00. When defendant went to Misenheimer, he left with plaintiff his 1964 Pontiac automobile, on which there is a balance due of $750.00. She avers that he agreed she was "to have the possession and use of the automobile." He admits that he left the car with her, but contends that she was to have it only until October 15, 1966. In the early morning hours of January 4, 1967, defendant came to Raleigh and surreptitiously took the Pontiac, leaving plaintiff a 1954 Chevrolet, which, she alleges (and he denies), is dilapidated and beyond repair.

Plaintiff alleges that at all times since her marriage to defendant she has been "a loyal, faithful, and dutiful wife, and has contributed her time, money, and energy in attempting to establish and maintain a home for defendant." Defendant admits this allegation. Plaintiff further alleges that defendant has contributed nothing to her support since August 1966 and that her earnings as a secretary are not sufficient to support her adequately or to defray the costs of this suit. She asks for alimony *pendente lite* and counsel fees, possession of the automobile and furniture, and permanent alimony. Defendant denies that plaintiff is entitled to alimony and that her income is insufficient for her necessary expenses.

Plaintiff's motion for alimony *pendente lite* came on to be heard before Judge Olive on February 23, 1967. Both plaintiff and defend-

ant offered affidavits, which — except for the complaint and answer — appellant did not include in his case on appeal. The case does, however, contain the statement that affidavits disclosed that defendant's gross monthly pay is $550.00; his net pay, $420; and that plaintiff's net monthly pay is $268.30.

After plaintiff had offered her affidavits, counsel "tendered" her as a witness; whereupon Judge Olive stated that he would consider affidavits only. Defendant's attorney then announced that he would like to cross-examine plaintiff. Permission to cross-examine was denied, and defendant excepted. After plaintiff had rested and defendant had offered two affidavits, his counsel called defendant's mother as a witness. The court again declined to hear oral testimony; whereupon defendant introduced his mother's affidavit, which is not in the transcript.

Judge Olive entered judgment that, pending the trial of the action, defendant pay plaintiff $100.00 a month subsistence; that plaintiff be awarded the possession of the 1964 Pontiac and the furniture; that defendant make the payments on the car and pay the balance due on the furniture; and that he pay plaintiff's attorney $150.00 for his services rendered in this action. Defendant gave notice of appeal.

Crisp, Twiggs & Wells by L. Bruce McDaniel for plaintiff appellee.

Jacob W. Todd for defendant appellant.

PER CURIAM. Defendant's first two assignments of error relate to the refusal of the judge to allow him to cross-examine plaintiff and to elicit oral testimony from his mother. In recognition of the limitations of time and the duration of sessions of court, the General Assembly provided in G.S. 50-16 that applications for alimony *pendente lite* "may be heard in or out of term, orally or upon affidavit, or either or both." With these words, the legislature gave the judge hearing the motion the discretion to decide in what form he should receive the evidence in his efforts to ascertain the truth. In hearing the motion in the instant case, Judge Olive limited the testimony to that contained in affidavits. This record and case on appeal contain no suggestion that, in so doing, he abused his discretion. He applied the same rule to both parties.

Defendant's third assignment is that the court erred in making any award to plaintiff when "plaintiff's affidavit showed that plaintiff had ample income to meet her needs pending the trial of this cause, without special requirements for a greater income than was already available to her." Suffice it to say that the case on appeal

contains no affidavit by plaintiff which shows that she has such funds. On the contrary, the complaint contains the positive averments that she is unable to provide adequate support for herself and to defray the necessary expenses of this action and that defendant has contributed nothing to her support since he separated himself from her in August 1966.

The judge, after hearing the evidence — only a portion of which appellant included in his case on appeal —, awarded alimony *pendente lite* as set out in the judgment. "(I)t is presumed that he found the facts from the evidence presented to him according to his conviction about the matter and that he resolved the crucial issues in favor of the party who prevailed on the motion." *Williams v. Williams,* 261 N.C. 48, 55, 134 S.E. 2d 227, 232. The amount allowed a wife for her subsistence *pendente lite* and for her counsel fees is a matter for the trial judge. "His discretion in this respect is not reviewable except in case of an abuse of discretion." *Rowland v. Rowland,* 253 N.C. 328, 331, 116 S.E. 2d 795, 797. *Accord, Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443. No abuse appears here.

It is noted that, in preparing the transcript, appellant completely ignored the July 1, 1963 amendment to Rule No. 19(1) of the Rules of Practice in the Supreme Court of North Carolina. The attention of the bar is once again directed to this rule.

The judgment of the court below is

Affirmed.

STATE v. ROBERT M. GREER.

(Filed 19 April, 1967.)

1. Criminal Law § 139—

Defendant's appeal from sentences imposed upon his pleas of guilty, entered by the court after interrogation disclosed that such pleas were intelligently, understandingly and intentionally entered, presents for review the one question whether error of law appears on the face of the record proper.

2. Constitutional Law § 36; Criminal Law § 131—

Sentences which do not exceed the limits fixed by the applicable statutes cannot be considered cruel or unusual in the constitutional sense.

APPEAL by defendant from *McLaughlin, J.,* 28 November 1966 Session of STANLY.

Criminal prosecution on four indictments. The first indictment,

case No. 1715, charges defendant in the first count on 19 July 1966 with feloniously breaking and entering a building occupied by Stop & Shop Grocery, Inc., with intent to commit larceny of the merchandise and goods therein, a violation of G.S. 14-54; the second count charges defendant on the same date and place with the larceny of goods and merchandise of Stop & Shop Grocery, Inc., of the value of more than $200, by feloniously breaking and entering the building aforesaid, a violation of G.S. 14-72; and the third count charges defendant on the same date and place with receiving the said goods and merchandise well knowing that they had been theretofore feloniously stolen, taken, and carried away. The second indictment, case No. 1716, charges defendant in the first count on 4 August 1966 with feloniously breaking and entering a building occupied by Vincent Cascio, d/b/a Cascio's Restaurant, with intent to commit larceny of the merchandise and goods therein, a violation of G.S. 14-54; the second count charges defendant on the same date and place with the larceny of goods and merchandise of Vincent Cascio, d/b/a Cascio's Restaurant, of the value of less than $200, by feloniously breaking and entering the building aforesaid, a violation of G.S. 14-72; and the third count charges defendant on the same date and place with receiving the goods and merchandise well knowing that they had been theretofore feloniously stolen, taken, and carried away. The third indictment, case No. 1718, charges defendant in the first count on 12 August 1966 with feloniously breaking and entering a building occupied by George Miller, d/b/a W. & T. Gulf, with intent to commit larceny of the goods and merchandise therein, a violation of G.S. 14-54; the second count charges defendant on the same date and place with the larceny of goods and merchandise of George Miller, d/b/a W. & T. Gulf, of the value of less than $200, by feloniously breaking and entering the building aforesaid, a violation of G.S. 14-72; and the third count charges defendant on the same date and place with receiving the goods and merchandise well knowing that they had been theretofore feloniously stolen, taken, and carried away. The fourth indictment, case No. 1719, charges defendant and two other persons in the first count on 18 August 1966 with feloniously breaking and entering a building occupied by John Cranford, d/b/a Richfield Farm Supply, with intent to commit larceny of the merchandise and goods therein, a violation of G.S. 14-54; the second count charges defendant and two other persons on the same date and place with the larceny of goods and merchandise of John Cranford, d/b/a Richfield Farm Supply, of the value of more than $200, by feloniously breaking and entering the building aforesaid, a violation of G.S. 14-72; and the

third count charges defendant and two other persons on the same date and place with receiving the goods and merchandise well knowing that they had been theretofore feloniously stolen, taken, and carried away.

Defendant, who was an indigent, was represented by court-appointed counsel, Edward E. Crutchfield. Defendant entered pleas of guilty to all four indictments. When he entered the pleas of guilty, the court asked him if he authorized his counsel to enter pleas of guilty in all four cases, and the defendant replied, "Yes sir." The court then asked defendant if he entered the pleas of guilty in all four cases without any promise of reward or hope of reward, and defendant answered, "Yes sir." Defendant stated to the court that he was ready for trial and that he was satisfied with his counsel. The court asked defendant as to whether he realized that the court could, if it saw fit in its discretion, sentence him to as much as 80 years in prison under his pleas of guilty in all four cases, and defendant replied, "Yes sir." The court then asked defendant as to whether he still wanted to enter these pleas of guilty freely and voluntarily, and defendant replied, "Yes sir."

The court heard evidence in respect to the charges in all four indictments.

The judgments of the court were as follows: In indictment No. 1715, 10 years in prison on the first count charging a felonious breaking and entry, a violation of G.S. 14-54, and on the second count in this indictment charging larceny, a sentence of 10 years, which sentence was to run consecutively and not concurrently with the sentence pronounced in the first count charging breaking and entry. In indictment No. 1716, a sentence of 5 years on the first count charging breaking and entry, this sentence to run consecutively and not concurrently with the judgment pronounced in the second count charging larceny in indictment No. 1715. In the second count in indictment No. 1716 charging larceny, judgment was continued for 5 years. In indictment No. 1718, the judgment was prayer for judgment continued for 5 years. In indictment No. 1719, the judgment was prayer for judgment continued for 5 years.

From these judgments, defendant appealed to the Supreme Court.

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

Edward E. Crutchfield for defendant appellant.

PER CURIAM. Defendant was allowed by order of court to appeal to the Supreme Court *in forma pauperis*. Edward E. Crutch-

field was ordered by the court to continue as counsel for defendant and to file a brief for him and appear for him in the Supreme Court. By order of court the case on appeal and the brief of defendant's counsel were mimeographed and paid for by the county.

Defendant, who was represented by court-appointed counsel, having intelligently, understandingly, and intentionally pleaded guilty as charged in all four indictments, his appeal presents for review the one question as to whether error of law appears on the face of the record proper. *S. v. Newell,* 268 N.C. 300, 150 S.E. 2d 405; *S. v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800.

The questions presented and argued in defendant's brief are that the total sentences imposed by the trial court of 25 years imprisonment were cruel and unusual punishment within the meaning of Article I, section 14 of the Constitution of North Carolina and the Eighth Amendment to the United States Constitution, and that the court abused its discretion in imposing sentences of 25 years.

The prison sentences imposed by the trial court did not exceed the statutory maximum provided in G.S. 14-54 and G.S. 14-72. *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91; *S. v. Wilson,* 264 N.C. 595, 142 S.E. 2d 180. We have held in case after case that when the punishment does not exceed the limits fixed by 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. No abuse of discretion on the part of the judge is shown.

A careful examination shows no error of law on the face of the record proper, and the judgments of the court below are

Affirmed.

STATE v. WILLIE BARNES ALIAS TOMMY WATSON, BOBBY RAY JONES, AND CURTIS HARRIS, JR.

(Filed 19 April, 1967.)

Criminal Law § 101; Larceny § 7— Circumstantial evidence of defendant's guilt of larceny held insufficient to be submitted to jury.

Evidence that a certain building had been broken into and entered and goods taken therefrom, that the goods were later found in a certain house, that at about 2:30 a.m. on the night of the offense an occupant of the house had let four men, including defendant, into the house, but did not at that time see any of the merchandise in question in the house, but

that some one and one-half hours thereafter the occupant saw in the house a number of items, later identified as the goods stolen, that a "rippled-sole" shoe track was found near a broken window of the building which had been entered, and that defendant was wearing a "rippled-sole" shoe sometime after the offense, *held* insufficient to be submitted to the jury on the question of defendant's guilt of larceny, there being no evidence that the shoe worn by defendant fitted into or was identical with the tracks found near the building, and no evidence that defendant had in his possession or at any time had control over the stolen merchandise.

APPEAL by defendant Jones from *Braswell, J.*, 2 October 1966 Regular Criminal Session of WAKE.

Criminal prosecution on an indictment containing three counts. The first count charges that Willie Barnes alias Tommy Watson, Bobby Ray Jones, and Curtis Harris, Jr., on 14 September 1966 did feloniously break and enter a certain shop and building occupied by J. H. Denning, d/b/a Denning's Grocery, with intent to commit larceny of the goods and merchandise therein, a violation of G.S. 14-54; the second count charges the same defendants on the same date at the same place, after having feloniously broken into and entered a shop and building occupied by J. H. Denning, d/b/a Denning's Grocery, did steal, take, and carry away certain specified articles of personal property therein owned by J. H. Denning, d/b/a Denning's Grocery, of the value of more than $300, a violation of G.S. 14-72; and the third count charges the same defendants on the same date at the same place with receiving the aforesaid articles of personal property well knowing that they had been theretofore feloniously stolen, taken, and carried away.

Defendant Barnes and defendant Jones, who appeared by separate counsel appointed for each one of them by the court, pleaded not guilty. Defendant Harris, who was represented by privately employed counsel, pleaded not guilty. Verdict: Not guilty as to all three defendants on the charge in the first count in the indictment of a felonious breaking and entry into a shop and building, and guilty as to all three defendants on the second count in the indictment charging larceny.

The judgment of the court as to defendant Barnes was that he be imprisoned for a term of not less than 5 years nor more than 7 years; the judgment of the court as to defendant Jones was that he be imprisoned for a term of not less than 5 years nor more than 7 years; and the judgment of the court as to defendant Harris was that he be imprisoned for a term of 3 years, with a recommendation that he be granted the option of serving the sentence imposed under the work release plan as provided by law. Defendant Jones appealed.

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

Garland B. Daniel for defendant appellant.

PER CURIAM. The State's evidence is uncontradicted that J. H. Denning, who owns and operates a store and service station located about nine miles from Raleigh, North Carolina, locked it up about 7:30 p.m. on 13 September 1966, and that on the morning of 14 September 1966 he went to his store and service station and found that it had been broken into and entered, and a quantity of cigarettes, underwear, shirts, beer, groceries, and other articles of personal property belonging to him of the value of more than $300 had been stolen, taken, and carried away from his store and service station. Denning identified a considerable quantity of the stolen property by his cost marks on it the following day in the home of Emma Jean Price at 514½ East Hargett Street in Raleigh. Denning also identified there a certain pistol that had been taken from his store.

Bobby Jean Lassiter testified for the State that she and Emma Jean Price, Freddie Bradshaw, and Willie Barnes arrived at Emma Jean Price's home at about 12:30 a.m. on 14 September 1966. About 1:30 a.m. Curtis Harris and Bobby Ray Jones came to the house and asked Bradshaw and Barnes to go out with them. They left together. About 2:30 a.m. Bobby Jean Lassiter got up, unlocked the door, and let the four men in. Barnes had a pistol. At 2:30 a.m. Bobby Jean Lassiter did not see any merchandise. Bobby Jean Lassiter went back to bed. Bobby Jean Lassiter got up at 4 a.m. to go to the bathroom and saw a number of items which later that morning Bobby Jean Lassiter helped Emma Jean Price put in some bags, which were left in the bathroom. These articles in the bags were later seized by officers, and identified by John H. Denning as goods stolen from him.

Emma Jean Price testified in effect that she arrived at her home about 12:30 a.m. on 14 September 1966 in a highly intoxicated condition, and that she did not know anything until about 11:30 or 12:00 o'clock the following day.

Deputy Sheriff Turner testified for the State that he observed a rippled-sole shoe track near a broken window of the service station or grocery store where the robbery occurred. After Harris and Barnes were arrested, defendant Jones came to the police station to find out about the amount of their bond, and the sheriff noticed that he was wearing a rippled-sole shoe.

There is no evidence in the record that the rippled-sole shoe de-

fendant Jones was wearing fitted into or was identical with the rippled-sole shoe print found around the store of Denning. There is no evidence in the record that defendant had in his possession or at anytime had control over the merchandise stolen from Denning's store. There is no evidence as to who brought the goods stolen from Denning into Emma Jean Price's home, or at what time they were brought in.

According to the record before us the defendants offered no evidence. Defendant Jones assigns as error the denial of his motion made at the close of the State's evidence for a judgment of compulsory nonsuit. Considering the State's evidence in the light most favorable to it, there is no evidence in the record before us tending to prove the fact of defendant Jones' guilt as charged, or which reasonably conduces to that conclusion as a fairly logical and legitimate deduction.

The court erred in overruling defendant Jones' motion for judgment of compulsory nonsuit.

Reversed.

LETTIE MAE GOWER v. CITY OF RALEIGH.

(Filed 19 April, 1967.)

1. Municipal Corporations § 12—

A municipality is not liable for injuries sustained by a pedestrian in a fall on a city street or sidewalk merely because of a defect in its sidewalk, curb or street unless such defect is of such nature and extent that a reasonable person, knowing of its existence, should have foreseen that it would likely cause injury, and the city had actual or constructive notice of its existence for a sufficient time prior to the fall to have remedied the defect.

2. Same— Evidence held insufficient to be submitted to the jury in this action to recover for fall on municipal street.

Plaintiff testified that she fell when she stepped from the sidewalk to the street and the heel of the shoe on one foot caught in a crack in the street and the other foot slipped on some oily substance on the sidewalk. Plaintiff's evidence did not disclose how long the oily substance had been on the sidewalk and was conflicting as to whether she did or did not see the crack in the street before she stepped into the street. The accident occurred on the morning of a clear day. *Held:* Nonsuit was properly entered, since if plaintiff could not see the crack before stepping into the street the defect would not have been more visible to a city inspector than to her, while if she did observe the crack and the existence of the crack was

so clearly dangerous to users of the sidewalk that the city should have anticipated injury therefrom, plaintiff was contributorily negligent in not avoiding the crack.

3. Appeal and Error § 41—

Where the answer which the witness would have given if permitted to testify is not shown in the record it cannot be ascertained that its exclusion was prejudicial.

4. Same—

Where plaintiff's evidence is insufficient to be submitted to the jury, even if testimony excluded had been admitted, the exclusion of the testimony cannot be prejudicial.

APPEAL by plaintiff from *Mallard, J.*, at the 4 October 1966 Civil Session of WAKE.

The plaintiff sues for injuries sustained when she fell while walking upon the crosswalk at the intersection of Cabarrus Street and Fayetteville Street in Raleigh on 7 December 1965. She appeals from a judgment of nonsuit entered at the close of her evidence.

The complaint alleges that the plaintiff, intending to cross Cabarrus Street, stepped down with her left foot from the sidewalk to the surface of the street, that her left foot went into a crack in the street pavement while her right foot remained upon the sidewalk and slipped upon some oily substance thereon. It alleges that these conditions and events, in combination, caused her to fall and sustain a fracture of her knee cap and that the city was negligent in failing to exercise reasonable diligence in the inspection of the street and sidewalk, and in permitting these conditions to exist thereon.

The answer of the city denies any negligence by it. It denies any knowledge of the existence of the conditions upon the street and sidewalk of which the plaintiff complains. The city also alleged contributory negligence by the plaintiff in failing to keep a proper lookout and in failing to exercise due care for her own safety in view of the conditions which she alleges existed upon such street and sidewalk.

The plaintiff's evidence, considered in the light most favorable to her, was, in substance, as follows:

At the time of her injuries, she was 49 years of age. She was not a resident of Raleigh. On this occasion she arrived in the city by bus, disembarked at the south end of Fayetteville Street, and walked northwardly on the sidewalk to Cabarrus Street. She glanced down, then looked up at the stop light and started to cross the intersection. She did not observe the cracked place in the concrete until she stepped on it. When she did so, her left heel went down into the crack. Her right foot then slipped, it having been upon the

edge of the curb, and she fell on the street, sustaining a fracture of her knee.

At the time she stepped upon the cracked portion of the pavement, she could not tell that there was anything wrong with it "since it was not cracked sufficient enough to see it." She described the crack as "real small," saying, "You couldn't hardly see it until you stepped on it * * * it was not a cracked place until you stepped on it and my foot went down in it." (On cross examination the plaintiff stated that the crack was not in the street pavement but was on the curbing, it not being clear whether this referred to the gutter or the curb itself.) After she fell, she observed the oily substance upon which her right foot had slipped when her left heel became caught in the crack. The crack "was nothing to be alarmed at," but when she stepped on it her heel gave way. This occurrence took place at 9:20 a.m., 7 December 1965, a fair, pretty day. Had the plaintiff looked, she "could not have seen the oily spot," but after she fell she saw it.

Paul F. Smith and Donald L. Smith for the City of Raleigh.
E. R. Temple and Ernest L. Culbreth for plaintiff appellant.

PER CURIAM. The plaintiff's evidence establishes that the plaintiff fell at the time and place stated in the complaint and sustained serious injury as the result of her fall. This is not sufficient to impose liability upon the city. It is not liable to every pedestrian who falls and sustains an injury by reason of an inequality in the level of or a defect in its sidewalk, curb or street. The city is not liable for such injury unless it was negligent in failing to correct the defect within a reasonable time after it knew, or should have known, that it existed and was a hazard to persons using the street or walk in a proper manner. *Waters v. Roanoke Rapids,* 270 N.C. 43, ... S.E. 2d .....; *Smith v. Hickory,* 252 N.C. 316, 113 S.E. 2d 557.

The plaintiff's evidence, taken as true, is not sufficient to permit a finding that the city knew of or, by reasonable inspection of its sidewalk and crosswalk, should have known of either the crack or the presence of the oily substance. She testified that at 9:20 a.m. on a clear day, she looked down before stepping off the curb and did not observe either condition. Neither would have been more visible to a city inspector than to her. There is nothing to indicate how long the oily substance had been upon the sidewalk or curb.

If, on the other hand, the plaintiff did observe the crack before she stepped on it, as her testimony at another point would indicate, and the existence of the crack was so clearly dangerous to users of

the sidewalk that the city should have anticipated injury therefrom, the plaintiff, having observed the crack, should also have recognized the danger of stepping upon it. Its small extent, according to her description, made it easy to avoid. If the city should have known the crack was a hazard to pedestrians, the plaintiff was negligent in stepping upon it, and thereby contributed to her own injury.

The plaintiff also excepts to certain rulings of the court sustaining objections to evidence offered by her. With reference to exception No. 8, the answer which the witness would have given is not shown in the record. Consequently, this ruling cannot be deemed prejudicial error. Had all the other proposed testimony been admitted, there would still be insufficient evidence to support a finding of negligence by the city.

Affirmed.

HUBERT MONTAGUE AND HARVEY MONTAGUE, D/B/A MONTAGUE BUILDING COMPANY, PLAINTIFFS, V. C. T. WOMBLE, DEFENDANT.

(Filed 19 April, 1967.)

Pleadings § 24—

The effect of sustaining a plea in bar is to destroy the cause of action alleged, and motion to be allowed to amend thereafter made by plaintiff is properly denied.

APPEAL by plaintiffs from *Bone, E.J.*, December 1966 Assigned Civil Session, WAKE Superior Court.

Bailey, Dixon & Wooten by Wright T. Dixon, Jr., for plaintiff appellants.

Crisp, Twiggs & Wells by Hugh A. Wells, for defendant appellee.

PER CURIAM. The plaintiffs' complaint is quoted in full, the defendant's answer is summarized, and the pertinent facts involved in this controversy are discussed in the former opinion of this Court reported in 267 N.C. 360.

The plaintiffs' cause of action was based entirely on the allegation the defendant issued to the plaintiffs a check for $5,000 which did not clear the bank. They demanded judgment for the amount of the check and interest. The defendant admitted signing and delivering the check. As a plea in bar, he alleged the check was intended as a down payment or credit on the purchase price of a

house and lot which the parties were then negotiating; that the negotiations were entirely in parol, were never consumated and, in fact, the plaintiffs sold and conveyed the house and lot to another; and that the defendant received nothing for the check. These facts appeared from the plaintiffs' testimony at the trial. They admitted the house and lot were sold to another purchaser. This Court reversed the judgment in plaintiffs' favor entered in the court below upon the ground the plaintiffs' evidence established the defendant's plea in bar.

After our decision was certified to the Superior Court, the plaintiffs appeared and moved to amend their complaint, attempting to set up another and different cause of action. Judge Bone denied the motion and the plaintiffs appealed. When the plea in bar was established, the effect was to destroy the cause of action alleged. Judge Bone was correct in refusing to permit the plaintiffs to amend. The judgment is

Affirmed.

PATRICIA TUNSTALL v. DAVID RAINES AND CHARLES EDWARD TUNSTALL.

(Filed 19 April, 1967.)

Automobiles § 41g— Evidence that defendant along servient highway entered intersection without stopping held to take issue of negligence to jury.

Plaintiff's evidence to the effect that she was a passenger in a car traveling south on a dominant highway, that a car traveling west on a servient highway was closer to the intersection but entered without stopping, that the driver "cut the corner" to his left and proceeded obliquely toward the lane for southbound traffic, and that the collision occurred between the left rear of the car entering the intersection from the servient highway and the right-hand side of the car traveling south on the dominant highway, *held* sufficient to be submitted to the jury on the issue of the negligence of the driver along the servient highway, notwithstanding evidence of negligence on the part of the driver on the dominant highway when the evidence does not establish as a matter of law that this driver's negligence was the sole proximate cause of the collision.

APPEAL by plaintiff from *Braswell, J.*, September 19, 1966 Regular Civil Session of WAKE.

Plaintiff's action is to recover damages for personal injuries resulting from a collision on November 11, 1965, between a 1963 Ford operated by defendant Tunstall, in which plaintiff was riding as a

passenger, and a 1956 Cadillac operated by defendant Raines, near the intersection of Rural Paved Roads #1152 and #1301.

When approaching said intersection, Tunstall was driving south on #1152, the dominant highway, and Raines was driving west on #1301.

Plaintiff alleged each defendant was negligent in particulars set forth and that the joint and concurrent negligence of defendants proximately caused the collision and plaintiff's injuries.

The only evidence was that offered by plaintiff. At the conclusion thereof, each defendant moved for judgment of nonsuit. Tunstall's motion was overruled. Raines's motion was allowed. Thereupon, plaintiff took a voluntary nonsuit as to defendant Tunstall.

As to defendant Raines, the court entered judgment of involuntary nonsuit. Plaintiff excepted thereto and appealed.

Hatch, Little, Bunn & Jones for plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis for defendant appellee Raines.

PER CURIAM. There was evidence sufficient to permit the jury to find the following: As the two cars approached the intersection, the Raines car was closer to the intersection than the Tunstall car. Raines failed to stop in obedience to the stop sign confronting him. Upon entering the intersection, Raines "cut the corner" to his left and proceeded obliquely towards the lane of #1152 for southbound traffic. The collision was between the "left rear" of the Raines car and the "right-hand side" of the Tunstall car. When the collision occurred, the "left rear" of the Raines car was "close to the center" of #1152. The debris from the collision began 100-105 feet south of the southern limit of the intersection. Raines did not see the Tunstall car prior to the collision.

Careful consideration impels the conclusion that the evidence, when considered in the light most favorable to plaintiff, is sufficient to require submission for jury determination of an issue as to the alleged actionable negligence of Raines. Nor does the evidence establish as a matter of law that plaintiff was contributorily negligent. Moreover, although there is plenary evidence as to the actionable negligence of Tunstall, the evidence does not establish as a matter of law that Tunstall's negligence was the sole proximate cause of the collision and of plaintiff's injuries. Having reached these conclusions, we deem it appropriate to refrain from further discussion of the evidence presently before us. *Byrd v. Motor Lines*, 263 N.C.

369, 372, 139 S.E. 2d 615, 617, and cases cited. The judgment of involuntary nonsuit as to defendant Raines is reversed.

Reversed.

STATE v. FRANK WALLACE.

(Filed 19 April, 1967.)

1. Larceny § 10; Criminal Law § 137—

A plea of guilty of receiving stolen property knowing it to have been stolen is insufficient to support a felony sentence, even though the indictment charges defendant with receiving stolen goods having a value of more than $200. If there should be a correction of the record proper by appropriate proceedings so as to show that defendant pleaded guilty as charged, the court could then enter a felony sentence.

2. Criminal Law § 151—

The record proper and not the case on appeal controls.

APPEAL by defendant Frank Wallace from *McLaughlin, J.*, November 28, 1966 Session of STANLY.

Frank Wallace, the appellant, referred to hereafter as defendant, and Samuel Monroe Wilson, alias Coy Scarboro, and Robert M. Greer, were indicted jointly in a three-count bill. The third count charged in substance that defendants received described stolen property of one John Cranford, d/b/a Richfield Farm Supply, of the value of more than $200.00, with knowledge it had been stolen and with felonious intent.

In the record on appeal, the following (presumably an excerpt from the minutes) is quoted:

"The defendant through court-appointed counsel, R. L. Brown, Jr., entered a plea of guilty of receiving stolen property knowing it to have been stolen.

"Let the defendant be confined to the State Prison for a period of 10 years."

Defendant excepted, assigning as error that the sentence of ten years was "cruel and unusual punishment" and therefore violative of his constitutional rights.

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

Richard L. Brown, Jr., for defendant appellant.

PER CURIAM. Defendant's plea, "guilty of receiving stolen property knowing it to have been stolen," is insufficient to support the judgment.

"In the bill of indictment the defendant was charged with a felony, that is, receiving goods of the value of more than one hundred dollars. G.S. 14-71 and G.S. 14-72. In order for the defendant to be found guilty under G.S. 14-71, *it is incumbent upon the State* to prove beyond a reasonable doubt that the value of the goods was more than one hundred dollars. *This is an essential element of the crime* because G.S. 14-72 specifically provides that 'the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars is hereby declared a misdemeanor.'" (Our italics.) *S. v. Tessnear,* 254 N.C. 211, 214, 118 S.E. 2d 393, 394-395. G.S. 14-72 was amended by Chapter 39, Session Laws of 1961, so as to provide, in pertinent part, that "(t)he larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than *two* hundred dollars," is declared a misdemeanor. (Our italics.)

We are advertent to the fact that the case on appeal sets forth that defendant tendered and the State accepted "a plea of guilty on the third count, that is, receiving stolen goods knowing them to have been feloniously stolen." However, the record proper, not the case on appeal, controls. *S. v. Truesdale,* 125 N.C. 696, 34 S.E. 646; *Bartholomew v. Parrish,* 190 N.C. 151, 129 S.E. 190.

Upon the record before us, defendant's plea is insufficient to support the judgment. Hence, the judgment is vacated and the cause is remanded for a new judgment.

Any judgment pronounced upon defendant's plea of guilty as presently recorded must be as upon conviction of a misdemeanor. If there should be a modification and correction of the record proper by appropriate proceedings (1 Strong, Criminal Law § 137; *S. v. Arthur,* 246 N.C. 690, 99 S.E. 2d 918) so as to show that defendant, at said November 28, 1966 Session, pleaded guilty *as charged in the third count* of the bill of indictment, in such event the case would be for the pronouncement of judgment as upon conviction of a felony.

Error and remanded.

STATE OF NORTH CAROLINA v. BERNARD J. LEPARD.

(Filed 19 April, 1967.)

Criminal Law § 131; Constitutional Law § 36—

A sentence which does not exceed the maximum prescribed by the applicable statute cannot be considered cruel and unusual punishment in the constitutional sense. Constitution of North Carolina, Art. I, § 14.

CERTIORARI to review the judgment of *Bickett, J.*, at the March 1966 Criminal Session of WAKE.

By an indictment proper in form, Bernard J. LePard, Phillip Alvin Reese and Dante Ferrara were charged with the offense of robbery with firearms, the indictment charging that on 1 November 1965 they, being armed with certain pistols whereby the life of Woodrow Wilson Weatherman was endangered and threatened, robbed Weatherman of watches, other jewelry and money of the value of $7,844.74.

It does not appear upon the present record whether Ferrara has been brought to trial upon this charge. LePard and Reese were brought to trial and were represented by privately employed counsel. Each having announced in open court his readiness for trial, each through his counsel entered a plea of guilty to armed robbery as charged in the bill of indictment.

Witnesses for the State thereupon testified, the substance of their testimony being that LePard, Reese and Ferrara on 1 November 1965 entered the premises of Weatherman, trading as Weatherman's Jewelry, closed the doors, drew the window shades and, with the use of firearms, bound and gagged Weatherman and another occupant of the premises and removed therefrom various and sundry watches, other jewelry and money of the total value of $7,844.74. The defendants offered no evidence.

Thereupon, the court entered judgment that LePard be imprisoned in the State's Prison for a term of not less than 24 years nor more than 30 years at hard labor. A like judgment was entered as to Reese. LePard gave notice of appeal. The superior court entered its order permitting him to appeal *in forma pauperis* and appointed as his counsel on appeal the same attorneys who represented him as privately employed counsel at his trial. The appeal not having been perfected within the time allowed therefor, a petition for writ of *certiorari* was filed and allowed. The sole assignment of error is that the sentence imposed constitutes cruel and unusual punishment.

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

W. L. Thompson and Earle R. Purser for defendant.

PER CURIAM. The sentence imposed does not exceed the maximum sentence authorized by G.S. 14-87 for the offense of robbery with firearms. It is well established that a sentence which does not exceed the maximum prescribed by statute for the offense of which the defendant has been convicted or of which he has entered a plea of guilty does not constitute cruel and unusual punishment forbidden by Article I, § 14, of the Constitution of North Carolina. *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216; *State v. Downey*, 253 N.C. 348, 117 S.E. 2d 39; *State v. Lee*, 247 N.C. 230, 100 S.E. 2d 372; *State v. Smith*, 238 N.C. 82, 76 S.E. 2d 363; *State v. Daniels*, 197 N.C. 285, 148 S.E. 244. The record reveals no violation of any constitutional right of the defendant or any error in the judgment of which he complains or in the proceedings leading thereto.

No error.

STATE OF NORTH CAROLINA v. RUSSELL WRIGHT AND LARRY D. SMITH.

(Filed 19 April, 1967.)

1. Criminal Law § 162—

Ordinarily, the admission of incompetent evidence will not be held prejudicial when evidence of the same import is theretofore admitted without objection.

2. Criminal Law § 87—

The consolidation of indictments against defendants charged with committing like offenses at the same time and place, is addressed to the sound discretion of the trial court.

3. Criminal Law § 161—

The charge of the court will not be held for error when the charge, construed contextually, is not prejudicial.

APPEAL by defendants from *Johnson, J.*, October 1966 Criminal Term of FRANKLIN Superior Court.

Both defendants were serving sentences for felonies at Franklin County Prison Unit on June 12, 1966. They disappeared about 2:20 P.M., without permission, and were not seen, as far as the

record discloses, until the following night, when they were captured some eleven miles away. They were indicted for unlawful escape. The cases were consolidated for trial, and both were convicted and received additional prison sentences. Both defendants appealed.

J. P. Lumpkin, Attorney for defendant Russell Wright; E. F. Yarborough, Attorney for defendant Larry D. Smith.

T. Wade Bruton, Attorney General, and Ralph A. White, Jr., Staff Attorney, for the State.

PER CURIAM. The defendants assign as error the admission of the following evidence: "Question: Did they have authority to leave the farm to which they were assigned to work? Answer: No, sir, they didn't have any authority to leave. I had not checked previously that day." The witness admitted on cross examination that the testimony was not based on his personal knowledge; however, evidence which was substantially the same had been admitted previously without objection. Superintendent Hayes testified: "The inmates did not have permission to come to Louisburg."

> "If incompetent evidence is admitted over objection but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost." *Shelton v. Railroad,* 193 N.C. 670, 139 S.E. 232. And this is true whether the same evidence is from the same witness or from a different one. Stansbury, N. C. Evidence, § 30; *Dunes Club v. Insurance Co.,* 259 N.C. 294, 130 S.E. 2d 625.

The defendants also except to the order consolidating the cases for trial. We have held so many times that this is discretionary that we do not deem the exception worthy of discussion. *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; *State v. Combs,* 200 N.C. 671, 158 S.E. 252.

The defendants take exception to parts of the charge, but upon examination, it is found that the allegedly objectionable part is either not a complete statement of what the court said, or it is taken out of context. The full statements of the court show that the criticized portions are merely statements of contentions made by the State which were entirely reasonable and justified by the evidence.

There was ample evidence to sustain the conviction of the defendants, and in their trial there was

No error.

R. H. BOULIGNY, INC., A CORPORATION, v. UNITED STEELWORKERS OF AMERICA, AFL-CIO, AN UNINCORPORATED ASSOCIATION.

(Filed 3 May, 1967.)

1. Appeal and Error § 47—

Upon appeal from an order allowing a motion to strike, the facts alleged, as distinguished from the conclusions of law, must be taken as true, and the question determined on the basis of whether the allegations are germane.

2. Associations § 5; Master and Servant § 15—

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members, G.S. 1-69.1, G.S. 1-97(6), and may be held liable in damages for torts committed by its employees or agents while acting in the course of their employment.

3. Libel and Slander § 1—

A corporation may maintain an action for libel or slander for words which injure it in its credit, in its business good will, or in its relations with its employees.

4. Same—

While a corporation may not maintain an action for libel or slander of its officers, where the published statements complained of charge that the corporation's representative did certain things, but, in context, it is clear that the accusation was that the things were done by the representative in the execution of corporate policy, the libel relates to the corporation itself.

5. Same—

Written statements that a corporation did certain acts which would have the natural and immediate tendency to cause actual damage to the relationship between the corporation and its employees are actionable *per se*.

6. Libel and Slander § 16—

A libel or slander which is actionable *per se* ordinarily entitles plaintiff to recover nominal damages at least, but plaintiff may recover compensatory damage only upon proof of both the fact and the extent of damages actually suffered by it as a result of the publication, and may recover punitive damages only upon proof that the publication was made with actual malice, and, even so, the amount awarded as punitive damages rests in the discretion of the jury, subject to the limitation that the amount may not be excessively disproportionate to the circumstances.

7. Libel and Slander § 9—

The public interest in the free expression and communication of ideas in legislative bodies and in judicial proceedings, etc., requires that words spoken or published by the participants in such circumstances be absolutely privileged, and no action for libel or slander will lie even though the statements be false and malicious, but the privilege attaches to the circumstances under which the words are used and not to the persons themselves.

8. Libel and Slander § 8—

Qualified privilege extends to all communications made *bona fide* upon any subject matter in which the party uttering the statement has an interest or in reference to which he has some moral or legal duty to perform, in which case recovery for false and defamatory words may be had only upon proof of actual malice.

9. Same; Master and Servant § 15—

Statements spoken or published in good faith by a labor union in the course of a campaign to solicit members or to establish itself as an authorized representative of the employees of a business enterprise are qualifiedly privileged provided there is a reasonable relation between such objectives and the statements made, and such privilege extends to communications between the union and prospective members as well as between the union and its members.

10. Same—

Qualified privilege is no defense to an action for libel or slander if the false statements were made with actual malice.

11. Same—

Mere vituperation and name calling by a labor union in its activities to solicit members or obtain the right to represent the employees of a business cannot be made the basis of an action for libel or slander by the employer.

12. Same—

Plaintiff alleged that defendant labor union published false statements concerning plaintiff's treatment of an employee or former employee, which statements were made for the purpose of creating, and had the natural tendency to create, distrust and disloyalty between plaintiff and its employees. *Held:* The burden rests upon plaintiff to prove actual malice in the publication of the defamatory statements, but if the jury finds actual malice by the greater weight of the evidence, the fact that such statements were qualifiedly privileged, is no defense.

13. Libel and Slander § 12—

Privilege is an affirmative defense which must be alleged in the answer.

14. Constitutional Law § 1—

An act of Congress pursuant to the Constitution of the United States is the supreme law of the land, and in case of a conflict between such act and the laws of this State, the act of Congress and the decisions of the U. S. Supreme Court construing such act, control.

15. Courts § 18; Master and Servant § 14—

The National Labor Relations Act, 29 U.S.C. 141 etc., and the Norris-LaGuardia Act, 29 U.S.C. 101, do not deprive the State courts of jurisdiction of an action for libel by an employer against a labor union for statements published during the course of a campaign by the union to solicit members and become the representative of the employees for collective bargaining; nevertheless, in such instance a State court may not apply the doctrine of libel *per se* and may render judgment only if the plaintiff alleges and proves not only actual malice but some actual damage resulting from the libelous publications.

16. Libel and Slander § 1; Constitutional Law § 18—

Even though the First Amendment to the Federal Constitution applies to state action by virtue of the Fourteenth Amendment, the constitutional guarantee of freedom of speech and of the press affords no protection against an action for libel or slander uttered with actual malice and resulting in actual damage.

17. Pleadings § 34—

There is no prejudicial error in striking from a pleading allegations which merely repeat or restate that which has been expressly alleged or necessarily implied in other portions of the pleading not stricken. G.S. 1-153.

18. Same—

In an action by an employer against a labor union for libel, allegations of the answer to the effect that the statements were published in connection with the union's efforts to organize plaintiff's employees are relevant to the question of the union's qualified privilege and to the application of the modification of State law by the National Labor Relations Act, and were improperly stricken.

19. Same—

There is no error in striking from a pleading matters which are not allegations of fact but mere conclusions.

20. Libel and Slander § 1; Master and Servant § 15—

In an action by an employer against a labor union for libel growing out of a publication by the union in its efforts to organize the employees for collective bargaining, proof that the labor union made false and malicious statements having a tendency to injure the employer's good name and reputation in the eyes of its employees or prospective employees would constitute proof of the element of actual damage sufficient to permit recovery of nominal damages under the National Labor Relations Act.

21. Libel and Slander § 16; Master and Servant § 14—

The Federal decisions do not preclude the recovery of punitive damages by an employer in its action for false and malicious libel by a labor union, in connection with the union's efforts to organize plaintiff's employees, when the plaintiff establishes that it has suffered some compensable harm as a result of the libel.

APPEAL by defendant from *Jackson, J.*, at the 20 June 1966 Schedule "B" Civil Session of MECKLENBURG, docketed and argued as No. 291 at the Fall Term 1966.

The defendant appeals from an order of the superior court sustaining the plaintiff's demurrers to the defendant's second and fourth further answers, and its motion to strike certain allegations from the defendant's first and fifth further answers.

The complaint alleges that the defendant caused to be written and published certain false and defamatory statements with respect

to the plaintiff and thereby "intentionally, wilfully and maliciously" libeled the plaintiff and injured its good name and reputation and the relations between it and its employees, for which the plaintiff prays the recovery of $100,000 actual damages and $100,000 punitive damages. The alleged false statements are these:

(1) The plaintiff has lied to its employees;

(2) After one Millard Smith was discharged from its employment, a representative of the management of the plaintiff went to the subsequent employer of Smith and attempted to get Smith discharged from that employment;

(3) For such purpose the representative of the plaintiff presented to Smith's subsequent employer the work record and progression chart of Smith as employee of the plaintiff;

(4) The plaintiff's representative "would not only deny Millard Smith a chance to make a decent living for himself, but he has absolutely no feeling for Millard Smith's wife and four children";

(5) The plaintiff's representative could not "stand the thought of one of his former slaves having a job where he is now making" a higher salary than he formerly made with the plaintiff;

(6) Such conduct by the representative of the plaintiff's management is a "dirty trick";

(7) "There is no level to which" such representative of the plaintiff's management "will not sink";

(8) Unless the employees of the plaintiff embrace the defendant, they "will always have to live in fear of people like" the representative of the plaintiff's management "doing the same thing" to them and to their "wives and children."

The defendant in its answer denies every material allegation of the complaint, including the allegation that it wrote and published the above statements, the allegation of wilfulness and malice and the allegation of damages. There was no motion, demurrer or order with reference to this portion of the answer.

The defendant also alleged five further answers and defenses, the allegations of which and the motions, demurrers and rulings with reference to which are as follows:

I. *First Further Answer and Defense.*

A. *Allegations:*

"1. The defendant is a labor union, formed for the purpose of providing mutual aid and protection to employees. At the time of the events complained of in the complaint, the defend-

ant was engaged in a campaign to organize the employees of the plaintiff.

"2. The communications referred to in the complaint were privileged communications, made in pursuance of the common interest of the defendant and plaintiff's employees, and were pertinent to their common interests.

"3. The statements contained in the communications referred to in the complaint were not defamatory of plaintiff.

"4. To the extent said statements constituted statements of opinion, they were legitimate statements of opinion.

"5. To the extent said statements constituted statements of fact, they were true.

"6. The defendant, acting without malice, ill will, or other improper motive, disseminated only such information as, on the basis of reliable information it had received, it reasonably believed to be true. The defendant is informed and believes and upon such information and belief alleges that all matters disseminated by it in the course of the organizing campaign herein referred to were, in fact, true and the same were published and distributed by the defendant in good faith that all facts therein contained were true, and the defendant pleads the truth as a defense to the plaintiff's complaint, and in mitigation of damages."

B. *Motion and Ruling.*

The plaintiff's motion to strike paragraphs 2, 3 and 4 of this further answer and defense was allowed.

II. *Second Further Answer and Defense.*

A. *The Allegations:*

"The plaintiff conducted the operation of its business activities, and suffered no actual losses attributable to any efforts or conduct on the part of the defendant alleged in the complaint."

B. *Demurrer and Ruling:*

The plaintiff demurred to this further answer and defense on the ground that it does not allege a bar to the plaintiff's cause of action. The demurrer was sustained and this further answer was struck.

III. *Third Further Answer and Defense.*

A. *The Allegations:*

"1. The plaintiff is engaged in interstate commerce and has its principal place of business located in the State of North Carolina. It annually buys substantial amounts of materials

from and ships substantial amounts of materials to, points outside the State of North Carolina.

"2. At the time to which the complaint refers, defendant was engaged in a campaign to organize plaintiff's employees into the Union. Said campaign was conducted subject to, and pursuant to, the National Labor Relations Act. At the time to which the complaint refers, defendant was prepared to file (or had filed) a representation petition with the National Labor Relations Board.

"3. The communications referred to in the complaint are, as a matter of federal law, not actionable. They were true, or were made in the reasonable belief that they were true, and were made with reckless disregard for their truth or falsity. Plaintiff did not suffer actual, compensable harm."

B. *Motions and Rulings:*

There was no motion, demurrer or ruling with reference to this further answer and defense.

IV. *Fourth Further Answer and Defense.*

A. *The Allegations:*

"1. Defendant did not actually participate in, actually authorize, or ratify the distribution of any defamatory materials, and cannot be held liable, as a matter of federal law. 29 U.S.C. Section 106."

B. *Demurrer and Ruling:*

The plaintiff demurred to this further answer and defense for the reason that Chapter 29, § 106, of the United States Code has no application to civil litigation in state courts and the defendant is liable for the acts of its servants and agents within the course and scope of their employment. This demurrer was sustained, and this further answer was struck.

V. *Fifth Further Answer and Defense.*

A. *The Allegations:*

"1. The plaintiff is engaged in interstate commerce and has its principal place of business located in the State of North Carolina. It annually buys substantial amounts of materials from and ships substantial amounts of materials and products to, points outside of the State of North Carolina.

"2. This libel or slander action is brought for alleged conduct arising in the course of an organizing campaign by defendant union among plaintiff's employees. The rights and duties of defendant generally during and with respect to such cam-

paign, and in particular with respect to literature used and statements made in the course thereof as alleged in the Complaint, are preemptively governed by the provisions of the National Labor Relations Act as amended (herein called "Act"). Jurisdiction to adjudicate claims based upon such alleged conduct and action lies exclusively with the National Labor Relations Board to be exercised according to its administrative procedures.

"3. At the time to which the Complaint refers, defendant was prepared to file (or had filed) a representation petition with the National Labor Relations Board, and that body had exclusive jurisdiction thereof and of the penalties to be imposed and the relief to be granted for, actions as alleged in the Complaint and occurring during the campaign for representative rights.

"4. The use of pamphlets, circulars and statements as are described in the Complaint is protected by the Act and by the First and Fourteenth Amendments to the Constitution of the United States, and such use cannot be limited or impaired by the judgment of this Court or by other exercise of this Court's jurisdiction.

"5. The right critically to discuss officials and conduct of an employer in the course of such a campaign is governed preemptively by the Act and is protected by said Act and by the First and Fourteenth Amendments.

"6. Federal law does not permit and prohibits recovery of punitive damages in actions such as this in which only nonviolent acts are alleged to have been committed by a labor union.

"7. Plaintiff's remedy, if any, for the matters and things complained of is exclusively within the preemptive administrative jurisdiction of the National Labor Relations Board and this Court is without jurisdiction of the subject matter of the Complaint.

"8. This Court is without jurisdiction to award damages for this alleged cause of action."

B. *Motion, Demurrer and Ruling:*

The plaintiff demurred to this further answer and defense and also moved to strike therefrom paragraphs 2 through 8. The court overruled the demurrer but sustained the motion to strike, except with reference to the first sentence in paragraph 2, thus leaving in the answer the first paragraph and the first sentence of the second.

Cooper, Mitch, Johnston & Crawford and James B. Ledford for defendant appellant.

Grier, Parker, Poe & Thompson by Joe W. Grier, Jr., and Gaston H. Gage for plaintiff appellee.

LAKE, J. This action was instituted 29 May 1963. Thereupon, the defendant filed a petition for its removal to the United States District Court upon the ground of diversity of citizenship and also upon the ground that the subject matter of the action arises under the laws of the United States. The plaintiff moved to remand. The District Court denied the motion. The Court of Appeals reversed, saying, "Having found no diversity, we also think that no federal question jurisdiction exists." *R. H. Bouligny, Inc., v. United Steel Workers of America,* 336 F. 2d 160. On *certiorari,* the Supreme Court of the United States affirmed, and the action was remanded to the Superior Court of Mecklenburg County. Thereupon, the defendant filed its answer, the plaintiff filed its motions and demurrers and the superior court entered the order which gives rise to the questions now before us, four years having thus been consumed without any determination as to whether the alleged statements were made or, if so, were true or false, malicious or in good faith, or whether the plaintiff was damaged thereby.

For the purpose of determining the validity of the order from which this appeal is taken, we assume that the allegations of fact in the complaint, as distinguished from conclusions of law, are true. We also assume that the affirmative allegations of fact in the several further answers, as distinguished from conclusions of law and from denials of facts alleged in the complaint, are true. *Trust Co. v. Currin,* 244 N.C. 102, 92 S.E. 2d 658. The questions for us are whether, on these assumptions, the allegations struck from the further answers constitute, or are germane to, a valid and sufficient defense to the cause of action, if any, alleged in the complaint. In search of the solution to those questions, we turn first to the law of this State and then to the Constitution and laws of the United States to ascertain what, if any, effect they have upon the law of North Carolina otherwise applicable.

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members. G.S. 1-69.1; G.S. 1-97(6); *Gainey v. Brotherhood,* 252 N.C. 256, 113 S.E. 2d 594; *Martin v. Brotherhood,* 248 N.C. 409, 103 S.E. 2d 462; *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 98 S.E. 2d 852; *Stafford v. Wood,* 234 N.C. 622, 68 S.E. 2d 268. As such,

it may be held liable in damages for torts committed by its employees or agents acting in the course of their employment. See *Transportation Co. v. Brotherhood,* 257 N.C. 18, 31, 125 S.E. 2d 277, *cert. den.,* 371 U.S. 862, 83 S. Ct. 120.

The right of a private business corporation to sue for damages for slander or libel does not appear to have been determined by this Court. It has, however, been considered in other jurisdictions and the right of the corporation to sue appears well settled. 33 Am. Jur., Libel and Slander, § 193; 53 C.J.S., Libel and Slander, § 146; Annot. 86 A.L.R. 442; Annot. 52 A.L.R. 1199; Restatement of the Law, Torts, § 561. Obviously, a corporation may not suffer mental anguish or an injury to personal reputation. It may, however, be injured in its credit, in its business good will, or in its relations with its employees. When so injured, its corporate nature is not a bar to its recovery of damages from the wrongdoer.

The complaint alleges that the statements alleged to have been published by the defendant "injured the good name and reputation" of the plaintiff, and "injured the relations between the plaintiff and its employees" in the total amount of $100,000. At the trial of the action, the plaintiff will have the burden of proving both the nature and the extent of its injuries. For the purposes of this appeal, it is sufficient to note that it has alleged injuries which a corporation is capable of sustaining.

The complaint alleges the defendant published statements asserting that "the plaintiff's representative" did certain things. Of course, a corporation may not maintain an action for damages for libel or slander of its stockholders, officers, employees or representatives. 53 C.J.S., Libel and Slander, § 146; Annot., 52 A.L.R. 1199. However, the fair interpretation of the complaint is that the statements alleged to have been published by the defendant were such, in words and context, that the reader would impute to the plaintiff the alleged conduct of its representative, and thus the plaintiff's own reputation and relations with its employees were damaged. The burden will rest upon the plaintiff at the trial of the action to prove that it, as distinguished from its representative, was libeled by the publications of which it complains.

In *Kindley v. Privette,* 241 N.C. 140, 84 S.E. 2d 660, Bobbitt, J., speaking for the Court, said:

> " 'The publication of any libel is actionable *per se,* that is irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise. Such a publication is itself an injury * * * and therefore a sufficient ground for recov-

ery of at least nominal damages.' Restatement of the Law, Torts, sec. 569.

* * *

"The phrase 'libelous *per se*,' used extensively, has been criticized as inexact. * * * While this phrase appears in our decisions, the words are used in the sense of actionable *per se*. *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55."

In *Flake v. News Co., supra,* Barnhill, J., later C.J., speaking for the Court, said:

"Libels may be divided into three classes: (1) Publications which are obviously defamatory and which are termed libels *per se;* (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not, and (3) publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances. This type of libel is termed libel *per quod.*

"When an unauthorized publication is libelous *per se,* malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous *per se* and they are not required to be proved by evidence since they arise by inference of law, and are allowed *whenever the immediate tendency of the publication is to impair plaintiff's reputation,* although no actual pecuniary loss has in fact resulted." [Emphasis supplied.]

It is to be remembered that the above cases dealt with libel of an individual. A false statement concerning a corporation, which is, by its very nature, incapable of mental suffering or loss of social relationships, is not actionable unless "the immediate tendency of the publication is to impair plaintiff's reputation" in its business relationships, or actual pecuniary loss is alleged and proved. Here, the natural and immediate tendency of the alleged statements, if in fact made, would be to cause actual damage to the relationship between the plaintiff and its employees, an important asset of any business corporation. Thus, nothing else appearing, the statements, if in fact published and false, would be actionable *per se.*

In *Jones v. Hester,* 262 N.C. 487, 137 S.E. 2d 846, the jury found that the defendant had published the libelous statement in question and had done so with actual malice. It awarded $1.00 in actual damages and $1.00 in punitive damages. In sustaining the denial of a

motion to set aside the verdict on the issues as to actual and punitive damages, this Court said:

> "The verdict on Issue No. 1 [publication of the libel] entitled the plaintiff to nominal damages. Any further compensatory damages (other than nominal) could be awarded only upon the basis of proof, by the greater weight of the evidence. The answer to Issue No. 2 [malice] permitted the jury to award punitive damages in its discretion, not as a matter of right, but as punishment for intentional wrongdoing."

Thus, even though the alleged statements were published by the defendant, were not privileged, were false and had a natural and immediate tendency to impair the plaintiff's reputation in the areas of its customer or employee relations, the plaintiff can recover, under the law of this State, as compensatory damages, only a nominal amount in absence of proof of both the fact and the extent of damages actually suffered by it as the result of the publications. It can recover punitive damages only if it proves that the publications were made with actual malice, *Roth v. News Co.*, 217 N.C. 13, 6 S.E. 2d 882, and, even in that event, the amount awarded may not be excessively disproportionate to the circumstances. *Cotton v. Fisheries Co.*, 181 N.C. 151, 106 S.E. 487.

A libelous statement, otherwise actionable, may be not so for the reason that the circumstances under which the statement was published confer upon the publisher a privilege to publish it. "The great underlying principle of the doctrine of privileged communications rests in public policy." *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360. The basis of privilege is the public interest in the free expression and communication of ideas. Where this interest is sufficient to outweigh the interest of the state in protecting the individual or corporate plaintiff from damage to his or its reputation, social or business relationships, the law does not allow recovery of damages, actual or punitive, occasioned by the defamatory speech or publication.

The leading case in this jurisdiction upon the subject of privileged communications in the law of libel and slander is *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775, quoted with approval in *Ponder v. Cobb*, 257 N.C. 281, 126 S.E. 2d 67. In the *Ramsey* case, Clark, J., later C.J., speaking for the Court, said:

"Privileged communications are of two kinds:

> "1. *Absolutely Privileged*—Which are restricted to cases in which it is so much to the public interest that the defendant should speak out his mind fully and freely, that all actions

in respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with express malice. This complete immunity obtains only *where the public service or the due administration of justice requires it, e.g.,* words used in debate in Congress and the State Legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like. [Emphasis added.] In these cases the action is absolutely barred. [Authorities omitted.]

"2. *Qualified Privilege* — In less important matters where the public interest does not require such absolute immunity, the plaintiff will recover in spite of the privilege, if he can prove that the words were not used *bona fide*, but that the defendant used the privileged occasion artfully and knowingly to falsely defame the plaintiff. [Authorities omitted.] In this class of cases, an action will lie only where the party is guilty of falsehood and express malice. [Authorities omitted.] Express malice is malice in fact, as distinguished from implied malice, which is raised as a matter of law by the use of words libelous *per se*, when the occasion is not privileged. Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact."

Both as to absolute privilege and as to qualified privilege, the protection from liability to suit attaches by reason of the setting in which the defamatory statement is spoken or published. The privilege belongs to the occasion. It does not follow the speaker or publisher into other surroundings and circumstances. The judge, legislator or administrative official, when speaking or writing apart from and independent of the functions of his office, is liable for slanderous or libelous statements upon the same principles applicable to other individuals.

Likewise, there is nothing inherent in the nature of a labor union which confers upon it a privilege to slander or to libel. Even when the union, through its representatives, speaks or writes in the course of and with reference to an activity in which the union has a legitimate interest, such as a campaign by it to solicit members or to obtain the right to represent the employees of a business establishment in their collective bargaining with their employer, the public interest in free discussion of the issues involved is not sufficient to clothe the union with an absolute privilege, such as is enjoyed by

a member of the Legislature in a debate within the legislative chambers, or a witness or a judge in the trial of a law suit.

However, "[q]ualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has some moral or legal duty to perform." *Alexander v. Vann, supra.* Thus, qualified privilege has been extended to a statement made in good faith by the chairman of a political party charging misconduct of election officials, the statement being made to public officials from or through whom redress might be expected, even though the statement is also made public in a press release. *Ponder v. Cobb, supra.* Qualified privilege has also been extended to statements made in good faith by an investigator, sent by the governing body of a religious organization to inspect the work of its missionaries, the statements being made in his report to the appropriate officials of the denomination. *Herndon v. Melton,* 249 N.C. 217, 105 S.E. 2d 531. Qualified privilege is likewise extended to statements in a newspaper, published in good faith and without malice, concerning alleged waste of public funds, *Yancey v. Gillespie,* 242 N.C. 227, 87 S.E. 2d 210, and to statements made in good faith by the president of a corporation in a notice calling a meeting of its stockholders to consider evidence of misuse of corporate funds. *Jones v. Hester,* 260 N.C. 264, 132 S.E. 2d 586.

We now hold that the defense of qualified privilege extends to statements spoken or published in good faith by a labor union in the course of a campaign to solicit members or to establish itself as the authorized representative of the employees in a business enterprise in their collective bargaining with their employer, provided there is a reasonable relation between such objective and the statement made. The qualified privilege to discuss in good faith the advantages of union membership and conditions of employment which the union might be in a position to improve is not limited to communications between the union and those already members of it, but extends also to communications between the union and prospective members. It is not enough, however, that the statement was made or published at a time and place when and where such campaign was in progress. The statement is not qualifiedly privileged unless there is a reasonable relation between the alleged fact so stated and the objective of the campaign. It cannot be said that the alleged facts so stated in the statements alleged to have been published by the defendant were, upon their face, unrelated to the organizational campaign alleged in the answer so as to render them unprivileged as a matter of law.

Even though the allegedly false statement be of a fact so related to the campaign to achieve a legitimate union objective, the defense of qualified privilege fails if the false statement was made with actual malice. A union has no legal or moral duty or privilege to make a statement, which it knows to be false, concerning an employer's treatment of an employee or former employee, and which it makes for the purpose of creating in other employees hatred, distrust or disloyalty toward the employer. The burden rests upon the employer to prove actual malice in the speaking or publication of the defamatory statement, but, when the jury finds such malice by the greater weight of the evidence, the union is not absolved from liability for the resulting damage to the employer by the fact that its motive was the procurement of additional members or greater authority for the union as spokesman for employees of the establishment. See *Jones v. Hester*, 260 N.C. 264, 132 S.E. 2d 586; *Ponder v. Cobb, supra.*

Mere vituperation and name calling directed by a union against an employer, or vice versa, in the course of a labor dispute or organizational campaign, are not sufficient basis for a recovery of damages for slander or libel. Even where the plaintiff is an individual, some thickness of skin is required of him by the law in the realm of labor disputes, just as in battles in the political arena. Where, however, the false statement goes beyond insulting language and is a positive charge of conduct in specific instances and it is made with knowledge of its falsity or reckless disregard of whether it is true or false, damages may be recovered for resulting injury to the reputation of the employer, or of its products, in the eyes of potential or actual customers, or for injury to the employer's relationship to its employees. These are assets of a business as truly as are its building and machinery. For malicious damage to these assets, the employer may recover in the courts of this State, even though the damage was done by a published statement of a union in the course of a campaign to organize the employer's plant.

Privilege is an affirmative defense. The ultimate facts upon which the defendant claims that it cannot be held liable in damages for its publication of a false statement otherwise actionable must be alleged in the answer. See: *Bryant v. Reedy*, 214 N.C. 748, 200 S.E. 896; *Barringer v. Deal*, 164 N.C. 246, 80 S.E. 161; *Logan v. Hodges*, 146 N.C. 38, 59 S.E. 349.

It is elementary that an act of Congress, in pursuance of the Constitution of the United States, is the supreme law of the land. Constitution of the United States, Article VI, Clause 2. Thus, in case of a conflict between such an act and the law of North Caro-

lina, the act of Congress controls and, so long as it remains in effect, modifies the law of this State and the authority of its courts to render judgment in accordance therewith. It is equally well settled that a decision of the Supreme Court of the United States, construing an act of Congress, is conclusive and binding upon this Court. We, therefore, turn to the National Labor Relations Act, 29 U.S.C. 141, *et seq.,* and the Norris-LaGuardia Act, 29 U.S.C. 101, *et seq.,* relied upon by the defendant, to determine the extent to which, if any, the courts of this State are thereby prevented from applying the law of North Carolina to an action brought against a labor union for damages for libel.

Our attention has been directed to no decision by the Supreme Court of the United States suggesting that the Norris-LaGuardia Act relates to an action in a state court for the recovery of damages for libel. The act plainly relates to the jurisdiction of courts of the United States to issue injunctions and restraining orders in cases involving or growing out of labor disputes. Section 6 of the act, cited by the defendant, states the basis upon which an association or organization participating in or interested in a labor dispute shall be held responsible for acts of its officers, members or agents "in any court of the United States." This act, therefore, does not affect the jurisdiction of the courts of this State over suits for damages for libel and does not prevent them from applying to such actions the law of North Carolina above set forth.

The effect of the National Labor Relations Act upon the jurisdiction of state courts to apply state law to an action against a labor union for the publication of libelous statements during a union organizational campaign was determined by the Supreme Court of the United States in *Linn v. Plant Guard Workers,* 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582. The Court, speaking through Mr. Justice Clark, said:

> "We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him."

Mr. Justice Fortas, dissenting, characterized the alleged libel in the *Linn* case as "hardly incendiary," and "pale and anemic" when compared with "the considerably more imaginative use of vituperation" reflected in the complaint now before us, it having been before the Supreme Court of the United States, as above noted, on

the question of the remand to the Superior Court of Mecklenburg County. See 383 U.S. 70, Note 1.

The majority further stated:

"[I]t appears that the exercise of state jurisdiction here would be a 'merely peripheral concern of the Labor Management Relations Act,' provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that 'an overriding state interest' in protecting its residents from malicious libels should be recognized in these circumstances. * * * We similarly conclude that a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon.* [*San Diego Building Trades Council, etc., v. Garmon,* 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775.] * * *

"[I]t must be emphasized that malicious libel enjoys no constitutional protection in any context. After all the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses. * * *

"The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. * * * The Board [National Labor Relations Board] can award no damages, impose no penalty, or give any other relief to the defamed individual. * * *

"We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage. * * *

"As we have pointed out, certain language characteristic of labor disputes may be held actionable *per se* in some state courts. These categories of libel have developed without specific reference to the labor controversies. However, even in those jurisdictions, the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle. We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state torts laws. * * * Likewise, the defamed party must

establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages."

Thus, it has been determined by the final authority upon the construction of acts of Congress that the National Labor Relations Act does not take from the courts of this State jurisdiction to entertain and to determine, according to the law of this State, actions for damages for libel punished by a union during the course of its campaign to solicit members and become the spokesman for the employees of an industrial plant in their collective bargaining with their employer. It has, however, been so determined that in such an action the courts of this State may not apply the doctrine of libel *per se*. Judgment for the plaintiff in such an action may be rendered only if the plaintiff alleges and proves not only the actual malice sufficient to overcome the qualified privilege allowed the union by the law of this State but also some actual damage resulting from the libelous publication. With this modification, the rules of law applicable to the trial of suits for libel generally in the courts of this State are presently applicable to the trial of such an action against a labor union for libel published by it during the course of a campaign to organize workers in an industrial plant.

There remains for consideration the contention of the defendant that the courts of this State may not award damages against it for the alleged libel because to do so would violate the provisions of the First Amendment to the Constitution of the United States guaranteeing freedom of speech and of the press, which guarantees are now deemed by the Supreme Court of the United States to be incorporated within the protection of the Due Process Clause of the Fourteenth Amendment.

As above stated, the law of North Carolina extends to publications by a labor union, relevant to and in the course of a campaign to organize workers in an industrial plant, the protection of a qualified privilege; that is, no action may be maintained for libel therein in the absence of proof of actual malice. As the majority of the United States Supreme Court said in the *Linn* case, *supra*, "[M]alicious libel enjoys no constitutional protection in any context." In *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430, the Court said, "Of course espousal of the cause of labor is entitled to no higher constitutional protection than espousal of any other lawful cause." In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, the Court was concerned with "the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." Substantially prior to that decision, this Court had declared: "Everyone has a right to comment

on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously." *Yancey v. Gillespie, supra.* The holding in *New York Times Co. v. Sullivan, supra,* was, "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless* he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." [Emphasis added.]

We find nothing in the foregoing decisions by the Supreme Court of the United States, or in any other decision of that Court to which the defendant has directed our attention, to indicate that the Fourteenth Amendment grants a more extensive immunity to a labor union writing about an employer than it extends to a newspaper writing about the official conduct of a Commissioner of Police. Consequently, we hold that the First and Fourteenth Amendments to the Constitution of the United States do not deprive the courts of this State of jurisdiction to render a judgment for damages against a labor union in favor of a corporate employer who alleges and proves it suffered actual damages as the result of a libelous statement published by the union "with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

In the light of these principles of the law of this State, as modified by the National Labor Relations Act, we turn to the rulings of the superior court upon the demurrers and motions to strike filed by the plaintiff concerning the further answers of the defendant.

G.S. 1-153 provides, "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby * * *." An allegation in a pleading is irrelevant if it has no substantial relation to the controversy between the parties in the particular action. *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551. "The test of relevancy of allegations sought to be stricken from an answer is whether such allegations, either in themselves or in connection with other averments, tend to state a defense or a counterclaim." *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843. There is no prejudicial error in striking from a pleading an allegation which merely repeats or restates that which is expressly alleged, or necessarily implied, in other portions of the pleading not stricken. *Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893; *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660.

Measured by these tests, paragraph 2 of the first further answer

alleges facts which are relevant to the existence of a qualified privilege and also relevant to the applicability to this action of the above stated modification of the law of this State by the National Labor Relations Act. Thus, the striking of this paragraph from the answer was error.

The allegations in paragraphs 3 and 4 of the first further answer that the statements alleged to have been made by the defendant "were not defamatory of plaintiff" and "were legitimate statements of opinion" are not allegations of fact but are conclusions. There was no error in striking them from the answer. *Construction Co. v. Board of Education,* 254 N.C. 311, 118 S.E. 2d 753; *Pinnix v. Toomey, supra.* If by the allegation that the statements were not "defamatory of plaintiff" it was intended to allege that the statements were true, this is merely repetitious of the express allegations in paragraphs 5 and 6 of the first further answer. If the intent was to allege that the statements did not relate to the plaintiff, this allegation is merely repetitious of the denial in the answer in chief. In either event, the striking of this allegation from the answer was in no way prejudicial to the defendant.

The second further answer alleges only that the plaintiff "conducted the operation of its business activities, and suffered no actual losses" by reason of the alleged libelous publications. The *Linn* case, *supra,* does not require proof by the plaintiff of an economic loss in the operation of its business which is capable of accurate measurement in dollars and cents. Proof by the plaintiff of its allegation that the publications "injured the relations between the plaintiff and its employees" or damaged the "good name and reputation" of the plaintiff in the eyes of the employees or prospective employees would be sufficient proof of the element of actual damage, required in the *Linn* case, to permit recovery of nominal damages. Consequently, the second further answer does not allege facts constituting a defense to the cause of action set forth in the complaint and there was no error in sustaining the demurrer to it. The sustaining of this demurrer will in no way prevent the defendant from controverting the allegations of damage contained in the complaint or from offering evidence to disprove them. Those allegations are denied in the answer in chief and are also included within the broader allegation in the third further answer that "plaintiff did not suffer actual, compensable harm." There was no demurrer to or motion to strike any allegation in the answer in chief or in the third further answer. These, therefore, remain in the answer unaffected by the order before us on this appeal, and at the trial of the action the

defendant may introduce evidence, otherwise proper, in support of the allegations therein contained.

There was no error in sustaining the demurrer to the fourth further answer. This merely pleads section 6 of the Norris-LaGuardia Act as a defense to the cause of action set forth in the complaint. This act, as above stated, has no application to an action for damages for libel in the courts of this State.

The allegations stricken from the fifth further answer are not allegations of fact, with the exception of paragraph 3 which, as to the facts alleged, is mere repetition of paragraph 2 of the third further answer. With this exception, the stricken allegations are conclusions and arguments with reference to the jurisdiction of the superior court over the subject matter of this action. The effect of the motion to strike these allegations in the fifth further answer was that of a demurrer to the attack upon the court's jurisdiction to hear and determine the matter on its merits. When these allegations are read in relation to the complaint, it is clear that there was no error in striking these portions of this further answer. Indeed, the allegations allowed to remain in the fifth further answer merely repeat those in the third, which were undisturbed.

As to the contention in paragraph 6 that the federal law does not permit the courts of this State to give judgment for punitive damages in actions such as this, it is sufficient to note that the Supreme Court of the United States said in the *Linn* case, *supra*, "[T]he defamed party must establish that he has suffered some sort of compensable harm *as a prerequisite to the recovery of additional punitive damages.*" [Emphasis added.]

The order of the superior court is, therefore, modified by reversing the allowance of the motion to strike paragraph 2 of the first further answer and defense. Except as so modified, the order is affirmed and the action is remanded to the Superior Court of Mecklenburg County for further proceedings in accordance with this opinion.

Modified and affirmed.

IN THE MATTER OF THE CUSTODY OF HARVIN AUSTIN SAULS, III.

(Filed 3 May, 1967.)

1. Divorce and Alimony § 22; Habeas Corpus § 3—

The institution of an action for divorce in this State ousts the custody jurisdiction theretofore invoked by the filing of a writ of *habeas corpus* for the custody of the children as between the husband and wife, regardless of whether the writ of *habeas corpus* was entered under G.S. 17-39 or G.S. 17-39.1.

2. Judgments § 19; Courts § 2—

The fact that a party does not appeal from a judgment does not preclude such party from thereafter attacking the judgment on the ground that the court was without jurisdiction to enter the judgment, since jurisdiction cannot be conferred upon a court by consent, waiver or estoppel.

APPEAL by respondent from *McLaughlin, J.*, 28 November 1966 Session of STANLY.

Proceeding instituted under G.S. 17-39 to determine the custody of a child.

These facts appear from the pleadings and orders entered in the cause: Harvin Austin Sauls, Jr. (petitioner), and Dorothy Wheeler Sauls (respondent) were married on 29 January 1949. One child, Harvin Austin Sauls, III (Harvin), was born to them on 15 September 1955. From 1962 until 1 September 1964, the parties lived in Albemarle, where petitioner is employed and still resides. On 1 September 1964, they separated and respondent moved to Wilson with the child.

On 7 September 1964, petitioner filed an application for a writ of *habeas corpus* under G.S. 17-39 to determine the custody of Harvin. The writ issued and the proceeding came on for hearing before McConnell, J., Resident Judge of the Twentieth Judicial District, who, after extensive investigation and two hearings, entered an order on 21 December 1964 in which he found each party to be of good character and a fit and suitable person to have the custody of Harvin. He awarded his custody to respondent from 25 December 1964 through 25 July 1965 and ordered petitioner to pay her $100.00 a month for his support. The cause was retained for further orders. On 13 January 1965, Judge McConnell amended the order to allow petitioner specified visitation privileges. Upon petitioner's application, Judge McConnell again heard the matter on 30 June 1965, when he entered an order reciting his decision to divide Harvin's custody equally between the parents and declared that "the time has now come for custody of said child to revert to the father." He then awarded custody to petitioner from 2 July 1965 through 1 January 1966, with the same visitation rights to the mother which the former

order had granted to the father. No further orders fixing custody have been entered in this proceeding.

On 20 July 1965, at petitioner's request, respondent quit her employment in Wilson and returned to him in Albemarle, where she remained in the home until 21 September 1965. Thereafter, she returned to Wilson, where she is now employed as a medical secretary. The parties' sharply conflicting contentions with reference to the cause of their second separation appear in the verified pleadings filed in the action for divorce *a mensa et thoro* which respondent instituted in the Superior Court of Wilson County in July 1966. In her divorce action, respondent asked for alimony *pendente lite* and the custody of Harvin. In his answer, petitioner denied her right to any relief. He also filed a motion requesting that the divorce action be removed to Stanly County for trial for the convenience of witnesses.

Respondent's motion for alimony, counsel fees, and custody came on to be heard before Fountain, J., on 27 August 1966, at which time (by consent) she was allowed alimony and counsel fees. Judge Fountain "being of the opinion that it would not be proper for this Court to consider the matter of custody" because of the *habeas corpus* proceeding pending in Stanly County, declined to consider respondent's motion for custody.

On 6 October 1966, respondent filed an unverified motion in the Superior Court of Stanly County and moved to dismiss the *habeas corpus* proceeding for that (1) since the entry of the last order the petitioner and respondent had resumed the marital relationship and (2) an action for divorce *a mensa et thoro* in which she sought custody of Harvin is now pending in Wilson County. This motion to dismiss was heard on 26 October 1966 by Olive, J., Judge Presiding, who held (1) that "there was insufficient evidence presented to support a finding that the parties had resumed the marital relationship subsequent to the institution of the *habeas corpus* proceeding" and (2) that the order of Fountain, J., in the Wilson County action, in which he declined to consider the matter of custody because of the pendency of the *habeas corpus* proceeding in Stanly County, should not be disturbed by the court. In his discretion, Judge Olive denied respondent's motion to dismiss the *habeas corpus* proceeding.

On 19 November 1966, respondent filed a motion in which she asserted that it was through no fault of hers that she was not present at the hearing before Judge Olive on October 26th and that no evidence was presented in her behalf. She moved that she be allowed to offer evidence of the resumption of marital relations and that her motion to dismiss be reconsidered on its merits. This motion was heard at the November 1966 Session by Judge McLaughlin, who found as

a fact that respondent's failure to attend the hearing of her motion to dismiss and to offer evidence in her behalf was due to no fault of hers but "was the result of oversight on the part of her attorney." He held (1) that the merits of respondent's motion to dismiss the *habeas corpus* proceeding "are found in the issue as to whether there had been a reconciliation and a resumption of the marital relations between the parties subsequent to the commencement of this action"; (2) that Judge Olive has already considered and ruled upon the merits of the motion; and that he, therefore, had no jurisdiction to receive further evidence and reconsider the issue. He denied the motion to reconsider and retained the proceeding for further orders with reference to the custody of the child. Respondent excepted and appealed.

Robert L. Scott for Harvin Austin Sauls, Jr., petitioner appellee.

Lucas, Rand, Rose, Morris & Meyer; Coble, Tanner & Grigg; Ruff, Perry, Bond, Cobb & Wade for Dorothy Wheeler Sauls, respondent appellant.

SHARP, J. The rights of the parties to this controversy have become embogged in a procedural quagmire. As a result, we have the anomalous situation in which petitioner, in his answer to the Wilson County divorce action, pleads respondent's departure from his home in Albemarle on 21 September 1965 as an abandonment which defeats her suit, while the judge presiding in Stanly County denies her motion to dismiss the *habeas corpus* proceeding pending there because no resumption of marital relations has been shown. It would seem that an unconditional, bona fide resumption of marital relations, if such has occurred, would have vacated any order of custody then in force. Certainly it would destroy the status which, in the beginning, gave the court jurisdiction to issue the writ under G.S. 17-39. See *Hester v. Hester,* 239 N.C. 97, 79 S.E. 2d 248. We need not, however, pick our way through the procedural quicksands to reach that problem because, *in limine,* we are here confronted by this question: Was the custody jurisdiction which the Superior Court of Stanly County had previously acquired under G.S. 17-39 ousted by the institution of the divorce action in the Superior Court of Wilson County? In pertinent part, G.S. 17-39 provides:

> "When a contest shall arise on a writ of *habeas corpus* between any husband or wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought

before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same. . . ."

G.S. 17-39.1, enacted on 7 May 1957, as Chapter 545 of the Session Laws of 1957, provides:

"In addition to the above mandatory section (G.S. 17-39) and other methods authorized by law for determining the custody of minor children, any superior court judge having authority to determine matters in chambers in the district may, in his discretion, issue a writ of *habeas corpus* requiring that the body of any minor child whose custody is in dispute be brought before him or any other qualified judge. Upon the return of said writ the judge may award the charge or custody of the child to such person, organization, agency or institution for such time, under such regulations and restrictions, and with such provisions and directions, as will, in the opinion of the judge, best promote the interest and welfare of said child. The cause may be retained for the purpose of varying, modifying or annulling any order for cause at any subsequent time."

Prior to the enactment of G.S. 17-39.1, the decisions of this Court made it quite clear that immediately upon the institution of an action for divorce, either absolute or *a mensa et thoro,* jurisdiction of the custody of the parties previously acquired under G.S. 17-39 was ousted and vested in the court in which the divorce action was pending. G.S. 50-13. The rule was succintly stated by Barnhill, J. (later C.J.), in *Phipps v. Vannoy,* 229 N.C. 629, 632, 50 S.E. 2d 906, 907-8:

"So soon as the 'state of separation' between husband and wife resolves itself into, brings about, or is followed by an action for divorce in which a complaint has been filed, the jurisdiction of the court acquired under a writ of *habeas corpus* as provided by G.S. 17-39 is ousted and authority to provide for the custody of the children of the marriage vests in the court in which the divorce proceeding is pending. *Robbins v. Robbins, ante,* 430; *In re Blake, supra; McEachern v. McEachern, supra; In re Albertson, supra; Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144; *Story v. Story,* 221 N.C. 114, 19 S.E. (2) 136. Jurisdiction

rests in this court so long as the action is pending and it is pending for this purpose until the death of one of the parties.

"When, however, the parents were divorced outside this State, either parent may have the question of custody as between them determined in a special proceeding in the Superior Court. G.S. 50-13."

Accord, Swicegood v. Swicegood, post, at 278, 154 S.E. 2d 324; *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71; 3 Lee, N.C. Family Law § 222 (3d Ed., 1963).

Did the enactment of G.S. 17-39.1 change this well established rule and authorize the judge, in his discretion, to use *habeas corpus* as an alternative or additional remedy to *all other* authorized methods for determining custody, *including actions for divorce?* See 36 N.C. L. Rev. 52, 53 (1957).

In *Cox v. Cox,* 246 N.C. 528, 530, 98 S.E. 2d 879, 882, decided June 28, 1957 — approximately two months after the passage of G.S. 17-39.1 —, this Court said:

"When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests *exclusively* in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action. G.S. 50-13." (Emphasis added.)

In *Cleeland v. Cleeland,* 249 N.C. 16, 18, 105 S.E. 2d 114, 116, petitioner and respondent had been divorced in Virginia. Respondent, a resident of North Carolina, had custody of the children of the marriage. Petitioner, a resident of California, came to North Carolina and filed a petition for *habeas corpus* to obtain their custody. It was held that *habeas corpus* was an available remedy, and this statement appears in the opinion:

"Prior to 1957 *habeas corpus* could not be used to determine the right to the custody of children whose parents had been divorced, *In re McCormick,* 240 N.C. 468, 82 S.E. 2d 406; but by legislative act, c. 545, S. L. 1957, G.S. 17-39.1, the marital status of parents is not now a factor in determining the procedure to obtain custody of a child."

In *In re Herring,* 268 N.C. 434, 435, 150 S.E. 2d 775, 777, a case in which grandmothers were contending for the custody of their orphan grandchild, it is said: "The statute quoted above (G.S. 17-39.1) was enacted for the purpose of giving Judges of the Su-

perior Courts authority to hear and determine the custody of infants in all cases and without regard to previous proceedings."

Other cases in which G.S. 17-39.1 has provided the remedy to determine custody are: *In re Craigo,* 266 N.C. 92, 145 S.E. 2d 376 (custody of the children of contending parents divorced outside of North Carolina awarded to the maternal grandparents); *In re Skipper,* 261 N.C. 592, 135 S.E. 2d 671 (dispute over children in North Carolina between parents with divorce action pending in South Carolina); *Murphy v. Murphy,* 261 N.C. 95, 134 S.E. 2d 148 (Plaintiff-wife, living apart from defendant-husband under a deed of separation, sued for breach of the support agreement, custody, and support for the minor children. She stated no cause of action for divorce or alimony without divorce. Held, notwithstanding, she had stated a cause for breach of contract, and "a *habeas corpus* proceeding is also available to plaintiff. G.S. 17-39, G.S. 17-39.1." The court could "treat the complaint as a petition for writ of *habeas corpus* and proceed accordingly."); *Spitzer v. Lewark,* 259 N.C. 50, 129 S.E. 2d 620 (dispute between the parents of an infant and its paternal grandparents); *Lennon v. Lennon,* 252 N.C. 659, 114 S.E. 2d 571 (dispute between parents, one a resident of North Carolina, the other a nonresident divorced in Nevada).

We have found no case decided since the passage of G.S. 17-39.1 in which custody has been adjudicated in a *habeas corpus* proceeding *after* a divorce action has been instituted. The statements quoted above from *Cleeland* and from *In re Herring* were too broad and are hereby disapproved to the extent that they conflict with the rule that the institution of a divorce action ousts custody jurisdiction acquired under *habeas corpus.* To hold that with the enactment of G.S. 17-39.1 the legislature gave the judge presiding in the district the discretion to issue a writ of *habeas corpus* and to hear and determine the custody of all infants, without regard to previous decisions relating to their custody, would make a shambles of the statutes relating to custody. G.S. 7-103(c); G.S. 17-39; G.S. 17-39.1; G.S. 50-13; G.S. 50-16; G.S. 110-21(3). *Ipsissimis verbis,* some of those statutes are conflicting and inconsistent, and this Court, from time to time, has labored hard to reconcile or harmonize them. See *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857; *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35; *Phipps v. Vannoy, supra; In re Hamilton,* 182 N.C. 44, 108 S.E. 385. Yet one must read the cases to find that "exclusive original jurisdiction" does not mean what it says in G.S. 110-21.

The filing of an action for divorce, either absolute or *a mensa et thoro,* abrogates the necessity for *habeas corpus* to determine cus-

tody, for the court, in its equitable jurisdiction, has the inherent power to order the children of the parties brought before it. *Bunn v. Bunn,* 258 N.C. 445, 128 S.E. 2d 792. In divorce actions, the marital rights and obligations of both husband and wife, as well as the custody and support of the children of the marriage, are before the court in a *single* action. In a *habeas corpus* proceeding, the judge has jurisdiction of only one facet of the marital dispute, the custody and support of the children. When, as here, the right of the wife to support as well as to custody is at issue, justice to all parties — particularly the husband-father — is best served when one judge is able to see the controversy whole and to deal with all the financial problems which it creates.

In this case, alimony *pendente lite* has been awarded respondent in Wilson County. There is at present no support order in the *habeas corpus* proceeding in Stanly County. Conceding, *arguendo,* that custody could be awarded respondent in that proceeding, the judge there would then be called upon to fix the amount which petitioner should pay her for the child's support.

We are constrained to believe that the legislature did not intend *habeas corpus* under G.S. 17-39.1 to be used to determine custody disputes between parents divorced in North Carolina or between whom a divorce action is pending, but that this section provides an alternate remedy (to be used in the judge's discretion) in other cases. We hold, therefore, that the institution of a divorce action in this State ousts the custody jurisdiction previously obtained under a writ of *habeas corpus,* whether it be issued under G.S. 17-39 or G.S. 17-39.1. We note, however, that the general rule that exclusive custody jurisdiction is vested in the divorce court is subject to an exception: It was held in *Blankenship v. Blankenship, supra,* that a court before which an action for alimony without divorce (G.S. 50-16) was pending did not lose its custody jurisdiction to the court of another county in which an action for divorce had been subsequently filed. It was there pointed out that prior to the 1953 and 1955 amendments to G.S. 50-16, this Court had uniformly held that the court in which a divorce action was instituted obtained and retained exclusive jurisdiction over the custody of the children of the marriage as long as both parties lived and that, until the 1953 amendment to G.S. 50-16, custody of children could not be determined in an action for alimony without divorce. *Blankenship* holds that G.S. 50-16 created an additional method whereby all questions relating to custody and child support are brought into and determined in the suit for alimony, that is, in one action. This decision was bolstered by the 1955 amendment to the statute, which provided

that custody orders were authorized in actions under G.S. 50-16 "in the same manner as such orders are entered by the court in an action for divorce." It noted, however, that, if the divorce action had been first instituted, the court in which that action was pending would have acquired exclusive jurisdiction. For a comment on *Blankenship,* see 47 N.C.L. Rev. 464 (1963).

Respondent did not lose her right to challenge the custody jurisdiction of the Superior Court of Stanly County by failing to appeal from the order entered by Judge Olive on 26 October 1966. "Jurisdiction over the subject matter cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to demur or object to the jurisdiction is immaterial." 1 Strong, N. C. Index, Courts § 2 (1957); *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673; *Hanson v. Yandle,* 235 N.C. 532, 70 S.E. 2d 565.

The order of Olive, J., dated 26 October 1966, and the order of McLaughlin, J., dated 29 December 1966, are reversed, and this cause is remanded to the Superior Court of Stanly County, which is directed to enter an order dismissing the *habeas corpus* proceeding from the docket.

Reversed.

ROBERT BENJIE WATSON, MINOR, BY HIS NEXT FRIEND, ROBERT E. WATSON, v. PATRICK MEYERS STALLINGS.

(Filed 3 May, 1967.)

1. Bill of Discovery § 4—

Where plaintiff examines defendant adversely prior to trial, the defendant is entitled to introduce the record of his own examination at the trial. G.S. 1-568.24(a).

2. Appeal and Error § 20—

A party is not entitled to except to matters relating to an issue answered in his own favor.

3. Automobiles § 16—

The requirement that a person entering a public highway from a private road or drive must yield the right of way to vehicles on the public highway applies to a person riding an animal as well as to a person driving a motor vehicle. G.S. 20-156(a); G.S. 20-171.

4. Negligence §§ 1, 16—

In determining negligence, the standard is always the conduct of a reasonably prudent person or the standard prescribed by statute, and although the standard is constant, the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occa-

sion, and, in an action involving a collision with a boy riding a pony, the age, experience, capacity and knowledge of the boy are "exigencies of the occasion" to be considered in determining whether he exercised the care of a reasonably prudent boy under the circumstances.

5. Automobiles §§ 42m, 46; Negligence § 16— Instruction on contributory negligence of minor held without error.

Plaintiff, when eleven years old. was struck by defendant's vehicle at the intersection of a rural paved road and a farm road when plaintiff rode his pony into the intersection from the farm road. The court correctly charged that negligence on the part of plaintiff was to be measured by his age and ability to discern and appreciate the circumstances of danger, and then charged that the statutory requirement that a person entering a public highway from a private drive yield the right of way to vehicles along the highway applied to the rider of a pony, and that if the defendant had satisfied the jury by the greater weight of the evidence that plaintiff failed to keep a reasonably proper lookout or failed to yield the right of way to defendant in entering the highway from a private road without exercising for his own safety that degree of care commensurate with his age and capacity, that such conduct on the part of plaintiff would constitute negligence. *Held:* The charge is free of prejudicial error when construed contextually, and is not subject to the contention that it placed on plaintiff the same degree of care as a mature person operating a motor vehicle.

6. Trial § 51—

Motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the sound discretion of the trial court.

APPEAL by plaintiff from *Hall, J.*, September 1966 Civil Session of JOHNSTON.

Minor's action by next friend to recover damages allegedly caused by the negligence of defendant in which the pleadings raised issues of negligence, contributory negligence and damages.

Evidential facts sufficient to an understanding of the questions for decision on plaintiff's appeal are stated below.

On Saturday, September 21, 1963, about 3:20 p.m., in Johnston County, plaintiff (Benjie), aged eleven years and nine months, was riding his pony in a southerly direction on a farm road approaching its intersection with Rural Paved Road No. 2374; and defendant was operating his Pontiac car in a westerly direction on No. 2374 approaching its intersection with said farm road. This intersection is approximately one-half mile west of the Town of Pine Level. Plaintiff and his pony and defendant's car collided in or near the center of said intersection. Plaintiff sustained serious and permanent injuries, including the loss of his left leg, and his pony was killed.

Prior to the tragic accident Benjie and Bobby Holt, aged ten years, had been riding their ponies on country roads "all around

out from Pine Level." Benjie had had his pony for two or three years. He rode him "just about every day." His pony was "real gentle" and had never given Benjie any trouble. The pony was kept at the house of Benjie's grandfather, "a quarter of a mile from where the collision occurred."

Benjie's testimony relates primarily to the nature and extent of his injuries and suffering. At trial, he was fourteen and in the ninth grade. His grades were A's and B's. He made good grades before the accident. Dr. Hubert M. Poteat, his surgeon and friend, testified: "He's got more guts than any patient I've ever seen. . . . Then he returned to school and went back to all the activity he could do. He's something, I'll tell you that. He's a great kid. He had quite a remarkable recovery and most of it is between his ears, because he wanted to. I have seen him since this artificial limb has been fitted on him. He and I are both great horsemen. He can ride a horse better than I can right now."

Apart from testimony relating to his injuries and to facts narrated above, Benjie testified the last thing he remembered before he "came to" in the hospital was that he and Bobby had started to go home and had "stopped at the house where the spigot was and . . . watered the ponies."

Bobby Holt testified as follows: He and Benjie, after riding up in the field, had stopped at a house and watered their ponies. Coming down the farm road, his pony was directly behind Benjie's pony. The ponies were galloping, "a slow gallop, not very fast," as they approached the intersection. His pony, when "about 30 feet" from the road, "turned to the left and stopped and started eating grass, and Benjie's pony went straight ahead." Benjie "kept on galloping down front" and "continued to gallop on out to the road." About five seconds after his pony stopped and started to eat grass, he (Bobby) heard the tires of a car "squeal" and then "this crash" and "looked around." He did not see the accident. When it occurred, he was looking at the head of his pony. After the collision, he got off his pony and led her to defendant's car. Benjie was lying on the paved portion of the road, "almost in the middle of this intersection," and the pony was lying on the road. He and Benjie intended to turn left at the intersection and go towards Pine Level.

There was evidence tending to show the following: The paved portion of No. 2374 is twenty-two feet wide. On each side there is a dirt shoulder approximately six feet wide. The unpaved farm road has "a very wide entrance." Extending north from No. 2374, it narrows to thirty feet and then to twenty feet. No. 2374, the farm road and the land north of No. 2374 and east of the farm road are of sub-

stantially the same elevation. Proceeding in a westerly direction thereon, No. 2374 is straight for a distance of approximately 400 feet before reaching its intersection with the farm road.

The evidence was in sharp conflict as to the height and density of the growth, consisting principally of broomstraw and weeds, in the area north of No. 2374 and east of the farm road, and as to whether it was sufficient to obstruct defendant's view of a pony and rider approaching said intersection on the farm road.

Plaintiff's evidence included testimony to the effect this growth "was approximately two or three or three and a half feet high," that it "wasn't thick," but was "sparse"; that a motorist traveling in a westerly direction along No. 2374 could see through this growth anything that was higher than "about three feet" from the base of the farm road; that the back of Benjie's pony was around four and a half feet high; and that the top of Benjie's head from the ground when he was astride the pony was at least six feet. Defendant testified the height and density of this growth was such that he could not see the pony and rider until they came out from the farm road (referred to at times as the dirt road or path) into the area of the intersection. Defendant's evidence included the following testimony of the investigating State Highway Patrolman: "From the curve, the growth in the field, weeds and broomstraw, obstructed your view of the dirt road. The grass and the broomstraw in the field would obstruct your vision of the dirt road as you continued down this road and approached the dirt road. The density of it was quite thick."

Defendant testified in substance: His home was at Pilot, about five miles east of Zebulon. This Saturday afternoon, he and his brother (then in the Service) "had no purpose for coming to Johnston County other than just riding around." They were proceeding on their right side of No. 2374 from Pine Level towards Smithfield, at a speed of 30-35 miles per hour, "listening to a football game." When he first saw the pony, it was coming out of the farm road or path, "running," and was 8-10 feet from the north edge of the hard surface. The pony appeared to be coming out of the path "at a gallop." His "guess" was that he was then "30 or 40 feet" from the farm road or path. He applied his brakes immediately and turned to his left. His tires skidded when he applied his brakes. When his car was veering to the left, the pony was making a left turn and heading towards him. The impact occurred when the pony was "somewhere in the vicinity of the center line." The right front of his car struck Benjie's left leg. Only his left front wheel had crossed the center line at the point of impact. His car stopped "just a matter

of a few feet from the point of impact." At that time, it was headed at an angle to the left. The left front wheel was on the shoulder and the right front wheel on the hard surface. Beyond the car, Benjie, who was knocked clear of the pony, was on the left side of the road, his leg severed. (Note: Defendant's brother, using his belt, applied a tourniquet to Benjie's left leg, "up around the thigh region.") Beyond Benjie, the pony, dead, was lying in the center of No. 2374. Defendant testified: "It was just a second from the time the pony appeared in my view until the impact."

The State Highway Patrolman testified, in substance, that skid marks leading to defendant's car began in the right lane for westbound traffic, veered to the left across the center line and then more directly to the left shoulder.

The jury answered the negligence and contributory negligence issues, "Yes," and did not reach the issues relating to damages. Judgment for defendant, in accordance with the verdict, was entered. Plaintiff excepted and appealed; and on appeal sets forth six assignments of error.

Spence & Mast for plaintiff appellant.
Smith, Leach, Anderson & Dorsett for defendant appellee.

BOBBITT, J. Whether the evidence was sufficient to warrant the submission of the first issue and the jury's finding in favor of plaintiff thereon is not presented. The judgment from which plaintiff appeals is based on the jury's answer to the contributory negligence issue.

Prior to trial, plaintiff examined defendant adversely as provided in G.S. Chapter 1, Article 46. At trial, defendant did not testify. He offered in evidence the record of his testimony at said adverse examination. Plaintiff's objection thereto was overruled and he excepted. Assignment of Error No. 2, based on this exception, is without merit.

G.S. 1-568.24(a) provides: "Upon the trial of the action or at any hearing incident thereto *any* party may offer in evidence the whole, but, if objection is made, not a part only, of any deposition taken pursuant to this article, but such deposition shall not be used as evidence against any party not notified of the taking thereof as provided by G.S. 1-568.14." (Our italics.)

Earlier statutes relating to the examination of parties, G.S. 1-568 through G.S. 1-576, Volume 1, General Statutes of North Carolina of 1943 (previously codified as C.S. 899-907, inclusive), were repealed by Session Laws of 1951, Chapter 760. G.S. 1-571 (previously

C.S. 902) provided in part: "The examination shall be taken and filed by the judge, clerk, or commissioner, as in case of witnesses examined conditionally, and may be read by either party on the trial." Under this statutory provision, essentially the same in this respect as G.S. 1-568.24(a), it was held that a party who was examined adversely was entitled to introduce in evidence at trial the record thereof. *McGraw v. R. R.*, 209 N.C. 432, 184 S.E. 31; *Beck v. Wilkins-Ricks Co.*, 186 N.C. 210, 119 S.E. 235, and cases cited.

Plaintiff assigns as error extended excerpts from the court's instructions to the jury.

The instructions set forth in the excerpts on which Assignments Nos. 4 and 6 are based relate to legal principles pertinent to the first (negligence) issue. Although these instructions appear to be in accord with our decisions, plaintiff is in no position to complain of error, if any, therein, since the first issue was answered in his favor. *Anderson v. Office Supplies*, 236 N.C. 519, 73 S.E. 2d 141, and cases cited.

Assignment No. 3 is based on the following excerpt: "Another section of the statute, 20-156, provides in part that the 'Driver of a vehicle entering a public highway from a private road, or drive, shall yield the right of way to all vehicles approaching on such public highway,' and that statute would apply to the driver of an animal, that is the rider of a pony, as well as to the driver of a motor vehicle, and under that statute it would be the duty of a person driving a horse, or riding a horse, or driving a motor vehicle, who is coming out of a private driveway onto a main highway, to yield the right of way to vehicles on the main highway, and it would be the duty of such a person to use reasonable care, to look to see if there is any approaching traffic, and a failure to do so would be negligence. It is the duty of a driver of an animal, or a vehicle, coming out of a private driveway on the public highway, as I told you, to stop and to yield the right of way to the motorist who is on the main-traveled highway." Plaintiff asserts as error "that the Court charged upon the infant plaintiff riding on his pony the same duty of care as a person operating a motor vehicle."

The quoted instruction, in respect of the duty under G.S. 20-156(a) of a motorist entering a public highway from a private road or drive, is in accord with our decisions. *Equipment Co. v. Hertz Corp.* and *Contractors, Inc., v. Hertz Corp.*, 256 N.C. 277, 286, 123 S.E. 2d 802, 809; *Gantt v. Hobson*, 240 N.C. 426, 82 S.E. 2d 384; *Garner v. Pittman*, 237 N.C. 328, 75 S.E. 2d 111. G.S. 20-171 provides: "Every person riding an animal or driving any animal drawing a vehicle upon a highway shall be subject to the provisions of

this article applicable to the driver of a vehicle, except those provisions of the article which by their nature can have no application." (Our italics.) Both G.S. 20-156 and G.S. 20-171 are provisions of Article 3 of Chapter 20 of the General Statutes.

Prior to the quoted instruction, the court had charged the jury with reference to the second (contributory negligence) issue as follows: "In this case, all the evidence tends to show that at the time of this incident the minor plaintiff was only eleven years of age and I instruct you that there is a *prima facie* presumption that a child between the ages of seven years and fourteen years is incapable of contributory negligence, but this presumption may be overcome. It is rebuttable by evidence that the child in fact was capable of contributory negligence. Now, negligence on the part of a child is to be measured by his age and his ability to discern and appreciate the circumstances of the danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. A child must exercise that degree of care commensurate with the child's knowledge, age and capacity and experience, and the failure to do so would be negligence and if a proximate cause, it would be contributory negligence." This instruction is in substantial accord with our decisions. *Wooten v. Cagle,* 268 N.C. 366, 150 S.E. 2d 738, and cases cited.

In determining negligence, the standard is always the conduct of a reasonably prudent person. When a statute prescribes a standard, the standard so prescribed by the General Assembly is absolute. *Bondurant v. Mastin,* 252 N.C. 190, 196, 113 S.E. 2d 292, 296, and cases cited. Although the standard is constant, "the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occasion." *Raper v. McCrory-McLellan Corp.,* 259 N.C. 199, 204, 130 S.E. 2d 281, 284, and cases cited. Thus, the standard of care for the rider of a horse or pony entering upon a public highway from a private road is constant. In applying the standard to the facts of this case, Benjie's age, experience, capacity and knowledge are "exigencies of the occasion" to be considered in determining whether he exercised the degree of care a reasonably prudent boy of his age, experience, capacity and knowledge should and would have exercised under the same or similar circumstances.

With reference to the excerpt to which Assignment No. 5 relates, plaintiff asserts "the Court charged the minor plaintiff with the same duty of care as a person operating a vehicle under his own

control." It is noted there was no evidence that the pony was not at all times under Benjie's control.

In this excerpt, the court, after referring again to the presumption that plaintiff was incapable of contributory negligence, instructed the jury "if the defendant . . . has further satisfied you by the greater weight of the evidence that the plaintiff failed to keep a reasonably proper lookout, or failed to yield the right of way to the defendant in entering a public highway from a private road, or that he rode the pony out into the highway without exercising for his own safety that degree of care commensurate with his age and capacity, that such conduct on the plaintiff's part would constitute negligence, and if the defendant has further satisfied you by the greater weight of the evidence that such negligence of the plaintiff in any one or more of these respects was a proximate cause, or one of the proximate causes of the collision and resulting injuries and damages, it would then be your duty to answer the second issue, 'Yes.' If the defendant has failed to so satisfy you by the greater weight of the evidence, it would then be your duty to answer that issue, 'No.'"

When the charge is considered contextually, we think the court's instructions made it plain that (contributory) negligence on the part of Benjie was to be determined on the basis of whether on this occasion he exercised the degree of care a reasonably prudent boy of his age, experience, capacity and knowledge should and would have exercised under the same or similar circumstances. Having instructed the jury to this effect, as quoted above, continuous repetition was unnecessary.

In Assignment No. 1, plaintiff asserts as error the denial of his motion to set aside the verdict as being contrary to the greater weight of the evidence. Judge Hall, in the exercise of his discretion, denied the motion. There was ample evidence to support the verdict as to the second issue. No abuse of discretion having been shown, the assignment is without merit.

No error.

ALLSTATE INSURANCE COMPANY v. LINDA MILLS HALE, MARY PEOPLES SMITH, AND JERRY WINFRED HENRY, BY HIS GUARDIAN AD LITEM, RALPH GOODALE.

(Filed 3 May, 1967.)

1. Insurance § 2—

Evidence that insurer sent the assigned risk policy in suit to the producer of record of the policy for delivery to the insured and instructed such producer of record to collect from insured the balance due on the annual premium, is sufficient to support a finding by the jury that the producer of record was a special agent of insurer, and payment by insured of the balance of the premium to the producer of record is payment to insurer.

2. Insurance § 61—

Where an agent with authority from insurer to accept the balance due on the annual premium on an assigned risk policy accepts from insured the balance of the premium on the morning prior to the mailing of the notice by insurer of cancellation of the policy for nonpayment, the attempted cancellation by insurer is ineffective.

3. Same—

Under the 1963 amendment to the Vehicle Financial Responsibility Act, insurer must give the Department of Motor Vehicles 15 days notice prior to the effective date of cancellation of an assigned risk policy.

4. Insurance § 53.2—

In regard to insurance in excess of the amount required by the Vehicle Financial Responsibility Act, a policy of insurance is voluntary and the rights and liabilities under the policy will be determined by construction of the policy agreement; but in regard to assigned risk insurance the policy must be interpreted in light of the statutory requirements rather than the agreement or understanding of the parties.

APPEAL by plaintiff from *Gwyn, J.*, October 10, 1966 Civil Session, FORSYTH Superior Court.

The plaintiff, Allstate Insurance Company, instituted this civil action under the Declaratory Judgment Act to have the Superior Court determine and declare its duties and liabilities to the defendants arising under the plaintiff's policy of automobile liability insurance issued to the defendant, Mary Evans Smith (also known as Mary Peoples Smith), under the North Carolina Assigned Risk Plan.

On October 22, 1964, Mary Evans Smith of Winston-Salem, owner of a 1957 Ford automobile, called on Harold Roberts Insurance Agency of Winston-Salem for the purpose of securing liability insurance on the Ford automobile. Mrs. Smith disclosed to Mr. Harold A. Roberts that her son, James Peoples, Jr., age 17, was to have the exclusive use of the vehicle. Roberts informed her she could

not qualify for voluntary insurance on account of the boy's age, and it would be necessary for her to get insurance under the North Carolina Assigned Risk Plan. Roberts prepared for her a proper application which he forwarded to the Plan in Raleigh. Mrs. Smith gave him $50 as a down payment on the premium, which he also forwarded with the application.

The application was assigned to Allstate Insurance Company and Roberts was designated as producer of record. Allstate issued the policy effective October 27, 1964, sent it to Roberts for delivery to Mrs. Smith and for collection of $75 balance due on the premium. Allstate paid Roberts his percentage of the $50 as producer of record and instructed him to collect $75 balance due on the insurance policy, with notice the policy would be cancelled in 30 days if payment of the balance due on the premium was not made. There was evidence a letter was mailed to Mrs. Smith to that effect. She testified, however, she never received any notice of cancellation.

When the Roberts Insurance Agency office opened on the morning of December 2, 1964, Mrs. Smith, according to her testimony, paid to Roberts the balance of $75 which should have continued the insurance in full force and effect until October 27, 1965. Roberts did not forward any part of the $75 to Allstate and on the afternoon of December 2, 1964, between 4:30 and 5:00, Allstate Insurance Company, from its Charlotte office, mailed notices of the cancellation of insurance on Mrs. Smith's Ford. One copy was sent to Mrs. Smith which, according to her testimony, she never received. A copy of the notice was sent to Roberts and enclosed was a check payable to Mrs. Smith and Roberts for $32.50, the unearned part of the $50 premium paid up to the time the cancellation was attempted. On December 29, 1964, Allstate sent the notice of cancellation to the Department of Motor Vehicles on Form FS-4, giving "12-19-64" as the date the cancellation became effective. This notice was received in the office of the Department of Motor Vehicles on January 11, 1965. Roberts cashed the check, but did not account to Mrs. Smith. Roberts testified Mrs. Smith's endorsement was not on the check when he cashed it at the bank.

Roberts testified that he wrote to Mrs. Smith on February 10, 1965 informing her he had received the check for the unearned premium and would hold it until she paid an additional amount of $36 for other insurance. She testified she did not receive this letter. On August 30, 1965, her son's friend, Jerry Winfred Henry, driving the Ford with her son's permission, was involved in an accident in which Linda Mills Hale was injured. On October 28, 1965 she in-

stituted a civil action against Mrs. Smith and Jerry Winfred Henry to recover damages for the injuries she sustained in the accident.

Allstate's purpose in instituting this action is to have the Court determine its duties and liabilities with respect to the defense of the action for Mrs. Smith and Henry and its liability to the claimant for her injuries. The Court, over plaintiff's objection, submitted two issues which the jury answered as here indicated:

"1. At the time of the alleged payment of the sum of $75.00 to Harold A. Roberts as the balance due on the automobile insurance policy, was the said Harold A. Roberts the agent of the plaintiff, Allstate Insurance Company, and as such acting within the scope of his authority, as alleged in the Answer: ANSWER: Yes.

2. Was the Allstate policy No. 35 325 244AR, as issued to the Defendant Smith, effectively cancelled prior to August 30, 1965, as alleged? ANSWER: No."

In addition to the issues, the Court made extensive findings of fact not necessary to be repeated here and concluded as a matter of law:

"(2. That Allstate Insurance Company, under its said insurance policy, owes the duty to the defendants Smith and Henry to defend the suit of LINDA MILLS HALE v. MARY PEOPLES SMITH and JERRY WINFRED HENRY presently pending in the Superior Court of Forsyth County;)

(3. That Allstate Insurance Company, under its said insurance policy, is obligated to pay any judgment rendered in favor of Linda Mills Hale in the case of LINDA MILLS HALE v. MARY PEOPLES SMITH and JERRY WINFRED HENRY;)"

The plaintiff excepted and appealed, assigning errors.

Womble, Carlyle, Sandridge & Rice by Grady Barnhill, Jr., for plaintiff appellant.

Mast and Wilson by David P. Mast, Jr., for defendant Hale.

White, Crumpler, Powell & Pfefferkorn by James G. White for defendants Smith and Henry.

HIGGINS, J. In response to the issues submitted, the jury found: (1) Harold A. Roberts was the agent of plaintiff Allstate Insurance Company and acting within the scope of his authority when he collected from Mrs. Smith the balance of $75 due on the policy involved in this cause; and (2) the policy was not cancelled prior to August

30, 1965 when the insured vehicle was involved in the accident in which the defendant Linda Mills Hale was injured.

The plaintiff stressfully contends that Harold A. Roberts at all times was acting independently as a producer of record in obtaining the insurance policy and was acting as the agent of Mrs. Smith thereafter, and at no time was he the agent of Allstate. Plaintiff further contends that Mrs. Smith's payment to Roberts was not a payment to Allstate and consequently the cancellation for nonpayment of premium was fully authorized by law.

The evidence fails to show Roberts was ever the general agent of Allstate. It is sufficient, however, to show that Roberts was authorized by Allstate to deliver its assigned risk policy to Mrs. Smith and to collect from her $75 balance due on the annual premium. "'A general agent is one who is authorized to do all acts connected with a particular trade, business or employment, and a special agent is one authorized to do one or more specific acts in pursuance of particular, specific instructions or within restrictions necessarily implied from such instruction.' 3 Am. Jur. 2d 422". Lee, N. C. Law of Agency & Partnerships, Sec. 45. "(A) special agent can only contract for his principal within the limits of his authority, and a third person dealing with such agent must acquaint himself with the strict extent of the agent's authority and deal with the agent accordingly." *Iselin & Co. v. Saunders,* 231 N.C. 642, 58 S.E. 2d 614, citing *Graham v. Ins. Co.,* 176 N.C. 313, 97 S.E. 6; *Swindell v. Latham,* 145 N.C. 144, 58 S.E. 1010; 122 Am. St. Rep. 430; Mechem on Agency (2d Ed.) Vol. 1, Sec. 742; 2 Am. Jur., Agency, Sec. 96, 2 C.J.S., Agency, Secs. 93, 114. "A broker authorized to deliver the policy and collect the premium has been quite generally held to be the agent of the company in respect to those acts." Mechem on Agency, Sec. 2369 (see footnote citing numerous authorities). "An insurance broker to whom a policy is entrusted by the insurer for delivery to the insured has the authority to receive the first premium, and payment to the broker constitutes payment to the insurer." Couch on Insurance (2d Ed.) Vol. 3, Sec. 25:97.

It is true that Roberts was the producer of record. However, nothing in the Assigned Risk Plan appears to require the insurer to send the policy to the producer for delivery or for the collection of the premium or any part thereof. If the insurer elects to assign these responsibilities to the producer of record, he becomes the agent of the insurer for these specific activities. At least assignment of these duties furnishes evidence from which the jury may infer the special agency. A case in point is *Taylor v. Casualty Co.,* 229 S.C. 230, 92 S.E. 2d 647. The South Carolina Court held the producer of

record completed his obligation when he forwarded the application and the deposit to the Assigned Risk Plan. Subsequent actions were of the insurer's "own choosing" and were sufficient to carry the issue of agency to the jury. In *Underwood v. Liability Co.*, 258 N.C. 211, 128 S.E. 2d 577 and *Daniels v. Ins. Co.*, 258 N.C. 660, 129 S.E. 2d 314, a different question was involved.

The evidence of agency was sufficient to require Judge Gwyn to submit the issue to the jury and to support the jury's finding that the agency existed. The acceptance by the agent of the full balance due on the premium before cancellation prevented the insurer from terminating the policy for nonpayment of the premium. The payment to the agent was payment to the principal. The evidence fixed the time of the payment as early in the morning of December 2, 1964. Notice of cancellation was not mailed until later that afternoon.

Some confusion has arisen as to the method of cancelling assigned risk policies. The Vehicle Financial Responsibility Act of 1957 provided:

> "No insurance furnished under the provisions of the 1957 Act 'shall be terminated by cancellation or failure to renew by insurer until at least fifteen (15) days after mailing a notice of termination to the named insured . . . *notice* . . . shall be mailed by the insurer to the Commissioner . . . *not later than fifteen (15) days following the effective date of such cancellation.* . . .' G.S. 20-310." *Faizan v. Ins. Co.*, 254 N.C. 47, 118 S.E. 2d 303. (Emphasis added)

Apparently Allstate sought to cancel its policy issued to Mrs. Smith by using forms and following procedures provided in the 1957 Act and discussed by Justice Moore in the *Faizan* case. Likewise, it appears that Allstate overlooked the 1963 Session Laws amendment which became effective October 1, 1963 as Chapter 964:

> "No insurance policy provided in paragraph (d) may be terminated by cancellation or otherwise by the insurer without having given the North Carolina Motor Vehicles Department *notice of cancellation fifteen (15) days prior to effective date of cancellation.*" (Emphasis added)

Plaintiff's Exhibit No. 2, introduced in evidence, carries this information:

> "NOTICE OF TERMINATION (giving name and address of insured, Mrs. Smith, the policy number and the serial number of the

insured vehicle) terminates effective 12-19-64. Date FS-4 prepared Dec. 29, 1964. To be filed with the Department of Motor Vehicles Financial Security Section, Raleigh, North Carolina. R. L. Hargrove, signature of authorized representative."

The reverse side of the notice shows it was received in the office of the Department of Motor Vehicles on January 11, 1965. The plaintiff's evidence not only failed to show prior notice to the Department of Motor Vehicles of the effective date of the attempted cancellation, but it affirmatively shows the notice was prepared on December 29, 1964, claiming cancellation effective "12-19-64". *Griffin v. Indemnity Co.*, 264 N.C. 212, 141 S.E. 2d 300 is not authority contra. *Griffin* was decided subsequent to the 1963 amendment, but the cancellation was effective prior to that date, and was according to the rules in force at the time of cancellation.

The primary purpose of the law requiring compulsory insurance is to furnish at least partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway. Insurance covering liability arising out of the ownership, maintenance and use of a motor vehicle on the highway in the amount required by statute is mandatory. If the policy exceeds the amount required, the policy to the extent of the excess is voluntary. Voluntary insurance is contractual and determines the rights and liabilities of the parties *inter se*. Assigned risk insurance is compulsory both as to the insurer and the insured, made so by law. Such policy must be interpreted in the light of the statutory requirement rather than the agreement or understanding of the parties. The requirements of the statute with respect to cancellation must be observed or the attempt at cancellation fails. Such policies "are generally construed with great liberality to accomplish their purpose." *Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654; *Wheeler v. O'Connell*, 297 Mass. 549, 9 N.E. 2d 544, 111 A.L.R. 1038.

We conclude the evidence was sufficient to support the finding that Roberts, as plaintiff's agent, received the balance due on the premium and that the plaintiff had not cancelled the policy. The Court entered judgment in part upon the jury's verdict and in part upon the Court's additional findings, both of which were supported by the evidence.

Any judgment against Allstate in favor of Linda Mills Hale may not exceed the maximum coverage provided in the policy.

Affirmed.

ROSE'S STORES, INC., v. TARRYTOWN CENTER, INC., AND TARRYTOWN DEVELOPMENT COMPANY.

(Filed 3 May, 1967.)

1. Venue § 7—

A motion for change of venue made before the time for answer has expired is made in apt time. G.S. 1-83.

2. Pleadings § 2—

The nature and purpose of an action is to be determined by the allegations of the complaint.

3. Venue § 5—

Where the facts alleged in the complaint put in issue the title to land, or the judgment which may be rendered thereon would affect an interest in land, the action is removable as a matter of right upon motion aptly made to the county in which the land is situate. G.S. 1-76.

4. Same—

Plaintiff lessee brought this action in the county of its residence against defendant lessor to enjoin lessor from constructing a building which plaintiff alleged would encroach upon the parking area and driveway rights which were guaranteed to plaintiff in the lease of a store in lessor's shopping center. *Held:* The action is to obtain a decree *in personam* to enforce contractual rights under the lease, and judgment would not alter the terms of the lease, require notice to third parties, or affect title to the land, and therefore defendant's motion to remove as a matter of right to the county in which the land is situate was properly denied.

APPEAL by defendants from *Johnson, J.*, November 1966 Civil Session of VANCE.

Defendant Tarrytown Center, Inc., is the owner and lessor of a shopping center complex in or near the City of Rocky Mount, Nash County, North Carolina. Plaintiff, as lessee, entered into an agreement with Tarrytown Center on 29 July 1963 to lease a certain store within the shopping center from defendant. It is alleged by plaintiff that the lease provided it was to have a non-exclusive right in common with other lessees in the shopping center to the parking and service areas, drives, walks and entrances, for the use of itself, its invitees, and others who service or deliver to plaintiff. It is further alleged that Tarrytown Center was to provide, grade and surface these areas at its own expense, and, further, that it was to "provide an adequate and sufficient area adjacent to and adjoining Tenant's service entrance for standing, loading, unloading and otherwise servicing the building demised, . . . and that a paved driveway at least twenty (20) feet in width will be constructed so as to provide a means of ready ingress and egress from said area"; and it was further alleged that Tarrytown Center was to "keep said parking

areas, sidewalks, streets, aisles, driveways, service and common areas unobstructed." A "Plot and Development Plan of the Shopping Center" was attached to the lease as exhibit "A" and made a part thereof.

Plaintiff filed complaint, alleging that in March 1966 defendant Tarrytown Center, through its agent, the defendant Construction Company, began construction of a department store across a driveway running along the north side of plaintiff's building; that the building under construction is in excess of the size provided for future construction according to the Plot and will occupy space which would otherwise be used for parking by visitors to plaintiff's store; and, further, that in the course of the construction, defendants have broken up the driveway and otherwise obstructed it, thereby hampering deliveries made to plaintiff's store.

Defendants are North Carolina corporations, with principal offices and places of business in Rocky Mount, Nash County, North Carolina. Plaintiff is a Delaware corporation, domesticated and doing business in the State of North Carolina, with its principal North Carolina office in the City of Henderson, Vance County.

Plaintiff prayed that defendants be permanently enjoined from violating the terms of the lease agreement, and that defendants appear and show cause why a temporary restraining order should not be issued pending final hearing on the merits.

After filing of the complaint and before time to answer had expired, appellants moved before the Clerk of Superior Court of Vance County that the action be removed to Nash County by authority of G.S. 1-76. The motion was allowed by the Clerk. This order was appealed to the Superior Court of Vance County, and on 9 November 1966 an order was entered by Judge W. A. Johnson reversing the Clerk's order and denying defendants' motion for change of venue.

Defendants appealed.

Perry, Kittrell, Blackburn & Blackburn for plaintiff.

Battle, Winslow, Scott & Wiley; Simpson, Thacher & Bartlett for defendants. Robert M. Wiley, John A. Guzzetta and David R. Solin of Counsel.

BRANCH, J. Defendants made a motion for change of venue as a matter of right, by virtue of G.S. 1-76, before time for answering expired. The motion was made in apt time. G.S. 1-83; *Casstevens v. Membership Corp.*, 254 N.C. 746, 120 S.E. 2d 94.

The pertinent portion of G.S. 1-76 reads:

"Where subject of action situated. — Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:

1. Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property."

The nature and purpose of plaintiff's action is to be determined by the allegations of its complaint. *Casstevens v. Membership Corp., supra.* According to plaintiff's allegations, it seeks, by reason of the terms of a lease agreement, to restrain defendants from constructing a building and obstructing a certain area in which plaintiff contends it has a right of way according to the terms of said lease.

The sole question presented by this appeal is whether the action is removable as a matter of right to the county in which the land is situate.

When the title to real estate may be affected by an action, this Court has consistently held the action to be local and removable to the county where the land is situate by proper motion made in apt time.

Penland v. Church, 226 N.C. 171, 37 S.E. 2d 177, was an action instituted in Yancey County to recover payment on a contract for construction of a building in Mitchell County and for an order directing sale of the real property to satisfy same under laborer's and materialman's liens filed in Mitchell County. The Court affirmed the order granting motion to move to Mitchell, stating: "And we see no essential difference in so far as an interest in real property is involved, in an action to foreclose a mortgage, a lien created by contract, and in one to foreclose a specific statutory lien on real property."

In *Powell v. Housing Authority,* 251 N.C. 812, 112 S.E. 2d 386, plaintiff, a resident of Sampson County, brought an action in that county to determine the ownership of six tracts of land situate in Wayne County. Defendant in apt time moved for change of venue to the county in which the land was situate. The Court, in holding that the action should be removed to the county in which the land was situate, stated: "Here the cause of action is the title to land. . . . In our opinion, sound reason and the weight of authority support the position that an action involving the title to real estate is properly triable in the county in which the land is situate."

Bohannon v. Trust Co., 198 N.C. 701, 153 S.E. 263, was a case in which plaintiff brought an action in Catawba County to restrain

the defendant, a Virginia trust company, from foreclosing its mortgage on lands lying in Buncombe County. The defendant made a timely motion for change of venue to Buncombe County, the situs of the land. Sustaining the granting of the motion, this Court said: "This action is, in effect, one to redeem land from a mortgage or deed of trust, and necessarily calls for the determination, in some form, of the rights or interests of the parties therein."

The plaintiff in the present case does not seek a judgment that would affect an interest in land, but seeks a judgment *in personam.*

McIntosh, Vol. 1, sec. 779, p. 416, states: "Specific performance of a contract for the sale of land is an equitable remedy and is often granted under the equity practice when the parties are within the jurisdiction of the court, although the land itself is not within the jurisdiction, since equity acts *in personam* and can compel a conveyance through its control over the person. To carry out the idea of a decree acting *in personam,* it may be necessary to consider a suit for specific performance as being transitory instead of local, . . ."

In the case of *Baruch v. Long,* 117 N.C. 509, 23 S.E. 447, a creditor's bill was brought in Mecklenburg County to set aside, because fraudulent and void as to creditors, the transfer of certain personal property and certain judgments suffered by the defendant Long who resided in Richmond County, the judgments being docketed in Richmond County. The defendant moved to remove to Richmond County upon the ground that the action was for determination of a right or an interest in real property situate in Richmond County. Holding that the motion was properly refused, the Court stated: "The docketed judgment confers no 'estate or interest' in real estate within the meaning of The Code, section 190(1) (now G.S. 1-76), but merely the right to subject the realty to the payment of the judgment by sale of the same under execution. It is a lien, taking priority according to the date of docketing. It is true it is said in *Gambrill v. Wilcox,* 111 N.C. 42: 'The lien of a docketed judgment is in the nature of a statutory mortgage,' and so it is, but it is not said that a judgment when docketed conveys an interest or estate in realty, as a conveyance by mortgage does."

Again considering this matter, this Court, in the case of *White v. Rankin,* 206 N.C. 104, 173 S.E. 282, held that where an action is brought on a note secured by a deed of trust, in which neither the trustee nor the trustors are parties, a motion to remove to the county in which the land lay was properly denied, since "The action does not involve any estate or interest in the land situate in Gaston County and described in the deed of trust referred to in

the complaint. On the facts alleged in the complaint, plaintiff is entitled to recover a personal judgment against each of the defendants for the amount due on the note. . . . She is not entitled on these facts to a foreclosure of the deed of trust by judgment or decree in this action."

McIntosh, Vol. 1, § 772, p. 411, states: "The test to be applied is: if the judgment to which the allegations of the complaint would entitle plaintiff, will affect the title to land, the action is local; otherwise, it is transitory."

The Court, in *Eames v. Armstrong*, 136 N.C. 392, 48 S.E. 769, held that an action to recover damages for breach of covenants of seizin and right to convey in a deed was not an action for the determination of a right or interest in land and therefore the action was not removable, as a matter of right, to the county in which the land was situate. The Court said: ". . . 'Apart from this provision of the Code fixing the venue, the action is upon a personal covenant sounding in damages. . . . On a breach of the covenant, it becomes a mere personal right which remains with the covenantee or his executors and does not descend with the land or run with it.' "

In the case of *Causey v. Morris*, 195 N.C. 532, 142 S.E. 783, there was an action to recover damages for false and fraudulent representations by which plaintiffs were induced to purchase a tract of land from defendants and to have certain notes executed by plaintiffs and held by defendants cancelled in partial satisfaction of damages. The representations were not made with respect to the title or the boundaries of the land which plaintiffs purchased from defendants. The Court held that this did not involve an interest in or title to land; that under C.S. 463(1), (now G.S. 1-76), an action was not removable as a matter of movant's right, and the plaintiff could select the county of his residence as the venue. The Court stated: "The title to the land situate in Rutherford County, purchased by plaintiffs of defendants, cannot be affected by any judgment which plaintiffs may recover of defendants upon the allegations of the complaint. Such judgment cannot be a lien on said land, nor can said land be sold for the satisfaction of said judgment, for the defendants having conveyed the land to the plaintiffs are not the owners thereof. Notwithstanding said judgment, plaintiffs will remain the owners of said land, claiming title thereto under their deed from defendants."

In the case of *Griffin v. Barrett*, 176 N.C. 473, 97 S.E. 394, it was held that the test as to where the title to land involved in an action, for the purpose of determining its removability as a matter of right, is the judgment which the plaintiff might recover on the allegations

of the complaint. If the plaintiff is entitled to a judgment which will affect the title to the land, the action must be tried in the county in which the land is situate; otherwise, it is not removable to such county as a matter of right.

"Title to realty must be directly affected by the judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein, or because the judgment that may be rendered may settle the rights of the parties by way of estoppel. It is the principal object involved in the action which determines the question, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone *in personam* against the parties, the action will be held local." 92 C.J.S., Venue, § 26, pp. 723, 724.

The judgment plaintiff seeks by its complaint would not alter the terms of the lease, nor would it require notice to third parties. The only result, should plaintiff prevail, would be the personal enforcement of rights granted under a contract of lease. This is a personal right and does not run with the land. Whatever the outcome of this action, the title to the land would not be affected. The defendants would still be owners, with their title unimpaired by this suit. The complaint sounds of breach of contract and not for "recovery of real property, or of an estate or interest therein, or for the determination of any form of such right or interest, and for injuries to real property." G.S. 1-76.

This is a transitory action and is not removable as a matter of right to the county in which the land is situate.

Affirmed.

ROSE'S STORES, INC., v. TARRYTOWN CENTER, INC., AND TARRYTOWN DEVELOPMENT COMPANY.

(Filed 3 May, 1967.)

1. Judgments § 18; Contempt of Court § 8—

Where neither party appeals from a valid temporary restraining order issued in the cause, both parties are bound to respect the terms of the order.

2. Contempt of Court § 8—

The findings of fact by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence, and are re-

viewable only for the purpose of passing on their sufficiency to warrant judgment.

3. Contempt of Court § 6— Evidence held sufficient to support finding that defendant wilfully violated terms of prior restraining order.

Order was issued in the cause enjoining defendant from interfering with the use of a driveway to a service entrance of the store leased by plaintiff from defendant. On the hearing of the order to show cause why defendant should not be punished for contempt, there was evidence that sliding doors were erected across the driveway in defendant's mall so that a watchman was required to open the doors successively when a vehicle proceeded on the driveway through the mall, that, on occasion, the driveway was broken up and covered with dirt, that trucks, ladders and building materials were left in the driveway, and that for a period of time strings were put across the driveway. *Held:* The evidence was sufficient to support a finding that the acts "interfered with, obstructed, delayed and prevented the free flow of vehicular and pedestrian traffic along said driveway" in violation of the terms of the prior restraining order, and, since the premises were under the control of defendant, that defendant had wilfully violated the terms of the order, the motives of defendant and whether it intended to show contempt for the court being immaterial.

4. Contempt of Court §§ 2, 3—

Criminal contempt must be based on acts already accomplished, committed in the actual or constructive presence of the court which tended to interfere with the administration of justice; civil contempt must be based on acts constituting a wilful violation of a lawful order of the court, continuing in nature, so that punishment is for the purpose of preserving and enforcing the rights of private parties to suits and to compel obedience to orders and decrees made for their benefit. The distinction between civil and criminal contempt is material, since there is a difference in procedure, punishment and review. G.S. 5-1, G.S. 5-2, G.S. 5-5, G.S. 5-7, G.S. 5-9.

5. Contempt of Court § 8—

An order entered in civil contempt to coerce respondent's obedience to a court order is appealable. G.S. 5-8.

6. Contempt of Court § 7—

A completed act in direct disobedience of a restraining order theretofore issued in the cause may be punished for criminal contempt by the imposition of a fine not exceeding $50; other acts existing and continuing at the time of the order which impede the rights of the parties under such order may be punished as civil contempt.

7. Contempt of Court § 6—

Where a prior restraining order issued in the cause enjoins defendant from interfering with the use of a driveway to a service entrance of plaintiff's store, an order entered by the court, upon the hearing of an order to show cause, requiring a canopy constructed by defendant over the driveway to be raised from its constructed height and imposing a fine for each day defendant should fail to raise the canopy after the time limited, *held* erroneous in the absence of evidence that the canopy as constructed interfered in any way with the use of the driveway.

8. Same—

Upon the hearing of an order to show cause why defendant should not be held in contempt for wilful violation of a valid court order theretofore entered in the cause, the sole question before the court is whether the terms of the prior order had been violated by defendant, and the court upon such hearing has no authority to modify the order or to exercise affirmative injunctive powers.

APPEAL by defendants from *Hobgood, J.*, in Chambers at Louisburg, FRANKLIN County, 8 November 1966.

Defendant Tarrytown Center, Inc., is the owner and lessor of a shopping center complex on the edge of Rocky Mount in Nash County. The shopping center is a mall type complex with all the shops centered off an enclosed mall. By lease dated 29 July 1963, plaintiff became a lessor from Tarrytown Center of store space within the mall. It was alleged in the pleadings and found as a fact by the court below that the lease agreement contained the following provisions:

> Section 25(a). "The landlord covenants and agrees, at Landlord's sole expense, to provide, grade and surface the areas shown or marked 'Parking' on the Plot and Development Plan of the Shopping Center attached hereto as Exhibit 'A' together with sidewalks, aisles, streets and driveways shown thereon, and also to provide adequate water drainage and lighting systems therefor. . . ."
>
> Section 25(c). "The Landlord agrees to provide an adequate and sufficient area adjacent to and adjoining Tenant's service entrance for standing, loading, unloading and otherwise servicing the building demised herein, having access at all times to the driveway described below, and that a paved driveway at least twenty (20) feet in width will be constructed so as to provide a means of ready ingress and egress from said area and from the delivery or service entrance of the building demised herein to the surrounding streets and highways for the purpose of receiving and delivering merchandise and otherwise servicing the demised premises."
>
> Section 25(d). ". . . The Landlord shall keep said parking areas, sidewalks, streets, aisles, driveways, service and common areas unobstructed. . . ."
>
> Section 25(e). "Landlord covenants and agrees that during the term of this lease or any renewal thereof, it will not, except within the area indicated as 'future expansion', erect any building or permit any obstruction of any portion of the common areas shown on the Plot and Development Plan attached

hereto and marked Exhibit 'A', which was provided for parking, aisles, walks, drives, entrances, exits, service areas, etc."

Attached to the lease and made a part thereof as Exhibit "A" was a schematic diagram or plot of the shopping center complex. According to this plot, a street or drive runs westerly off U. S. Highway 301, and along the north side of plaintiff's store within the shopping center. Directly north of, and bordering on this street, is a rectangle, marked off in dotted lines and designated on the plot as "Future Department Store."

Plaintiff alleges, *inter alia,* that on or about 15 March 1966, defendant Tarrytown Center, through its agent, servant and employee, defendant Tarrytown Development Company, began construction of a building on the north side of the street or drive that runs west off U. S. Highway 301 and along the north side of plaintiff's store; that the building under construction extends beyond the area marked "Future Department Store" on the plot and will thereby take up space which might otherwise be used by plaintiff's customers for parking space; and that in the course of construction defendants have blocked, obstructed, torn up, and otherwise made impassable the street running on the north side of plaintiff's store, all in violation of the lease agreement, and to plaintiff's injury. Plaintiff prayed that defendants be permanently enjoined from violating the terms of the lease agreement and that they be required to appear and show cause why a temporary restraining order should not be issued.

After due notice, Braswell, J., held a hearing, found facts, and entered an order dated 27 May 1966, enjoining defendants from "obstructing or causing to be obstructed the area described in Paragraph 4 (the driveway in question) . . . in any manner whatsoever that may invade, interfere with, obstruct, delay or otherwise prevent free flow of vehicular or pedestrian traffic within the confines of said area . . . until the final hearing of this action upon its merits." The order provides, however, that defendants could construct a canopy or other covering over the driveway so long as it was at least 14 feet 6 inches above the surface below at its lowest part. The order further provided that defendants could continue construction of the building.

Thereafter, on 23 September 1966 plaintiff petitioned the court to order the defendants to appear and show cause why they should not be held in contempt of court for violating the temporary restraining order. In support of the petition, plaintiff alleged and offered evidence tending to show, *inter alia,* that defendants had constructed a terrazo walkway across the drive which had a sur-

face area some five (5) inches above the surface of the drive, thereby obstructing the flow of vehicular traffic; that defendants had placed ladders, scaffolds, and building materials in the driveway and had placed strings across the driveway, thereby completely closing off traffic at times; that defendants had constructed a canopy at a height of less than 14 feet 6 inches from the surface area; and that defendants had hung sliding doors from the canopy which were maintained by a watchman and were opened only when vehicles approached and wished to pass over the terrazo walkway.

At hearing regularly held, Hobgood, J., found facts and entered an order fining defendants in the amount of $250 and further ordering that defendants:

> ". . . immediately cause said doors to be removed from the canopy herein described and the said driveway henceforth be left open and unobstructed at all times; that lines indicating the center of said driveway be marked in yellow paint upon said driveway by said defendants; and the word 'driveway' be written across said driveway at either end thereof in yellow paint by said defendants; that said canopy be raised to a height of 14 feet 6 inches above the surface of said driveway and a sign entitled 'Driveway Clearance 14 feet 6 inches' be placed at either end of the canopy where the same crosses said driveway, and that within the area covered by said canopy adequate warning signs be posted to protect pedestrians against vehicular traffic using said driveway, and partitions and doors be erected on each side of said driveway to permit the proper heating and air conditioning of said mall exclusive of the area occupied by said driveway, . . ."

Defendants were given two weeks to comply with the order, and it was further provided that they were to pay a fine of $250 a day every day thereafter until all conditions of the order were met.

Defendants appealed.

Perry, Kittrell, Blackburn & Blackburn for appellee, Rose's Stores, Inc.

Battle, Winslow, Scott & Wiley; Simpson, Thacher & Bartlett for defendants; Robert M. Wiley and John A. Guzzetta and David R. Solin of Counsel.

BRANCH, J. The questions presented by this appeal are:

1. Was there evidence to support the finding that the temporary restraining order was violated?

2. Was there evidence to support the finding that the appellants wilfully violated the terms of the temporary restraining order?

3. Was the court's order punishing defendants for contempt and requiring them to perform certain affirmative acts properly entered?

4. Did the court err in finding as a fact that defendants violated the temporary restraining order by building a canopy at a height of less than 14 feet 6 inches?

The temporary restraining order entered by Judge Braswell on 27 May 1966 was not void. Neither appellants nor appellee appealed from the order, and they are thus bound to respect its terms. *Nobles v. Roberson,* 212 N.C. 334, 193 S.E. 420.

The findings of fact by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence, *Cotton Mill Co. v. Textile Workers Union,* 234 N.C. 545, 67 S.E. 2d 755, and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. *In re Adams,* 218 N.C. 379, 11 S.E. 2d 163.

Plaintiff offered evidence tending to show that sliding doors were hung so as to give the appearance that the driveway was closed to through traffic, and which in fact did impede through traffic in that a watchman was required to open the doors when an automobile approached and then precede the car through the mall to open and close the second door. On occasion the watchman detained operators of vehicles for the purpose of asking questions. It also appears that during the process of construction the driveway was broken up and covered with dirt; trucks, ladders and building materials were left in the driveway; and, for a period of time, strings were put across the driveway. Thus, there was plenary competent evidence for the trial judge to find facts sufficient to warrant the finding that the acts "interfered with, obstructed, delayed and prevented the free flow of vehicular and pedestrian traffic along said driveway."

Defendants' contention that there was not sufficient evidence to support the finding they wilfully violated the terms of the temporary restraining order cannot be sustained.

In the case of *Weston v. Lumber Co.,* 158 N.C. 270, 73 S.E. 799, defendants were enjoined from cutting timber on land, the title to which was in dispute. Defendants, upon their own survey and without acquiescence of the court or plaintiff, cut timber in the disputed territory. Finding no error in the trial judge's judgment ruling defendants in contempt, this Court held:

"We have high authority for saying that a party enjoined must not do the prohibited thing, nor permit it to be done by his connivance, nor effect it by trick or evasion. He must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so. The order of the court must be obeyed implicitly, according to its spirit and in good faith. Rapalje on Contempt, sec. 40. The motive for violating the order is not considered in passing upon the question of contempt, and the respondent cannot purge himself by a disavowal of any wrong intent. It is the fact of his obedience that alone will be considered."

The Court, considering the same question in *Cotton Mills v. Abrams,* 231 N.C. 431, 57 S.E. 2d 803, held:

"The oath of a contemner is no longer a bar to a prosecution for contempt. 'The question is not whether the respondent intended to show his contempt for the court, but whether he intentionally did the acts which were a contempt of the court.' *In re Fountain,* 182 N.C. 49, 108 S.E. 342, 18 A.L.R. 208; *In re Parker,* 177 N.C. 463, 99 S.E. 342; *Herring v. Pugh,* 126 N.C. 852; *In re Young,* 137 N.C. 552; *In re Gorham,* 129 N.C. 481.

" 'The violation of a judicial mandate stands upon different ground, and the only inquiry is, whether its requirements have been wilfully disregarded. If the act is intentional, and violates the order, the penalty is incurred, whether an indignity to the Court or a contempt of its authority, was or was not the motive for it.' *Green v. Griffin,* 95 N.C. 50; *Nobles v. Roberson,* 212 N.C. 334.

"The respondents having sought to purge themselves, the burden was on them to establish facts sufficient for that purpose."

See also *Herring v. Pugh,* 126 N.C. 852, 36 S.E. 287; *In re T. J. Parker,* 177 N.C. 463, 99 S.E. 342.

Here, the defendants committed acts which clearly violated the terms of Judge Braswell's order when they had it in their power to obey its terms. They have failed to show facts sufficient to purge themselves.

Appellants contend that the court's order punishing them for contempt and requiring them to perform certain affirmative acts was improperly entered. In order to determine this question, we must consider the law governing contempt in this jurisdiction.

Luther v. Luther, 234 N.C. 429, 67 S.E. 2d 345, holds:

"A person guilty of any of the acts or omissions enumerated in the eight subsections of G.S. 5-1 may be punished for contempt because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority. A person guilty of any of the acts or neglects catalogued in the seven subdivisions of G.S. 5-8 is punishable as for contempt because such acts or neglects tend to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court.

"It is essential to the due administration of justice in this field of the law that the fundamental distinction between a proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 be recognized and enforced. The importance of the distinction lies in differences in the procedure, the punishment, and the right of review established by law for the two proceedings."

The procedure to punish *as for contempt* is by order to show cause based upon a petition, affidavit or other proper verification charging a wilful violation of an order of court. G.S. 5-7 and G.S. 5-9. Contempt committed in the actual or constructive presence of the court may be punished summarily. G.S. 5-5.

In *Erwin Mills v. Textile Workers Union,* 234 N.C. 321, 67 S.E. 2d 372, this Court stated:

". . . And whether the movent uses a petition or other document to obtain an order to show cause in such proceeding, it is the affidavit or verification that imports the verity to the charge of violating the judgment or order of the court, which is required upon which to base an order to show cause in such instances. G.S. 5-7; *Safie Manufacturing Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577; *In re Deaton,* 105 N.C. 59, 11 S.E. 244."

The court must specify the particulars of the offense on the record by stating the words, acts or gestures amounting to direct contempt, and when the record contains only conclusions that contemnor was contemptuous, contemnor is entitled to his discharge. *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581.

The punishment as to matters punishable *for contempt* is limited to a fine not to exceed $250 or imprisonment not to exceed thirty days, or both, in the discretion of the court. G.S. 5-4. However, punishment *as for contempt* is not limited by the terms of this statute.

The right of review in proceedings *for contempt* is regulated by G.S. 5-2, which denies to persons adjudged guilty of contempt in

the Superior Court the right of appeal to the Supreme Court except in cases arising under subsections 4 and 5 of G.S. 5-1, where the contempt is not committed in the presence of the court. G.S. 5-2 has no application, however, to proceedings *as for contempt* under G.S. 5-8, and as a result a person who is penalized *as for contempt* may obtain a review of the judgment entered against him by a direct appeal to the Supreme Court. *Luther v. Luther, supra.*

In the instant case there is a violation of a temporary restraining order in a civil action, and the proceeding was properly before the court on the petition of plaintiff seeking to coerce defendants into compliance with the court's order. The procedure for punishment as for contempt has been followed and the appeal is properly before us.

Criminal contempt or punishment *for contempt* is applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt or punishment *as for contempt* is applied to a continuing act, and the proceeding is had " 'to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties.' " *Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157.

There are certain instances where contemnors may be punished for both criminal contempt, *i.e., for contempt,* and for civil contempt, *i.e., as for contempt, Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822. Such appears to be the case here. Since the only limitation as to punishment relates to G.S. 5-1, and is within those bounds, we conclude that the imposition of fine and the amount thereof was proper. Defendants' completed acts, such as temporarily placing a string across the driveway and temporarily leaving trucks in the driveway, were acts which tended to impair the respect due to the court's authority and were punishable *for contempt;* whereas, the acts which existed and continued at the time of the order, such as the placing of sliding doors across the driveway, were punishable *as for contempt,* because such acts impeded, impaired, or prejudiced the rights of plaintiff in the pending action. *Galyon v. Stutts, supra.*

In this connection, there was competent evidence that the defendants did not build the canopy exactly to the height of 14 feet 6 inches as required by Judge Braswell's order. Concededly this variation might permit punishment *for contempt,* but there is no competent evidence to support the finding by the court that the variance in the height of the canopy has interfered with, obstructed, delayed and prevented free flow of vehicular and pedestrian traffic along said driveway, contrary to the provisions of the temporary

restraining order. Moreover, the record reveals that plaintiff did not contend the height of the canopy interfered with, obstructed, delayed and prevented the free flow of vehicular and pedestrian traffic along said driveway. This was indicated by the following statement of plaintiff's counsel: "Now, your Honor, while we are not going to abandon our contention that the canopy is lower than it should be, which is a violation of Judge Braswell's order, we are not going to ask necessarily to ask that they raise the roof or make them raise the roof, or anything of that sort." Thus, that part of the order which held the defendants in continuous contempt and imposed a fine of $250 per day on each defendant for continuous contempt was not proper for violation of the order relative to the height of the canopy. The entry of judgment *as for contempt* as to other violations of Judge Braswell's order was proper, except such parts of the order as required defendants to do affirmative acts beyond those required in the order of Judge Braswell. The sole question before Judge Hobgood was whether the order entered by Judge Braswell had been violated. He had no authority to modify the order. *Williamson v. High Point,* 214 N.C. 693, 200 S.E. 388. Nor did he have the authority to exercise affirmative injunctive powers. He could only *punish for contempt* or *as for contempt.*

The order of Hobgood, J., is vacated and the cause remanded to the Superior Court of Vance County for entry of judgment in accord with this opinion.

Error and remanded.

STATE v. FRED JOHNSON.

(Filed 3 May, 1967.)

1. Homicide § 18—

Where defendant in a homicide prosecution pleads self-defense, he is entitled to show the character of the deceased as a violent and dangerous man, and may testify as to incidents of violence in altercations between the deceased and himself, and may also testify as to specific acts of violence which occurred in defendant's presence or of which he had knowledge in altercations between the deceased and third parties, for the purpose of explaining and establishing defendant's reasonable apprehension when deceased advanced toward him.

2. Homicide § 12; Criminal Law § 33—

In this homicide prosecution, the evidence tended to show that deceased was fatally shot by defendant when deceased was some eight feet from

defendant, defendant contending that deceased was reaching for a pistol in the pocket of his trousers. *Held:* Testimony tending to show that deceased had suffered an injury while in service and was a partially disabled serviceman is immaterial and irrelevant, there being no contention of any physical combat between them, and such testimony is prejudicial as tending to incite the sympathy of the jury.

3. Homicide § 18—

Where, in support of defendant's plea of self-defense, he introduces evidence of the violent and dangerous character of the deceased, the State is limited in rebuttal to the general reputation of deceased for peace and quiet, and may not elicit evidence of the general good character of the deceased.

APPEAL by defendant from *Campbell, J.*, October 1966 Regular Criminal Session of MADISON.

Defendant was tried on bill of indictment charging first degree murder of one Travis Ray. He entered a plea of not guilty.

The evidence tended to show the following: Defendant was a tenant of Travis Ray and lived a short distance from Ray's house, on land owned by Ray. Around 8:00 o'clock A.M. on 27 August 1966 defendant and Ray were together at Ray's home dividing the proceeds received from sale of tomatoes. Very soon thereafter, defendant and his wife rode with one Jimmie Metcalf into the town of Marshall, where defendant visited a bank. On the return trip they stopped at a general store, where defendant purchased, among other things, shells for a 30-06 rifle. They then returned to defendant's home, where Metcalf left defendant and his wife. Around 1:00 o'clock P.M. Travis Ray stopped his truck in front of and across the road from defendant's home. One Kenneth Shelton drove his car up and parked behind Ray's truck, and the two stood at the car talking for several minutes. Ray then left Shelton and started up the path to defendant's home. Defendant was sitting on his front porch with his feet on the top step and a 30-06 rifle across his lap. As Ray approached the house, there was some conversation between him and defendant. When he was within about eight feet of the house, defendant shot him, then stood up, reloaded, and shot Ray two more times while he was lying on the ground.

Sheriff E. Y. Ponder testified that when he first arrived at defendant's home he observed the body of Travis Ray lying some eight feet down the path from the front porch. Sheriff Ponder stated: "In the ruler pocket on the trousers leg of the trousers the deceased was wearing, I found a Smith & Wesson pistol, with the barrel sticking down in it."

Kenneth Shelton, the only eyewitness, testified that as Ray approached the house he asked defendant why he had not started

picking tomatoes, and the defendant replied that he would pick tomatoes when he got good and ready. Ray then told defendant that he had brought people up to pick tomatoes, whereupon defendant replied that no one was going to pick tomatoes and, at this point, fired at Ray, and he, Shelton, ran.

Jimmie Metcalf, Travis Ray's son-in-law, testified concerning his trip to Marshall with the defendant, and stated that while they were driving to Marshall the defendant told him that he had gone to Ray's house that morning with the intention of killing Ray.

Defendant testified in his own behalf. He admitted that he shot and killed Ray, and testified to events substantially as presented by the State, except he denied making any statement to Metcalf that he intended to kill the deceased, and stated his version of the events immediately before the shooting, as follows:

". . . . And when he come into the walkway, up in the road, well, he come on about halfway from the road to me, and I noticed he had a gun. It was a pistol. As to where it was with reference to his right hand, he had it down on this side, on his right leg. He had a-hold of it with the handle. He had the handle in his right hand as he walked up towards me. Well, he walked about halfway up there to the steps where I was at from the road down there and he said to me, he said, 'Ain't you up a-picking no tomatoes yet?' He just asked me this question. He said, 'Ain't you up a-picking no tomatoes yet?' and I said, 'No, we are getting ready to.' He just kept walking on up to me and he said, 'If you and your wife don't get them g . . d . . . tomatoes picked, I'm going to kill you both and burn the house down on you.' After that, I was sitting there on this position and he walked another step or two from where he had said that, and I said, 'Travis, you'd better stop.' Then he made a move—move to bring this pistol up, and I fired. I fired the first shot a-sitting down across my lap. There were two more shots. I got on my feet before I fired the second and third shots. I fired the second and third shots because he was a-moving around there with his hand, his right hand; he was still a-trying to move his gun there. He was trying to move this revolver. I was protecting myself.

"I shot these three shots at Travis Ray because he had come there and threatened my life and my wife's, and I had no other way out. He was a-forcing me and I knew he was a dangerous man."

At this point defendant testified that on the evening prior to the shooting Ray had pulled him through a store two or three times, punching him in the ribs with a pistol. As defendant began further testimony concerning an incident involving statements made by Ray's wife about his dangerous and violent actions, the State objected and the Judge heard testimony from the defendant in the absence of the jury. Defendant testified to several instances concerning the violent and dangerous character of Travis Ray, which are summarized as follows: (1) An occasion when the wife of the deceased came to defendant's home stating the deceased had beat her; (2) an occasion when defendant saw Ray's wife "going through the field and her children a-running with her, and him a-shooting at them and her a-running for her life, a-going to her daddy's and mother's with them"; (3) an occasion when the defendant and his wife were riding with Ray in his new automobile and another car spun its tires and threw gravel on Ray's automobile. According to defendant, the deceased put a pistol in his wife's ribs and forced her to chase the other car for several miles, Ray having his foot on the accelerator and his wife applying the brakes so as to cause the brakes to burn out. Whereupon the court made the following ruling: "Let the record show that the foregoing evidence was elicited in the absence of the jury, the court sustained the objection to the testimony, but advised counsel that he would let the witness testify as to his own experience with the deceased; and to that extent the court will permit testimony to be introduced before the jury." Thereafter, defendant testified to one incident where deceased had shot a pistol past defendant's face and into the house where they were visiting.

The jury returned a verdict of guilty of murder in the second degree, and from judgment entered thereon defendant appealed.

Attorney General Bruton and Staff Attorney Wilson B. Partin, Jr., for the State.

A. E. Leake for defendant.

BRANCH, J. Defendant pleaded and offered evidence of self-defense. He contends that the trial judge erred in excluding testimony concerning specific incidents offered to show defendant was a violent and dangerous fighting man.

It is generally recognized in this jurisdiction that in a prosecution for homicide, where defendant pleads and offers evidence of self-defense, evidence of the character of deceased as a violent and dangerous fighting man is admissible if such character was known

to defendant. *State v. Morgan,* 245 N.C. 215, 95 S.E. 2d 507. In the instant case the court ruled that defendant could testify only as to his own experiences with the deceased. Thus we must decide if defendant may testify to specific acts of violence which occurred in his presence or of which he had knowledge prior to the homicide.

In the case of *Mortimore v. State,* 24 Wyo. 452, 161 P. 766, the Court stated: "(T)hat former specific acts of violence of the deceased, showing his brutal or dangerous disposition and character, known to the defendant, that is, acts committed in his presence, or communicated to him before the homicide, are admissible in evidence, not for the purpose, primarily, of showing the deceased's character, but to explain the defendant's motive and what he might reasonably have apprehended as to the danger."

Considering the same question in *Mendez v. State,* 27 Ariz. 82, 229 P. 1032, the Court was of the opinion that where the facts show a *prima facie* case of self-defense, the accused should generally be permitted to introduce evidence of specific acts of violence by the deceased toward third persons within his own knowledge or coming under his own observation.

Also, the Delaware Court held in *State v. Gordon,* 37 Del. 219, 181 Atl. 361, where defendant killed one who assaulted him with a knife, and it was held that he should have been allowed to testify to specific instances, known to him either personally or by hearsay, of affrays in which the deceased was the aggressor and had used a knife, the court said: "The state of mind of the accused is material. The jury is to pass upon his belief that the deceased was about to attack him. Without doubt, the reputation of the deceased for violence, known to the accused, is admissible; and there seems to be no substantial reason why the belief of the prisoner should not be evidenced by knowledge of specific acts of violence, as well as by knowledge of general reputation for violence, subject, of course, to exclusion in a proper case for remoteness."

In the case of *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443, the Court, speaking through Bobbitt, J., stated: "Ordinarily, evidence of prior threats and of incidents of violence on prior unrelated occasions are competent only if the defendant was present or had knowledge thereof prior to the alleged assault. *S. v. Blackwell,* 162 N.C. 672, 78 S.E. 316."

The rationale of this rule is that a jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life. We know of no better way to impart the knowl-

edge of fear or apprehension on the part of defendant than by giving the jury the benefit of specific incidents tending to show the dangerous and violent character of the deceased. It remains in the province of the jury to decide whether the incidents occurred or whether defendant's apprehension was a reasonable one. Here, it was error for the trial judge to limit defendant's testimony, *as a matter of law,* to his own experiences with the deceased. He should have been allowed to relate specific acts of violence which occurred when he was present or of which he had knowledge prior to the homicide.

Defendant contends the trial court erred in admitting evidence that deceased had a service-connected disability as a result of military service in World War II. The following questions were propounded and answered over defendant's objection:

> "Q. He was injured in the War, was he not, in some way?
> A. Yes, he told me, I believe, in his hip, or somewheres something had struck him sometime.
> Q. And he was classed as a disabled Veteran or partially disabled on account of that injury that he received in the Service, was he not?"

These questions were not material or relevant. In the case of *Holman v. State,* 97 Okla. Cr. R. 279, 262 P. 2d 456, the Court stated: "Likewise the physical condition of Holman attempted to be shown by Bayless Holman, son of the defendant, was immaterial to the issues herein involved; regardless of his condition he was in such shape he could shoot accurately."

The following is found in *Jones v. State,* 153 Tex. Cr. R. 345, 220 S.W. 2d 156: "In 22 Tex. Jur. p. 698, sec. 162, it is said: 'But where the homicide was committed with a firearm, this character of evidence (relative size and strength of appellant and deceased) usually throws no light on the transaction; in so far as it is germane, however, it may be received,' citing *Lundy v. State,* 59 Tex. Cr. R. 131, 127 S.W. 1032."

And in *Wright v. State,* 162 Miss. 592, 139 So. 846: "In the present case, there was no evidence whatever to show a physical combat between appellant and the deceased immediately before the homicide. Appellant shot the deceased at a time when they were several feet apart. . . . The court, therefore, committed no error in ruling out evidence offered by appellant to show that the deceased was a more powerful man. . . ."

Here, the evidence shows that deceased was shot when he and defendant were about eight feet apart. There is no evidence of phys-

ical combat or even the actual threat thereof. The injury referred to was a *hip* injury, and in no way interfered with deceased or so incapacitated him as to prevent the use of his weapon. The immateriality and irrelevancy of these questions, standing alone, would probably not seriously prejudice the defendant, but when the solicitor is twice allowed, over defendant's objection, to show the deceased was injured while serving his country, the prejudice to defendant becomes apparent.

Stanley v. Lumber Co., 184 N.C. 302, 114 S.E. 385, is a civil action wherein plaintiff sought recovery of damages for personal injuries. The court, holding that it was error to admit plaintiff's certificate of discharge from the U. S. Army during the World War, among other things, said: "It is clear that the major part of the certificate was used for the purpose of appealing to the sympathy of the jury." In *Watson v. State*, 48 S.W. 2d 623, an appeal from a conviction of murder, the court said: "We confess ourselves unable to see any right on the part of the State to prove that deceased was hurt in Belgium during the World War and that he had been operated upon unsuccessfully, and that he was sickly and unable to work at the time he was killed. Nothing in such proof would aid the state in legally establishing the guilt of the accused, or in properly rebutting any defensive theory advanced."

The admission of this immaterial and irrelevant evidence could only serve to excite sympathy for the deceased and prejudice against the defendant.

The State recalled Clarence Dean Cutshall, who, in response to the solicitor's questions concerning the reputation of the deceased, testified in part: "I do not exactly know his reputation. . . . Well, just as far as I know, he was a good man." The court overruled defendant's objection and motion to strike as to this testimony. Also, the State recalled witness Kenneth Shelton, who, over defendant's objection, testified in part as follows: "Q. Do you know his general reputation in the community, that is, what people said about him? A. Yes, I know his general reputation in the community. I have never heard of him bothering anybody. I have never heard of anyone speak of his being a dangerous or violent man."

In the case of *State v. Champion*, 222 N.C. 160, 22 S.E. 2d 232, where defendant in support of his plea of self-defense testified that deceased was a "dangerous and violent" man, the State in cross examining defendant's witnesses, and over the objection of defendant, elicited evidence of the general good character of the deceased. The court held that the evidence so elicited by the State was incompetent and its admission constituted prejudicial error, entitling de-

fendant to a new trial. The Court held that the State, in rebuttal, was *"limited to the general reputation of the defendant for peace and quiet."* (Emphasis added) In the instant case, the evidence offered goes beyond this limit.

The errors discussed when considered with the total circumstances weighed too heavily on defendant, and there must be a new trial.

Other exceptions pressed for error need not be considered as they may not recur on retrial.

New trial.

STATE v. HORACE BARBER.

(Filed 3 May, 1967.)

1. Criminal Law § 71—

Evidence tending to show that defendant, while at the police station being booked for homicide during the change of shifts while officers of his acquaintance were entering, leaving and standing in the lobby of the station, volunteered to several of the officers, without any questioning whatsoever, statements to the effect that he shot a named person and hoped that his victim died, *held* to support findings of the court upon the *voir dire* that the statements were freely and voluntarily made, and the admission of the statements in evidence was not error.

2. Criminal Law § 107—

The charge of the court in this case is held to declare and explain the law arising on the evidence as required by G.S. 1-180, and not to contain prejudicial error.

3. Criminal Law § 159—

Exceptions not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Hall, J.*, at the 12 September 1966 Session of LEE.

By an indictment, proper in form, the defendant was charged with the murder of Leroy Tally on 16 March 1966. Through his court appointed counsel he entered a plea of not guilty. He was found guilty of second degree murder and was sentenced to confinement in the State's prison for a term of not less than 22 nor more than 27 years. His contentions at the trial were that he did not intend to kill the deceased and that he shot in self-defense. Upon appeal, he contended in his brief and oral argument that the court

erred in admitting testimony of police officers concerning statements made by him following his arrest, and erred by failing in its charge to the jury to declare and explain the law arising upon the evidence.

The State's evidence, apart from testimony of police officers concerning statements made to them by the defendant, was to the following effect:

At approximately 11 p.m. on 16 March 1966, this being shift changing time at the mill of the Federal Spinning Corporation, the defendant, who was not employed at the mill, was in its office building in the company of Mrs. Tally, who was employed there, she then being engaged in a telephone conversation. They went out and, a few minutes later, she ran back into the office and telephoned the police. The defendant also came back into the office carrying a shotgun and, upon inquiry by an employee of the mill, replied, "I've done killed one s. o. b."

Police officers, arriving shortly thereafter in response to the call, found in the well-lighted parking lot of the mill the automobile of the deceased, parked near that of Mrs. Tally. The deceased was behind the steering wheel of his car, the left door being open and his foot being on the ground. He was bleeding profusely from the face. He died almost immediately, the cause of death being a pistol bullet wound entering the eye and continuing through the brain. Five bullet holes were found in the car in addition to the wound in the head of the deceased. Following a conversation with the defendant, the officers found upon the roof of the mill building a pistol, registered in the name of the defendant the preceding day, in which were six empty cartridges. This pistol had been in the defendant's possession the afternoon prior to the shooting of the deceased. When registering the pistol on the morning before the shooting, the defendant was told by a police officer that Tally had threatened to kill the defendant if the defendant did not leave his wife alone. The first police officer to reach the mill found the defendant walking from the office toward the parking lot and carrying a shotgun, which he dropped to the ground on the officer's command to do so. He was placed under arrest, handcuffed, put in a police car and carried to the police station.

Several police officers testified to statements made by the defendant. Prior to any testimony by the officers concerning these statements, the presiding judge sent the jury from the courtroom and heard testimony of the officers to the following effect:

Officer Rouse, who reached the scene first, had been informed by police radio that the defendant had shot someone at the mill and was armed. Upon arrival there he saw the defendant carrying a

shotgun and ordered him to drop it, which he did. He then asked the defendant, "Horace, what happened here?" The defendant replied that he had just shot Leroy Tally. Thereupon, Officer Rouse put handcuffs on the defendant, told him he was under arrest and instructed Officer Wicker, who had driven up, to keep the defendant in his police car. Officer Rouse then went over to the Tally automobile and observed the condition of the deceased and the automobile. He returned to the police car and asked the defendant where was the "other weapon that was used." He then told the defendant that he did not have to tell the police anything if he did not want to, that anything he said could be used for or against him in court and that he was entitled to counsel. He did not tell the defendant that if he was unable to employ counsel the State would furnish a lawyer to him. The defendant then told Officer Rouse where the "other weapon" was, this being the place where the pistol was found on the roof of the mill. No other question was asked the defendant at the scene of the shooting by anyone and no other warning as to his rights was given him prior to his statements to the police officers set forth below. No statement made by the defendant at the scene of the shooting was admitted in evidence.

Officer Wicker heard the above conversation between Officer Rouse and the defendant. Officer Wicker asked the defendant no questions. Officer Wicker did not testify in the presence of the jury concerning any statement made by the defendant. No one else was in the car with them at the scene of the shooting.

The defendant was driven to the police station by Sergeant McDougald. No one else was with them. Sergeant McDougald did not ask any questions of the defendant or make any statement en route to the police station. The defendant, while so in the police car, made the statement set forth below. On arrival at the station, Sergeant McDougald told the defendant he did not have to make any statement and he was entitled to an attorney, but he did not ask the defendant any questions. The defendant said he did not want an attorney.

Sergeant McDougald and the defendant reached the police station at the time for changing shifts. Consequently, several police officers were entering, leaving and standing in the lobby of the station. Sergeant McDougald stayed there with the defendant. Police Dispatcher Hooker was on duty. When the defendant was brought to the station, neither Dispatcher Hooker nor Sergeant McDougald asked him any questions or made any statement to him. In the presence of Dispatcher Hooker, the defendant three different times made the statement set forth below.

Radio Dispatcher Little was also present at the station when Sergeant McDougald brought in the defendant. Without any question by Dispatcher Little or anyone else, he heard the defendant make the statement set forth below.

Officer Nathan Johnson, coming on duty and knowing nothing of the shooting, entered the front door and immediately saw the defendant who, without any preliminary statement or question, greeted Officer Johnson with the statement set forth below.

Captain Mason was the officer in charge at the station when Sergeant McDougald brought the defendant in. He spoke to the defendant and without any question or statement by anyone, the defendant made to Captain Mason the statement set forth below.

At the police station the defendant was told that he could telephone anyone he liked. He requested the officers to send for his brother. They dispatched a police car to pick up the brother and brought him to the police station, where he conferred with the defendant, this being after making the statements in question.

The defendant did not contradict any of the above testimony nor did he deny making any of the statements attributed to him by the officers or contend that any officer mistreated him or coerced him into making any statement.

The trial judge excluded proposed testimony by Officer Rouse concerning statements made to him by the defendant at the scene of the shooting on the ground that the warning given by Officer Rouse did not meet all of the requirements therefor. He found that the statements made by the defendant in the presence of Sergeant McDougald, Officer Johnson, Dispatchers Hooker and Little, and Captain Mason were made voluntarily and allowed these officers to testify to such statements. Their testimony in the presence of the jury was as follows:

Sergeant McDougald heard the defendant say, while in the police car en route to the police station, "I shot him and I hope he dies." At the police station, he heard the defendant say three times, "I shot Leroy Tally and I hope he dies."

Dispatcher Hooker heard the defendant state three times, "I shot him and I hope the s. o. b. dies."

Dispatcher Little heard the defendant say, "I hope that s. o. b. breathes his last breath."

Officer Johnson was greeted at the station by the defendant with the statement, "Nathan, I just shot Leroy Tally and I hope the s. o. b. dies."

In response to Captain Mason's greeting, the defendant replied,

"I shot Leroy Tally and I hope the s. o. b. never breathes another breath."

The defendant testified in his own behalf and offered other witnesses. The gist of his testimony and theirs was that for more than four years he and the wife of the deceased had been carrying on, more or less flagrantly, an affair involving frequent acts of adultery and travels together. On several occasions the deceased had threatened to kill him and on one occasion had chased him with a shotgun. Two days before the shooting the defendant purchased a pistol and had it registered. On the occasion of the shooting he was at the mill waiting for Mrs. Tally pursuant to an earlier conversation with her. When she came out of the mill, they got in her car but the keys were missing. They went into the mill office and she telephoned for the keys. Thereupon, they went back out and sat in her car. The deceased then drove up and stopped. The door of his car opened and the defendant saw him getting out and a shotgun being raised over the steering wheel. The defendant got out of Mrs. Tally's car, ran to the front of it and started shooting at the deceased. He did not intend to kill the deceased but to scare him to keep the deceased from shooting him. After the deceased was shot and sat back in his car, the defendant crept up to it and took the shotgun. The defendant then went toward the mill building, threw his pistol up on the roof, went into the office and asked someone to call the police and an ambulance. Thereupon, he left the office, in response to the request of the employee in charge, and remained in the parking lot until Officer Rouse arrived. He told Officer Rouse he had shot Leroy Tally. He went to school with Officer Johnson and recalls telling him, at the police station, that he had shot Leroy Tally but does not recall saying that he hoped "the s. o. b. breathes his last breath." He does not remember what he said.

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

H. M. Jackson and J. C. Pittman for defendant appellant.

LAKE, J. In *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322, Bobbitt, J., speaking for the Court, said:

> "When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. In *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387, where the defense was that an

accidental discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only where there is an *intentional* killing with a deadly weapon; and since the *Gregory* case it has been often stated that these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, *intentional killing,* is not used in the sense that a specific intent *to kill* must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. [Citations omitted.] A specific intent *to kill,* while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions."

There was no error in the admission of the testimony of the several police officers concerning statements made in their presence by the defendant. The statements were obviously material both upon the question of the identity of the killer and upon the question of his intent. They were highly prejudicial to the defendant, but, as we said in *State v. Gray,* 268 N.C. 69, 78, 150 S.E. 2d 1, the mere fact that a self-incriminating statement was made while the defendant was in the custody of police officers, after his arrest by them upon the charge in question and before the employment of counsel to represent him, does not, of itself, render it incompetent. The test of admissibility is whether the statement was in fact made voluntarily.

When it became apparent that the State was about to offer in evidence statements made by the defendant to the police officers, the learned trial judge, following the procedure approved by us in *State v. Gray, supra,* excused the jury from the courtroom and inquired fully into the circumstances under which the proposed statements were made. The defendant did not deny the statements or offer any testimony whatever to show that they were not made voluntarily.

The judge excluded all evidence relating to statements made in response to the two questions by Officer Rouse at the scene of the shooting. Although this officer's opening remark upon arrival at the scene, "Horace, what happened here?", is a far cry from the mental or physical torture intended to wring a confession from an innocent person, which the constitutional protections against self-incrimination were designed to prevent, and though the defendant was not

technically under arrest when he replied, his statement in response to that question was excluded by the trial judge because the warning prescribed in *Miranda v. Arizona,* 384 U.S. 436, 85 S. Ct. 1602, 16 L. Ed. 2d 694, had not been given in its entirety. The trial judge likewise excluded the defendant's response to the question by Officer Rouse concerning the location of "the other weapon" for the reason that the warning given by the officer to the defendant did not comply with the formula prescribed in the *Miranda* case in its entirety. The correctness of these rulings is not before us on this appeal and we express no opinion thereon. They indicate the care with which the trial judge ruled upon the admissibility of statements made by the defendant to police officers.

On the other hand, the trial court found as a fact that the statements to which the other police officers were allowed to testify were made "freely and voluntarily." This finding, being supported by the evidence, is conclusive. *State v. Gray, supra.* The testimony of the officers recounting these statements by the defendant was therefore competent. This is not a case of a friendless transient locked in unfamiliar surroundings, deep in some secret recess of the police headquarters, alone except for armed strangers interrogating him unmercifully. This occurred in a relatively small North Carolina city where the defendant had lived for years and had a first-name acquaintance with several, if not all, of the officers to whom he talked without even waiting for them to question him.

We have carefully examined the charge of the trial judge to the jury in the light of the contention by the defendant that it fails to declare and explain the law arising on the evidence as is required by G.S. 1-180. The defendant has pointed out no error in any instruction relating to the law or called to our attention any applicable principle of law not fully covered by the court's instructions. He has directed us to no misstatement or omission in the court's review of the evidence. We find no error in the charge and no merit in this assignment of error.

Other exceptions in the record are deemed abandoned, these not having been brought forward in the appellant's brief and no argument being stated or authority cited therein with reference thereto. Rule 28, Rules of Practice in the Supreme Court.

No error.

STATE v. DONALD CLEVELAND MIDYETTE.

(Filed 3 May, 1967.)

1. Criminal Law §§ 1, 15—

A continuous series of acts by a defendant, occurring on the same date as parts of one entire plan of action, may constitute two or more separate criminal offenses, and if the offenses are separate and occur in different counties, the defendant may be tried for each in the county where it was committed.

2. Criminal Law § 26—

Where defendant is apprehended for speeding in one county and is pursued by the officer attempting to arrest him into another county where defendant assaults the officer attempting to arrest him, the offenses are separate, and the defendant may be tried upon indictment for violating the motor vehicle laws in the one county and indicted for resisting arrest in the other county, and the plea of double jeopardy is without merit.

3. Criminal Law § 29—

The fact that, four years prior to the offense with which defendant is charged, defendant had been a patient in a mental hospital, does not require the court to order a psychiatric examination of defendant in the absence of request therefor or any plea of insanity.

4. Criminal Law § 159—

Assignments of error not brought forward in the brief and in support of which no citation of authority or argument is given are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

5. Criminal Law § 26—

Trial on an indictment for one offense precludes a subsequent indictment for the same offense or any offense included within the first of which defendant might have been convicted under the first, or for any offense which the State, by averments in the indictment, elects to make in its entirety an essential element of the offense charged.

6. Same—

Two indictments were returned against defendant, the first charging an assault with a deadly weapon, a .22 caliber pistol, upon a named person, a police officer, with intent to kill, inflicting serious injuries not resulting in death; the second charging defendant with resisting arrest by firing and hitting the same officer with bullets from the .22 caliber pistol. *Held:* The first indictment precludes the second, since the State elected to make the second an element of the first, and judgment entered upon the second indictment is arrested.

7. Criminal Law § 139—

The Supreme Court may take cognizance *ex mero motu* of a defect appearing on the face of the record proper.

APPEALS by defendant from *Martin, S.J.*, at the 19 September 1966 Session of PAMLICO and from *Mintz, J.*, at the November 1966 Criminal Session of CRAVEN.

Two separate indictments, each proper in form, were returned in Pamlico County against the defendant. The first (Pamlico County Case No. 483) charged him with an assault with a deadly weapon, a .22 caliber pistol, upon W. I. Robertson, on 25 June 1966, with intent to kill, inflicting serious injuries, not resulting in death, namely, bullet wounds in the hand and chest. The second (Pamlico County Case No. 484) charged him with resisting, delaying and obstructing a public officer, W. I. Robertson, on 25 June 1966, in the discharge of his duty, namely, attempting to arrest the defendant on a charge of operating a motor vehicle upon a public highway at a speed in excess of that allowed by law, by firing at and hitting the said officer with bullets from a .22 caliber pistol.

The two Pamlico County cases were consolidated for trial and the defendant, having pleaded not guilty to both charges, was brought to trial thereon in Pamlico County at the session beginning 19 September 1966, Martin, S.J., presiding. The defendant was found guilty of assault with a deadly weapon and was also found guilty of resisting arrest, as charged in the indictment for that offense. He was sentenced to two years in the Pamlico County jail on each offense, the sentence in Case No. 484 (resisting a public officer) to commence at the expiration of the sentence in Case No. 483 (assault with a deadly weapon).

An indictment was returned in Craven County (Craven County Case No. 7534) charging the defendant, in separate counts, with three offenses in that county on the same date alleged in the Pamlico County indictments, 25 June 1966, these being driving a motor vehicle upon the public highways carelessly and heedlessly and in wilful and wanton disregard for the rights and safety of others, driving a motor vehicle upon the public highways of the county at a speed in excess of that allowed by law, to wit, 65 miles per hour in a 55 mile per hour speed zone, and failing to stop the motor vehicle which he was operating upon a public highway upon the approach of a police vehicle giving audible signal by siren. The defendant, having pleaded not guilty to each of these charges, was brought to trial in the Superior Court of Craven County at the 14 November 1966 Criminal Session, Mintz, J., presiding. He was found guilty as charged. He was sentenced to confinement in the Craven County jail for four months upon the first charge, 30 days upon the second and 30 days upon the third, these sentences to run consecutively, but each to be suspended upon the payment of $250 and costs, $100 and $50, respectively.

In due time the defendant gave notice of appeal from each of the foregoing judgments to this Court. He has undertaken to present

his appeals in both cases to this Court in a single record, has filed a single brief dealing with both and has presented oral argument dealing with both simultaneously. The record contains neither the evidence nor the charge of the court to the jury in the Craven County case.

The only assignment of error with reference to the Craven County case is that it should have been consolidated with the Pamlico County cases and tried in that county, being a part of the "overall offenses for which defendant was tried in Pamlico County." The record indicates no such motion in either court below. In his brief, the appellant asserts that the judgment in the Craven County case should be arrested on the ground that it violates the constitutional protection against double jeopardy.

The evidence in the Pamlico County case may be summarized as follows:

The State's Evidence: W. I. Robertson is a State Highway patrolman. On 25 June 1966, he was operating a radar device for checking speeds of motor vehicles in Craven County. With this device he observed that the defendant's vehicle was being operated upon a public highway in Craven County at a speed of 65 miles per hour, the maximum lawful speed being 55 miles per hour. He turned on his blue light and his siren and followed the car, which stopped. The defendant, who was the driver, got out. A conversation ensued. The officer told the defendant he was under arrest for speeding and placed his hand upon the defendant's arm. Thereupon, the defendant jerked back, jumped into his car and drove away. The officer pursued him in the patrol car, with the blue light flashing and the siren sounding. The chase proceeded over various roads in Craven and Pamlico Counties, with numerous unsuccessful efforts by the officer to bring the defendant to a halt. Eventually, the defendant drove into the driveway of his home in Pamlico County and stopped. The officer, who had been in immediate pursuit throughout, stopped in the driveway directly behind the defendant. The defendant got out of his car and walked to the back door of the house. The officer followed and again told the defendant he was under arrest for speeding. The defendant, with an oath, shoved the officer away. Thereupon, the officer struck him with a blackjack. The defendant then shot the officer in the chest with a .22 caliber pistol, the bullet passing almost entirely through the officer's body. An exchange of shots then occurred in which the officer was shot again in the hand and the defendant was shot in the leg. Eventually, both pistols being emptied, the officer succeeded in arresting the defend-

ant, placing him in the patrol car and carrying him to a point at which other officers came to his assistance.

Defendant's Evidence: Upon hearing the siren, he stopped. A man who "looked like a patrolman," being in uniform, came to his car and asked for his driver's license and registration card. The defendant said, "Let me see yours." Thereupon, the other man struck the defendant with a blackjack. The defendant, being dazed, got in his car and drove away. He was scared to stop until he reached his home. There, the patrolman again struck him with a blackjack and dazed him. He remembers reaching for his gun, which was in the glove compartment of his car, but does not remember shooting it. It was not until they reached the defendant's residence that the officer told him he was under arrest. At that time he told the defendant if he did not get in the patrol car he would kill him. At no time did the defendant exceed a speed of 55 miles per hour. Four years prior to this occurrence, the defendant was a patient in Dorothea Dix Hospital, the State hospital for the insane, for two months. He had been arrested many times before this occurrence.

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

Charles L. Abernethy, Jr., for defendant appellant.

LAKE, J. In his presentation of these appeals, the defendant has disregarded the rules of this Court in respects too numerous to mention. We have, nevertheless, considered each of his assignments of error and his contentions in his brief and oral argument.

The indictment in Craven County Case No. 7534 alleges that the offenses therein charged were committed in that county. It was, therefore, the proper venue for the trial thereof. G.S. 15-134. The defendant contends in his brief that his trial and conviction in Craven County, following his trial and conviction in Pamlico County, was a violation of his constitutional right not to be put twice in jeopardy for the same offense. 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. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44. These may occur in different counties and the defendant may be tried for each in the county where it was committed. See *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216.

As to the Pamlico County judgment, the defendant makes 34 assignments of error, but the entire record contains only four exceptions, two with reference to the admission of evidence, which

was competent, and two to the denial of the defendant's motions for judgment of nonsuit.

As to the contention in the defendant's brief that the trial judge should have continued the trial of the Pamlico County cases and ordered a psychiatric examination of the defendant, it is sufficient to note that there was no such request by the defendant and no evidence to show that, at the time of his trial, he lacked sufficient mental capacity to plead to the indictment or to stand trial on the charges therein. The record does not show a plea of insanity as a defense or any evidence to support such a plea. He was represented by counsel. The fact that, four years prior to the offense with which he is charged, the defendant had been a patient in a mental hospital does not require the court to order a psychiatric examination in the absence of a request therefor or of any plea of insanity.

The assignments of error relating to the court's charge in the Pamlico cases are not brought forward in the brief and supported therein by any citation of authority or argument. They are, therefore, deemed abandoned by the defendant. Rule 28, Rules of Practice in the Supreme Court. In this he was well advised for these assignments of error are without merit.

The defendant was convicted and sentenced in Pamlico County Case No. 483 for the crime of assault with a deadly weapon upon W. I. Robertson, on 25 June 1966, by shooting him with a .22 caliber pistol. He could not thereafter be lawfully indicted, convicted and sentenced a second time for that offense, or for any other offense of which it, in its entirety, is an essential element. *State v. Birckhead,* 256 N.C. 494, 497, 124 S.E. 2d 838, 6 A.L.R. 3rd 888.

By the allegations it elects to make in an indictment, the State may make one offense an essential element of another, though it is not inherently so, as where an indictment for murder charges that the murder was committed in the perpetration of a robbery. In such case, a showing that the defendant has been previously convicted, or acquitted, of the robbery so charged will bar his prosecution under the murder indictment. *State v. Bell,* 205 N.C. 225, 171 S.E. 50. In *State v. Overman, supra,* we said:

> "Where * * * 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 al-

leged offense an element of the second and the defense of former jeopardy bars the subsequent prosecution." (Emphasis added.)

Conviction upon the former charge would, of course, lead to the same result.

In the present instance, the State has, by the allegations in the indictment in Pamlico County Case No. 484, made the identical assault for which the defendant was convicted in Case No. 483, an element of the offense, resistance of a public officer, charged in the second indictment. It has alleged this same assault was the means by which the officer was resisted. Under this indictment, the State could not convict the defendant of resistance of a public officer in the performance of his duty without proving the defendant guilty of the exact offense for which he has been convicted and sentenced in Case No. 483, the shooting of W. I. Robertson with bullets from a .22 caliber pistol on 25 June 1966.

What the State cannot do by separate indictments returned successively and tried successively, it cannot do by separate indictments returned simultaneously and consolidated for simultaneous trial.

The defendant has not raised this question. However, the error in Pamlico Case No. 484 appears on the face of the record proper and, on our own motion, we arrest the judgment in that case.

There is no merit in any of the defendant's exceptions, assignments of error or contentions with respect to Pamlico County Case No. 483 and no error in the judgment with respect to that case.

There is likewise no error in the judgment of the Superior Court of Craven County in its Case No. 7534.

Craven County Case No. 7534 — No error.

Pamlico County Case No. 483 — No error.

Pamlico County Case No. 484 — Judgment arrested.

STATE v. THOMAS LEE LITTLE.

(Filed 3 May, 1967.)

1. Searches and Seizures § 1; Constitutional Law § 37—

A person may consent to a search of his premises, and such consent will render competent evidence obtained by the search, but the presumption is against the waiver of the constitutional right to be free from unreasonable searches and seizures, and the burden is upon the State to establish unequivocally that the consent was voluntarily, freely and intelligently given, free from coercion, duress or fraud.

2. Same— Evidence held sufficient to support finding that defendant freely and voluntarily consented to search of his room.

Evidence tending to show that the owner of a house in which defendant rented a room gave permission to search the house, that when the officers knocked at the door defendant came to the door and asked them in, that defendant was not under arrest and was not in custody, that defendant voluntarily told the officers which room was his and to go ahead and search the room, and that the defendant was asked to go with the officers to the police station but was told that he did not have to go if he did not want to, and that defendant voluntarily went with the officers, and outside the house, gave them the key to his car and told them to go ahead and search it, *held* sufficient to sustain the conclusion that defendant freely and voluntarily consented to the search, rendering competent in evidence items found in defendant's room which were identified as the very items taken the previous night from the store defendant was charged with breaking and entering and with larceny of goods therefrom.

3. Searches and Seizures § 1—

Upon the *voir dire* to determine the voluntariness of defendant's consent to a search of his premises, the weight to be given the evidence is peculiarly one for the trial judge, and his findings are conclusive when supported by competent evidence.

4. Criminal Law § 159—

Exceptions not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

ON *certiorari* from *Hobgood, J.*, August 1966 Criminal Session of ORANGE.

Criminal prosecution upon an indictment with two counts. The first count charges Thomas Lee Little, the defendant, on 21 October 1965 with feloniously breaking and entering, with intent to commit larceny, a certain storehouse, shop, and building occupied by one Howard Pope, a violation of G.S. 14-54; the second count charges that defendant on the same date in the same place, after feloniously breaking and entering the storehouse of Howard Pope, did feloniously steal, take, and carry away cigarettes, cigars, clothing, and watches of the value of $330.76 of the goods and chattels of Howard Pope.

The defendant, who was represented by his attorney, C. C. Malone, Jr., entered a plea of not guilty. Verdict: On the charge of breaking and entering, guilty as charged; on the charge of larceny, guilty.

The judgment of the court on the first count in the indictment was imprisonment for not less than seven nor more than ten years; on the second count the court treated the verdict of guilty as a verdict of guilty of a misdemeanor, and sentenced defendant to imprisonment for two years, and provided that this sentence was to

run concurrently with the sentence on the first count in the indictment.

From the judgment, defendant appealed. We allowed his petition for a writ of *certiorari* on 20 January 1967 for the reason that defendant for good cause shown could not docket his appeal within the time required by our rules.

C. C. Malone, Jr., for defendant appellant.

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

PARKER, C.J. The only assignment of error carried forward and discussed in defendant's brief is to the effect that the court committed prejudicial error in failing to sustain his motion to suppress certain evidence as having been obtained as the result of an unlawful search and seizure, in violation of the Fourth Amendment to the Federal Constitution and Article I, section 15, of the North Carolina Constitution.

The State offered evidence tending to show these facts: Howard Pope owns and operates a filling station and general store located ten miles north of Hillsborough on Highway #86. He closed his store about 9 p.m. on 21 October 1965. At 7 a.m. the following morning he returned to his store, and found the front door glass broken and the bars behind the glass prized open. There were stolen therefrom about 12 or 15 brands of cigarettes, Tampa Nugget and Tampa Club cigars, Westclox wrist watches, about six pairs of khaki pants, and a box of prime prophylactics.

Bobbie McCullock, a deputy sheriff of Orange County, between 1 a.m. and 2 a.m. on 22 October 1965, went to Howard Pope's store to check it out as a part of his duty. While there he observed a 1962 Pontiac station wagon bearing license No. UF 1236 parked about 200 feet across the road from the Pope store. He later found this station wagon was registered in the name of the defendant. No one was in or about the station wagon when he observed it. The hood of the car was partially raised. He checked the front door of Howard Pope's store, and no one had bothered it at that time.

About 4:30 p.m. on 22 October 1965, Frank McCrea, who had been employed by the Durham police department for 17 years, received information from Deputy Sheriff Maddry of Hillsborough that another deputy sheriff of Orange County about 2 a.m. on that day had observed a station wagon bearing license No. UF 1236 parked on Highway # 86 some 75 yards from a store that was later found to have been broken into, and that it had been learned that

the station wagon bearing this license number was registered in the name of Thomas Lee Little, and Deputy Sheriff Maddry asked McCrea to check it out and see what he could find. McCrea had known defendant for 12 or 14 years. Shortly after 4:30 p.m. that day, he, accompanied by Detective Leathers, went to a beauty parlor in Durham which he knew was operated by Mrs. Elizabeth Brown, and inquired of her if defendant lived at her dwelling house on Cedarwood Drive, Durham.

At this time, defendant objected. The jury was excluded from the courtroom, and the trial judge asked defendant's counsel, C. C. Malone, Jr., if he would like to examine the witness. Malone replied, "Yes, sir." This is a summary of the testimony of McCrea when examined by Malone. After Mrs. Elizabeth Brown stated that defendant did live at her house, he told her that he wanted to go to her dwelling house and look for stolen merchandise. Mrs. Brown told him it was perfectly all right and to go right ahead. He called Deputy Sheriffs McCloud and Young of Durham County, and all four of them went from the beauty parlor to the Brown dwelling. They knocked at the door, and defendant came to the door and asked them in. McCrea testified: "That he told Little that he wanted to look around for some stolen goods that came from a store, and Little said go ahead. That Little was dressed in a gauge *(sic)* shirt and had on the bottom of his pajamas and was in the process of shaving when he told him where his room was. That he (McCrea) was standing at the bathroom door. That he at no time told Little that he had a right to refuse the officers entry into the house. That as he (McCrea) had stated earlier, he told Little before he entered the house that he wanted to search for stolen goods and Mrs. Brown had given him (McCrea) permission to do so. That he asked Little where his room was and Little said the one next to the bathroom, go right ahead. That is the only statement made to Little about his room. That they (officers) searched the entire house. That throughout the search Little was in the bathroom, but when they started to search his room he came out of the bathroom into his room." Defendant was not placed under arrest. He just asked defendant to go with them to the station to talk further. He told him he did not have to go if he did not want to, but he went. Defendant was not handcuffed at this time. There was some conversation about the key to defendant's automobile, and defendant gave it to him. He told defendant they wanted to look in his car, and defendant replied, "Go right ahead." They were standing outdoors beside the car when this request was made of defendant. During all these conversations with defendant, he was free

to leave at will. Defendant at no time expressed a desire not to go to the police station with them. Deputy Sheriffs McCloud and Young were in full uniform and were wearing guns. Defendant knew that all of them were police officers. He did not apprise defendant of his constitutional rights, because he felt that defendant knew them.

At this time defendant moved to suppress all the evidence for the reason that the search and seizure were conducted illegally. The court denied the motion, and defendant excepted.

At this time the jury returned to the courtroom, and the solicitor for the State continued his direct examination of the witness, McCrea, who testified in the presence of the jury in substance as follows: Defendant informed him that his room was right next to the bathroom, and to go ahead and look. He found several items in his room, including a pair of khakis and Tampa Club cigars. He found a Westclox wrist watch in defendant's car. He carried all the articles that he found on the search to the police station. On cross-examination, McCrea testified in substance: Defendant was not under arrest at the time he gave the car keys to the officers.

Howard Pope testified in substance: That he could identify a pair of khaki pants which were found in defendant's room and carried to the police station, by his price tag fastened on them which had $4.25 written thereon in his handwriting, and that this was one of the items missing from his store on the morning of October 22. That he also could identify a box of prophylactics having his mark on the end of the box, and that this was one of the items missing from his store on October 22. He could not identify the Westclox wrist watch and the Tampa Club cigars, but there were stolen from his store Tampa Club cigars similar to those found by the officers in defendant's room.

Defendant offered testimony tending to show the following: His brother was driving his station wagon on the afternoon of 21 October 1965, and that he was not driving his automobile the night Howard Pope's store was broken into. Defendant did not testify in his own behalf, but offered only the testimony of Robert McNeil.

It is well-settled law that a person may waive his right to be free from unreasonable searches and seizures. "No rule of public policy forbids its waiver." *Manchester Press Club v. State Liquor Com.*, 89 N.H. 442, 200 A. 407, 116 A.L.R. 1093. It has been repeatedly decided in this jurisdiction, in the United States Supreme Court, and the Courts of this Nation that one can validly consent to a search of his premises, and consent will render competent evidence thus obtained. *S. v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506; *S. v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736; *S. v. McPeak*, 243 N.C.

243, 90 S.E. 2d 501, *cert. den.* 351 U.S. 919, 100 L. Ed. 1451; *S. v. Moore,* 240 N.C. 749, 83 S.E. 2d 912; *Zap v. United States,* 328 U.S. 624, 90 L. Ed. 1477; *United States v. Mitchell,* 322 U.S. 65, 88 L. Ed. 1140; *United States v. Page,* 302 F. 2d 81; *Nelson v. United States,* 208 F. 2d 505; *People v. Preston,* 341 Ill. 407, 173 N.E. 383, 77 A.L.R. 631; *State v. King,* 44 N.J. 346, 209 A. 2d 110, 9 A.L.R. 3d 847, and Annotation thereto in A.L.R. 3d, *ibid,* beginning at p. 858; 79 C.J.S., Searches and Seizures, § 62; 47 Am. Jur., Searches and Seizures, §§ 71-72; Annot. 31 A.L.R. 2d 1078.

Implicit in the very nature of the term "consent" is the requirement of voluntariness. To be voluntary the consent must be "unequivocal and specific," and "freely and intelligently given." *Judd v. United States,* 89 U.S. App. D.C. 64, 66, 190 F. 2d 649, 651. To be voluntary, it must be shown that the waiver was free from coercion, duress or fraud, and not given merely to avoid resistance. 79 C.J.S., Searches and Seizures, § 62b, p. 820. By such a waiver and consent a defendant relinquishes the protection of the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures, *United States v. Smith,* 308 F. 2d 657, 663, *cert. den.* 372 U.S. 906, 9 L. Ed. 2d 716 (1963), and also relinquishes the protection given by Article I, section 15 of the North Carolina Constitution against an unlawful search and seizure, *S. v. Hall,* 264 N.C. 559, 142 S.E. 2d 177.

The burden of proof is upon the State to establish by clear and positive testimony that consent was so given. *Judd v. United States, supra; State v. King, supra;* 79 C.J.S., Searches and Seizures, § 62a, p. 819.

Among the factors tending to show the voluntariness of defendant's consent to the search of his room in Mrs. Brown's dwelling house, and the seizure of certain articles therein are: (1) Officer McCrea told defendant that he wanted to look around for some stolen goods that came from a store, and defendant said, "Go ahead"; (2) Officer McCrea testified that he told defendant before he entered the house that he wanted to search for stolen goods, and Mrs. Brown had given him permission to do so, and he asked defendant where his room was, and defendant said the one next to the bathroom, "Go right ahead"; (3) when the jury returned to the courtroom, McCrea testified in substance that defendant informed him that his room was right next to the bathroom and to go ahead and look; (4) when the officers started to search his room, defendant came out of the bathroom into his room; (5) defendant was not under arrest and not in custody; (6) he was not handcuffed; (7) the officers asked defendant to go with them to the station to talk fur-

ther, and McCrea told him he did not have to go if he did not want to, but defendant went; (8) outside the house, McCrea told defendant that he wanted to look in his automobile, and defendant gave him the key and replied, "Go right ahead"; (9) there is nothing in the record tending to show that defendant ever denied his guilt except by a plea of not guilty at the trial, or ever stated that he did not consent to a search of his room, and (10) there is nothing in the record or in the defendant's brief which tends to show that he was a young and inexperienced person; however that may be, the trial judge saw him during the trial.

The trial judge is in a better position to weigh the significance of the pertinent factors than is an appellate tribunal. He has the advantage of seeing and hearing the witnesses, so that he cannot only evaluate their credibility but also can gain a "feel" of the case which a cold record denies to a reviewing court. The Court said in *United States v. Page, supra:* "We sometimes tend to forget that the testimony of a witness, presented to us in a cold record, may make an impression upon us directly contrary to that which we would have received had we seen and heard that witness." The weight to be given to the evidence was peculiarly one for the trial judge. Considering the totality of all the factors and evidence, we find that the evidence supports the finding by the trial judge that the evidence rebuts the presumption against a waiver of fundamental constitutional rights (*Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461), and supports the finding that defendant freely and intelligently consented to the search of his room in Mrs. Brown's dwelling house and to the seizure of the articles of merchandise therein found and carried to the police station, which is implicit in the judge's denial of defendant's motion to suppress certain evidence as having been obtained as the result of an unlawful search of defendant's room and the seizure of certain articles therein found. The testimony of the State clearly shows that defendant's consent was "unequivocal and specific" and "freely and intelligently given," and was free from fraud, coercion or duress, actual or implied. The proven facts demonstrate that defendant suffered no deprivation of his constitutional right under the State and Federal Constitutions to be secured from unreasonable searches and seizures, inasmuch as he gave his consent. Defendant's assignment of error that the court committed prejudicial error in failing to sustain his motion to suppress certain evidence as having been obtained as the result of an unlawful search and seizure is overruled.

Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited,

will be taken as abandoned by him. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810. All assignments of error set forth in the record but not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, have been carefully examined by us and are overruled.

In the trial below we find

No error.

STATE v. ROBERT LEE DUNCAN.

(Filed 3 May, 1967.)

1. Criminal Law § 136—

In this State, a defendant on probation or under a suspended sentence is entitled to notice and an opportunity to be heard before the sentence is activated.

2. Same—

Probation or suspension of sentence is an act of grace to one convicted of, or pleading guilty to, a crime, and in a proceeding to revoke probation or activate a suspended sentence the court is not bound by the strict rules of evidence, and the alleged violation of a valid condition of suspension need not be proven beyond a reasonable doubt, all that is required being that there be competent evidence reasonably sufficient to satisfy the judge, in the exercise of his sound judicial discretion, that the defendant had violated a valid condition of probation or suspension of sentence.

3. Same—

Where the record recites that defendant was present at a hearing by the court on the question of the revocation of probation for conditions broken, that the court had before it a verified report of the State probation officer stating in detail alleged violations by defendant of the conditions of probation, that the court made detailed findings of fact of violations of the conditions, and the record fails to show that defendant offered to testify or offered any witnesses, or was denied opportunity to cross-examine witnesses of the State, the order revoking the probation will not be disturbed.

4. Criminal Law §§ 151, 160—

The record imports verity and the Supreme Court may judicially know only what appears of record, and when defendant does not include in the record any matter tending to support his ground of objection, he has failed to carry the burden of showing error and has failed to make irregularity manifest.

APPEAL by defendant from *McLaughlin, J.*, Resident Judge of the Twenty-second Judicial District of North Carolina, in Chambers, in the IREDELL County Courthouse.

At the November 1962 Session of Davidson County Superior Court, defendant pleaded guilty to the crime of a felonious breaking and entry, larceny, and receiving, as charged in an indictment, was sentenced to imprisonment for 12 months, and the said sentence of imprisonment was suspended, and defendant was placed on probation for a period of five years under the supervision of the North Carolina Probation Commission and its officers, subject to the provisions of the laws of this State and the rules and orders of said Commission and its officers with leave that the execution might be prayed at any time during the period of probation. As conditions of probation, *inter alia,* he was required to do the following things: (c) "Report to the Probation Officer as directed"; (3) "Work faithfully at suitable, gainful employment as far as possible . . ."; (f) "Remain within a specified area and shall not change place of residence without written consent of the Probation officer"; and (k) "Support his dependents; violate no penal law of any state or the Federal Government and be on general good behavior."

At the 24 October 1966 Session of Davidson County Superior Court, a duly authorized probation officer reported to the court that defendant has willfully violated the terms and conditions of the probation judgment passed upon him at the 13 November 1962 Session of Davidson County Superior Court, reporting in detail the alleged violations. Whereupon, Latham, Judge presiding, pursuant to the provisions of G.S. 15-200, ordered that a *capias instanter* be issued by the clerk of the court with his seal imprinted thereon for the above-named defendant, and that he be taken and returned to the court for a further hearing as to whether or not he has violated the terms and conditions of the probation judgment. The assistant clerk of the Superior Court of Davidson County on 25 October 1966 issued a *capias instanter* for defendant.

On 3 November 1966, Robert L. Greeson, a State probation officer, filed a written verified report stating the terms of the probation aforesaid, and further stating with particularity the alleged violations of the conditions of probation.

On 5 November 1966, McLaughlin, J., who is Resident Judge of the Twenty-second Judicial District (Davidson County is in the Twenty-second Judicial District), issued an order revoking probation. This order is summarized as follows: After reciting the plea of guilty of defendant to the crime of housebreaking, larceny, and receiving, and the sentence imposed, and after reciting that this matter came on to be heard and being heard, the judge found the following facts: Defendant has willfully violated the terms and conditions of the probation judgment in the following respects: (a) On 8 Jan-

uary 1966 defendant was fired from his place of employment at Thomasville Veneering Company for refusing to report to work on Saturday morning as he had stated he would for several weeks; on 23 August 1966 defendant was fired from Rex Plastics after having been caught sleeping in the back part of the building at a time when he was supposed to be working on the job. At the time he was fired defendant was able to work, and work was available to him. This constitutes a violation of the probation judgment that "he shall work faithfully at suitable and gainful employment as far as possible and save his earnings above a reasonable and necessary expense." (b) On 13 January 1965 defendant left his residence at 510 Field Street, Thomasville, North Carolina, and moved to High Point, North Carolina, without securing the written permission of the probation officer. This is a violation of the condition of probation that "he must remain in a specified area." (c) On 23 August 1966 defendant was instructed to report to the probation officer on 25 August 1966. Defendant did not make said report as he had been instructed to do. This is a violation of the condition of probation that "he shall report to the probation officer when instructed to do so." (d) On 25 September 1966 defendant left his residence at Route 3, Thomasville, North Carolina, and went to Ocala, Florida, without securing the permission of his probation officer. The probation officer received a letter from defendant postmarked 18 October 1966 from Ocala, Florida, in which he advised that he was employed and was going to report to the authorities in Ocala to obtain a transfer of his probation. The probation officer received a letter through Interstate Compact dated 21 October 1966 from Mr. Howell L. Winfree, District Supervisor for Probation and Parole in Florida. Mr. Winfree advised that defendant had reported to him and had requested help in obtaining a transfer to Florida. On 23 October 1966 defendant was taken into custody by the probation officer in the city of Thomasville, North Carolina, and escorted to the Thomasville police department, where a warrant signed by his wife was served on him for abandonment and nonsupport. Defendant was then placed in jail. Defendant stated he was in Thomasville for the purpose of getting his wife and child to take them to Florida. This is in violation of the condition of probation that "he shall remain within a specified area and shall not move." (e) When defendant was accepted for supervision by the Probation Department, he was instructed orally and in writing to make a written monthly report to his supervising probation officer not later than the first of each month. Defendant has not made a written report to his probation officer since the one made for the month of August, 1966. This is a

violation of the condition of probation which states that "he shall report to his probation officer when instructed to do so." (1) On 28 October 1966 defendant was convicted of the crime of abandonment and nonsupport in the Thomasville Recorder's Court, and was given a prayer for judgment continued until the results of the hearing on the report concerning violation of probation are learned and this information is made available to Judge Hughes.

Whereupon, Judge McLaughlin in his discretion ordered that defendant's probation be revoked and the sentence of imprisonment be put into immediate effect. Defendant appeals to the Supreme Court.

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

Robert C. Hedrick for defendant appellant.

PARKER, C.J. Defendant by an undated written note notified the clerk of the Superior Court of Davidson County that he wanted to appeal to the Supreme Court of North Carolina. The clerk of the Superior Court of Davidson County submitted the writing to Shaw, Judge presiding over the courts of Davidson County, who made his entries of appeal and appointed a lawyer for him to perfect his appeal to the Supreme Court.

Defendant assigns as error that Judge McLaughlin entered an order revoking his probation and activating the sentence of imprisonment, heretofore suspended, without hearing any competent evidence relating to the violations of the conditions of probation as set forth in the probation judgment entered 13 November 1962.

On 25 October 1966 the assistant clerk of the Superior Court of Davidson County issued a *capias instanter* directed to the sheriff commanding him to take the body of defendant and have him to answer to the charge of a violation of his probation. Before the probation was revoked and the sentence of imprisonment put into effect, the probation officer submitted a report to the court in writing, properly verified, stating the grounds upon which probation was prayed to be revoked, pursuant to G.S. 15-200.1. The order of Judge McLaughlin revoking probation and putting the sentence of imprisonment into immediate effect recites this at the beginning: "This cause coming on to be heard, and being heard. . . , the defendant being in court in person and being represented by counsel. . . ."

The courts of this Nation are in conflict on the question that a convicted defendant, released on probation, is entitled to notice and a hearing on the issue of whether he has broken the conditions of

probation, before the probation can be revoked. Annot. 29 A.L.R. 2d, p. 1079 *et seq.*, where the cases are assembled.

The courts of this State recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice of the hearing and an opportunity to be heard. *S. v. Phillips,* 185 N.C. 614, 115 S.E. 893; *S. v. Smith,* 196 N.C. 438, 146 S.E. 73; *S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850; *S. v. Love,* 236 N.C. 344, 72 S.E. 2d 737; *S. v. Davis,* 243 N.C. 754, 92 S.E. 2d 177; *S. v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376; *S. v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; *S. v. Dawkins,* 262 N.C. 298, 136 S.E. 2d 632; *S. v. White,* 264 N.C. 600, 142 S.E. 2d 153.

Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime. *Escoe v. Zerbst,* 295 U.S. 490, 79 L. Ed. 1566. A proceeding to revoke probation is not a criminal prosecution, and we have no statute requiring a formal trial. Upon a hearing of this character, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. *S. v. Robinson, supra; S. v. Morton,* 252 N.C. 482, 114 S.E. 2d 115; *S. v. Brown,* 253 N.C. 195, 116 S.E. 2d 349; Supplement to 1 Strong's N. C. Index, Criminal Law, § 136.

In *S. v. Brown, supra,* the court held that in a hearing to determine whether defendant had violated the terms of a suspended sentence, the introduction in evidence of the minutes of a recorder's court to show that defendant had pleaded guilty to a criminal charge in that court will not be held prejudicial evidence, since rules of evidence are not so strictly enforced in a hearing by the judge as in a trial by jury. It has been generally held that a hearing of this character does not embrace the right to a trial by jury upon the issue of whether the terms of a suspended sentence or probation have been violated. Annot. 29 A.L.R. 2d 1109.

All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. Judicial discretion implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and "is directed by the reason and conscience of the judge to a just result." *Langnes v. Green,* 282 U.S. 531, 541, 75 L. Ed. 520, 526; *S. v. Robinson, supra; S. v. Morton, supra; S. v. Brown, supra.*

Proceedings to revoke probation are often regarded as informal or summary. 21 Am. Jur. 2d, Criminal Law, § 568. What is said in *Shum v. Fogliani*, ... Nev. ....., 413 P. 2d 495 (22 April 1966), is apposite, because with us probation or suspension of sentence is an act of grace and not of right:

> "In the federal law, probation is a privilege granted by Congress. The source of the probationer's privilege is to be found in the Federal Probation Act. One convicted of crime is not given a right to probation by the federal constitution. *Burns v. United States*, 287 U.S. 216, 53 S. Ct. 154, 77 L. Ed. 266 (1932); *Escoe v. Zerbst*, 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566 (1935); *Brown v. Warden, U. S. Penitentiary, supra* [351 F. 2d 564 (7th Cir. 1965)]; *Welsh v. United States*, 348 F. 2d 885 (6th Cir. 1965); *United States v. Huggins*, 184 F. 2d 866 (7th Cir. 1950); *Gillespie v. Hunter*, 159 F. 2d 410 (10th Cir. 1947); *Bennett v. United States*, 158 F. 2d 412 (8th Cir. 1946). Accordingly, the rights of an offender in a proceeding to revoke his conditional liberty under probation or parole are not coextensive with the federal constitutional rights of one accused in a criminal prosecution. *Hyser v. Reed*, 115 U.S. App. D.C. 254, 318 F. 2d 225 (1963); *Richardson v. Markley*, 339 F. 2d 967 (7th Cir. 1965); *Brown v. Warden, U. S. Penitentiary, supra.*"

Judge McLaughlin had before him the verified report of the State Probation Officer Greeson stating in detail alleged violations of the conditions of probation by defendant. We hold that that was competent evidence. Judge McLaughlin in his order revoking probation stated that the cause was heard. The record shows affirmatively from Judge McLaughlin's detailed findings of fact that he heard the cause. Defendant's first assignment of error is overruled.

Defendant assigns as error that Judge McLaughlin "erred in denying the defendant an opportunity to cross-examine the witnesses for the State." This assignment of error is overruled. This assignment of error implies that witnesses testified for the State, though nowhere in the record does it appear that witnesses testified for the State, except that it appears that Judge McLaughlin had before him the verified report of the State Probation Officer Greeson. However that may be, nowhere in the record does it appear that the defendant asked to cross-examine any witnesses for the State, and particularly the State Probation Officer Greeson, and was refused. The record imports verity and the Supreme Court is bound thereby. The Supreme Court can judicially know only what appears of record.

There is a presumption in favor of regularity. Thus, where the matter complained of does not appear of record, appellant has failed to make irregularity manifest. 1 Strong's N. C. Index, Criminal Law, § 151. The record does not support defendant's assignment of error that he was denied an opportunity to cross-examine the witnesses for the State. The record does not show the defendant offered to testify and was refused, or offered any witnesses to testify, and the court refused to hear them. There is nothing in the record to support the contention that defendant was not given an opportunity to be heard.

When a sentence of imprisonment in a criminal case is suspended upon certain valid conditions expressed in the sentence, the prisoner has a right to rely upon such conditions, and so long as he complies therewith the suspension should stand. In such a case, defendant carries the keys to his freedom in his willingness to comply with the court's sentence. Defendant has not challenged any finding of fact of Judge McLaughlin. Defendant does not contend that any one of the conditions of probation is invalid. Judge McLaughlin's findings of fact are definite and clear. A careful review of the record shows that the findings of fact of the learned and conscientious judge were adequately supported by the verified report of the State probation officer and established that the defendant has willfully and without just cause violated the above specified conditions of probation. There is nothing to show that the judge abused his discretion. Judge McLaughlin's order revoking probation and placing the sentence of imprisonment into immediate effect is

Affirmed.

J. KIRK SHUTE v. MANUEL FISHER AND WIFE, SHIRLEY D. FISHER.

(Filed 3 May, 1967.)

1. Reference § 3—

Findings by the court after trial begun that the case required an examination of the books and records of the maker of the note sued on, with numerous calculations of interest, detailed examination of numerous exhibits, determination of the fair value of the stock of the maker of the note, and that from the volume of evidence the ends of justice would be best served by compulsory reference, *are held* sufficient to sustain the court's order of compulsory reference, G.S. 1-189, it not being required that the court use the exact words of the statute in characterizing a case for compulsory reference.

2. Same—

The rule that a party waives the right to a compulsory reference by failing to make a motion therefor before the jury has been empaneled has no application to a compulsory reference ordered by the court *ex mero motu*, and where after trial has begun and after evidence has been introduced and numerous exhibits entered, the court finds facts supporting a compulsory reference and concludes that a compulsory reference would best serve the ends of justice, the discretionary order of the court for a compulsory reference will not be disturbed.

3. Reference § 5—

Where the parties fail to agree upon a referee, the court may appoint a referee, and such appointment will not be disturbed when only one of the parties objects thereto. G.S. 1-190.

4. Reference § 4—

A plea in bar which precludes a compulsory reference is one which extends to the whole cause of action so as to defeat it absolutely and entirely, and a plea amounting to a mere defense avoiding liability is not such plea in bar.

5. Same—

In this action against the endorsers and guarantors of a note, defendants claim that the payee bank and not the plaintiff was the real party in interest, that defendants' endorsement was obtained by fraud, and that defendants were entitled to offset usury charged by plaintiff in the transaction. *Held:* The pleas were not sufficient to preclude the discretionary power of the court to order a compulsory reference.

6. Trial § 5—

In the absence of controlling statutory provision or recognized rule of procedure, the conduct of a trial rests in the sound judicial discretion of the trial court.

LAKE, J., dissenting.

ON *Certiorari* allowed on petition by defendants to review the order of *Brock, S.J.*, August 1966 Special Civil Session of UNION County Superior Court.

The plaintiff brought suit against the defendants with the allegations summarized below.

During the month of December 1962, the plaintiff loaned National Business Music Company (NBM) $125,000. The defendant, Manuel Fisher, was a director and principal stockholder of this company (NBM). Mrs. Shirley D. Fisher is his wife. That the loan was made upon the express agreement that the defendants would endorse the note and guarantee its payment. Half the debt was to be paid by 18 February 1963, and the remainder was to be paid in monthly installments of $7,000 each. Some $95,000 of the proceeds of the loan was paid out to the defendants to reimburse them for

loans they had previously made to NBM. On 28 January 1963 there was a balance due on the principal of said note of $62,500, and in addition, earned interest of $1,500, plus estimated interest discounted of $8,000, making a total of $72,000; that a new note in this amount payable $2,000 per month was executed by NBM and endorsed by Mr. and Mrs. Fisher and was, for the convenience of the parties, made payable to the American Bank and Trust Company of Monroe, it being agreed that the Bank would act as the collection agent and receive therefor a collection fee of one-half of one per cent to be paid by the plaintiff. A total of $12,000 was paid on the new note. The plaintiff alleged that NBM is now insolvent and has been adjudicated bankrupt, that demand has been made upon the defendants for the balance due of $60,000; and upon failure to meet the demand, this action was brought to recover that amount of the defendants upon their endorsement and guarantee.

The defendants admitted the original loan of $125,000 to NBM, but denied they endorsed the note. They said that NBM paid $62,500 on it, and later made payments totaling $12,000 on the new note. As a further defense, defendants allege that the note is made to American Bank and Trust Company with no reference to the plaintiff nor to the Bank's position as a collecting agent, and, therefore, that the plaintiffs are not the proper parties in interest and are not entitled to recover on the said note. Further, that when the defendants endorsed the $72,000 note and guaranteed its payments, that the agent of the plaintiff had represented that the Bank had agreed to reduce the monthly payments to $2,000 but had required that the defendants guarantee payment of the note; that if they would do so, the Bank would pay the plaintiff the then balance due on the original note of $125,000, and that the corporation would thereafter be indebted solely to the Bank, not to the plaintiff. That the defendants had not endorsed the original note of $125,000 and that the representations of the plaintiff's agent were false and fraudulent and made for the purpose of obtaining the defendants' endorsement and guarantee on the new note.

Another defense was set up in which the defendants allege that NBM had paid a total of some $27,150 as interest and bonuses on the original $125,000 loan, which were usurious; that the defendants were entitled to offset against any liability which they might have on the current note a claim for usury and the penalties thereon.

When the case was called for trial, Judge Brock conferred with the attorneys for approximately half a day in an attempt to get certain stipulations, after which a jury was selected and the trial

begun. After two days of trial, the court signed an order which in part is as follows:

"ORDER OF REFERENCE

"THIS CASE CAME on for trial as the first case for trial during the second week of the August 1, 1966 Session of the Superior Court of Union County, and after several hours of conference between the Court and Counsel with respect to the possibility of disposing of numerous factual situations by stipulations, which conferences were not fruitful; and during the third day of trial, after the Plaintiff, having offered all of his evidence in chief and Defendants, having offered a portion of their defensive evidence and a portion of their evidence in chief upon their counterclaim, it became clear to the Court that in order to make intelligent findings of fact and conclusions of law, that an examination of the books and records of the National Business Music Company would be necessary; that it would be necessary to make numerous calculations of interest; that it would be necessary to make detailed examination of numerous exhibits; and that it would be necessary to determine the fair value of stock of the National Business Music Company, which stock had no open market, and it thereupon, appeared to the Court from the volume of evidence and exhibits, that the ends of justice would be best served if this case in its entirety was referred to a referee for the purpose of having the referee make detailed findings of fact and conclusions of law upon all issues of fact and questions of law, and make his report back to the Superior Court of Union County after a full and adequate hearing.

"NOW, THEREFORE, the Court, upon its own motion and in exercise of its discretion, withdraws a juror, orders a mistrial, and orders that all of the issues both of fact and of law in the above entitled action be and they are hereby referred to Francis O. Clarkson, Jr., of the Mecklenburg County Bar, who will hear the evidence of the plaintiff and the evidence of the defendants and report his findings of fact and conclusions of law to this Court in the manner provided by law not later than the 7th day of November, 1966.

"The Plaintiff excepts to the Reference.

"The Defendants except to the Reference.

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

"To the Order of the Trial Court that all of the issues both

of fact and of law in the above captioned action be referred to Francis O. Clarkson, Jr., of the Mecklenburg County Bar. (Defendants' Exception #1. R. pp. 85 & 86)"

The defendants filed a petition for Writ of *Certiorari* which was allowed by order of the court in conference, 20 October 1966, and was thereafter heard on 11 April 1967.

Haynes, Graham, Bernstein & Baucom, by Mark R. Bernstein, Attorneys for defendant appellants.

Carswell & Justice and Richardson & Dawkins, by Koy E. Dawkins, Attorneys for plaintiff appellee.

PLESS, J. G.S. 1-189 provides in part:

"Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

"1. Where the trial of an issue of fact requires the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein."

While the order of reference is not in the exact language of the statute, an examination of it shows that the facts to be determined by the Referee require the examination of a long account involving the books and records of the National Business Music Company; numerous calculations of interest; an examination of numerous exhibits, and the determination of the fair value of the stock of National Business Music Company. To hear evidence relating to these subjects would, in our opinion, be the equivalent of "the examination of a long account" which would justify the order of reference. It has been held that in ordering a reference, the exact words of the statute are not required. *Vaughan v. Lewellyn,* 94 N.C. 472; *Morisey v. Swinson,* 104 N.C. 555, 10 S.E. 754.

Our decisions hold that the right of a party to move for compulsory reference is waived unless made before the jury has been empaneled. *Peyton v. Shoe Co.,* 167 N.C. 280, 83 S.E. 487. This reference, however, was ordered by the court of its own motion — not upon the motion of one of the parties.

The statute distinctly provides that the court on its own motion may direct a reference in proper cases. We are quite sure that if, at the end of three days spent on this case and requiring 122 pages of transcript, Judge Brock could see any likelihood of completing

the jury trial within a reasonable time or that it could be properly tried by a jury, he would not have ordered it referred. This he did, in his discretion, and we find nothing in the record that indicates that his order was improper or constitutes an abuse of discretion.

Both parties excepted to the order of reference, but in his brief the plaintiff says that "a reference is proper in this cause." It is not unusual for both parties to informally suggest an order of reference and yet ask to be allowed to make formal objections to the order so that the right to a jury trial may be preserved. We assume that was the reason for the plaintiff's exception.

The defendants further except to the alleged failure of the court to observe the provisions of G.S. 1-190 in the appointment of a referee. That statute provides that the parties *may* agree in writing upon a person to act as referee and that that person must thereupon be named by the court in that capacity. Here there was no such agreement, and the court thereupon nominated and appointed Mr. Francis O. Clarkson, Jr., of the Mecklenburg County Bar, as referee. Only one of the parties objected to this appointment, so that it also is authorized by statute (G.S. 1-190).

Our Court has consistently held that when the answer raises a plea in bar which, if established, would end the action, a compulsory order of reference cannot be properly ordered until such plea is decided. *Bank v. Fidelity Co.*, 126 N.C. 320, 35 S.E. 588; *Solon Lodge v. Ionic Lodge*, 245 N.C. 281, 95 S.E. 2d 921.

The defendants claim that this principle of law was not observed in this case in that they have set up three defenses which they denominate as "pleas in bar." Summarized, they are: (1) that the American Bank and Trust Company, and not the plaintiff, is the real party in interest; (2) that defendants' endorsement of the note sued upon was obtained by fraud; and (3) that they are entitled to offset against any sums due on the note the alleged usury charged by the plaintiff in the transaction. There are many defenses which, if established, would defeat the plaintiff's cause of action, and thus produce the same result as a plea in bar. The latter has been defined as one which extends to the whole cause of action so as to defeat it absolutely and entirely, and which if found in favor of the pleader will put an end to the case, leaving nothing further to be determined. *Grimes v. Beaufort County*, 218 N.C. 164, 10 S.E. 2d 640.

An absolute denial of indebtedness, lack of authority on the part of an agent, non-participation in a controverted incident, all if established would defeat a cause of action and put an end to the case, but these are not considered pleas in bar. They are defenses

presented to avoid liability. We are of the opinion, and so hold, that the so-called pleas in bar do not require their determination before a reference could be ordered, but on the contrary, they are legitimate and proper questions to be answered by the referee upon the evidence presented.

It is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case. Unexpected developments, especially in the field of procedure, frequently occur. When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his discretion in the interest of efficiency, practicality and justice. The able judge has done that in this case, and his order of compulsory reference and the appointment of a referee is hereby

Affirmed.

LAKE, J., dissenting: I dissent from that portion of the majority opinion which holds the defendants' plea of fraud and its plea that the plaintiff is not the real party in interest are not pleas in bar. These should be heard and determined before the remainder of the controversy is referred. If the defendants prevail on either of these contentions, that will end the lawsuit and there will be no occasion for a long and expensive reference.

GEORGE CREE MITCHELL v. GERALDINE EDWARDS MITCHELL.

(Filed 3 May, 1967.)

1. Divorce and Alimony § 21—

A contract under which the husband agrees to pay the wife specified sums for her support may not be enforced by contempt proceedings even though the agreement is approved by the court, but if the court not only approves the agreement but orders and directs the husband to make monthly payments for the support of the wife in accordance with the agreement, the judgment is enforceable by contempt proceedings, since failure to make the payments is in violation of the order of the court.

2. Divorce and Alimony § 16— Order held to direct husband to make payments of alimony in accordance with agreement of parties.

The husband instituted action for divorce on the ground of separation. The wife denied the separation, alleged abandonment, and filed cross-action for alimony without divorce. The court, in accordance with agreement of the parties, ordered the husband to pay monthly payments to the wife in a specified sum for a period of ten years, and dismissed the cross-action. Thereafter the husband obtained absolute divorce in his ac-

tion. *Held:* The sums ordered by the court to be paid the wife were payments of alimony, notwithstanding the failure of the judgment to so denominate the payments, it being clear from the record that the payments were not in furtherance of a property settlement but were intended and regarded as alimony in satisfaction of the wife's action.

3. Same—

Even though the court may not ordinarily award alimony in a gross sum, the court may, by and with the consent of the parties, direct the husband to make monthly payments in a specified sum for a period of ten years or until the wife remarries.

APPEAL by defendant from *Bailey, J.*, at chambers in Raleigh 5 November 1966.

This action was instituted by plaintiff-husband in September 1965 for an absolute divorce from defendant on the ground of one year's separation. Defendant, in her answer, denied that she and plaintiff had been continuously separated for one year, alleged that he had abandoned her, and set up a cross action for alimony without divorce, counsel fees, and alimony *pendente lite* under G.S. 50-16. Plaintiff demurred to the cross action and moved to dismiss, for that defendant "fails to state a cause of action against plaintiff."

In an order signed 2 June 1966, Judge Brock sustained plaintiff's demurrer, dismissed defendant's cross action, and allowed defendant thirty days in which to file an amended answer and cross action. Thereafter, on the same day, Judge Brock signed a judgment which recited that the parties had settled all matters in controversy between them. He "ORDERED, ADJUDGED AND DECREED, by consent of the parties, as follows" (except when quoted, the decree is summarized):

"(1) Plaintiff shall pay to defendant the sum of $150.00 on the 5th day of June, 1966, and the sum of $150.00 on the 5th day of each month thereafter through and including the 5th day of May, 1976."

(2) — (5) Plaintiff ordered to pay specified hospital bills and a fee to defendant's attorney.

(6) Defendant ordered to surrender to plaintiff all credit cards issued in his name, and she agrees to make no further charges to plaintiff's account.

"(7) That this judgment shall constitute a full and final settlement of all matters raised by defendant in her cross action, and all matters which might have been raised in defendant's answer in this cause, and that neither plaintiff nor defendant shall make any further claims or demands upon the other arising out of said matters and things.

"(8) In the event defendant remarries, plaintiff shall after said time not be obligated to make any further payments as provided hereinbefore in paragraph (1)."

(9) Plaintiff ordered to continue hospital insurance covering defendant and her three children so long as he "may legally maintain said contract."

"It is, therefore, ORDERED, ADJUDGED AND DECREED by consent, that defendant's 'Further Answer and Defense and Cross Action against the Plaintiff' be and the same is hereby dismissed and that plaintiff be taxed with the cost.

"This the 2nd day of June, 1966.

/s/ Walter E. Brock
WALTER E. BROCK
JUDGE PRESIDING

/s/ Fred T. Mattox
Fred T. Mattox
Attorney for Defendant

/s/ Eugene Boyce
Eugene Boyce
Attorney for Plaintiff

"WE CONSENT:
/s/ Geraldine Edwards Mitchell
Geraldine Edwards Mitchell

/s/ George Cree Mitchell
George Cree Mitchell"

Plaintiff made the June payment of $150.00. On 18 July 1966, he secured a judgment of absolute divorce. In July, he paid nothing. In August 1966, he paid defendant $119.40, and since then has made no payment. On 17 October 1966, when plaintiff was in arrears $330.60 with his monthly payments, defendant secured a rule commanding plaintiff to appear before the resident judge of the district and show cause why he should not be punished as for contempt for failing to comply with the order of 2 June 1966. When the matter came on for hearing before Judge Bailey, he held as a matter of law that the consent judgment dated 2 June 1966 is not enforceable against plaintiff by contempt proceedings. He discharged the rule to show cause, and defendant appealed.

Boyce, Lake & Burns for plaintiff appellee.
Harrell & Mattox for defendant appellant.

SHARP, J. A contract between husband and wife whereby he agrees to pay specified sums for her support may not be enforced by contempt proceedings even though the agreement has the sanction and approval of the court. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118; *Brown v. Brown,* 224 N.C. 556, 31 S.E. 2d 529. When, however, a court having jurisdiction of the parties and the cause of action adjudges and orders the husband to make specified payments to his wife for her support, his wilful failure to comply with the court's judgment will subject him to attachment for contempt notwithstanding the judgment was based upon the parties' agreement and entered by consent. *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882; *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576; *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819. See *Smith v. Smith,* 247 N.C. 223, 100 S.E. 2d 370. This is true, "not because the parties have agreed to it, but because the judgment requires the payment." *Sessions v. Sessions,* 178 Minn. 75, 226 N.W. 701. When the parties' agreement with reference to the wife's support is incorporated in the judgment, their contract is superseded by the court's decree. The obligations imposed are those of the judgment, which is enforceable as such. *Adkins v. Staker,* 130 Ohio State 198, 198 N.E. 575; *accord, Gloth v. Gloth,* 154 Va. 511, 153 S.E. 879. In such a case the wife has the option of enforcing the judgment by a rule of contempt or by execution, or both.

Plaintiff argues, however, that the court's judgment that he pay defendant $150.00 a month for ten years, or a total of $18,000.00 if she fails to remarry, is not an award of alimony but merely a contract between the parties to which the court gave its approval. The answer to this argument is that the judge went further than merely putting his stamp of approval on the parties' contract. He could have manifested approval just by making the certificate required by G.S. 52-6 and G.S. 47-39. Instead, he entered a judgment in which he *ordered* plaintiff to make the payments which he had agreed to make and which defendant had agreed to accept. When the court incorporated the agreement in its mandate, its approval was implicit, but, having made the order, its mandate cannot be downgraded to mere approval.

Plaintiff urges that since the monthly payments which he agreed to make to his wife were not denominated *alimony* in the judgment,

they cannot be construed as such. The provision that defendant's remarriage will relieve plaintiff of the obligation to make further payments, *Fox v. Fox,* 253 P. 2d 1030 (Cal. Dist. Ct. App., 2d Dist., Div. 1), the circumstances surrounding the entry of the judgment, and the motives which prompted each party to consent to it, render this contention feckless. There is no suggestion in the transcript that there had been a property settlement between the parties and that the monthly payments were to reimburse defendant for property she had transferred or released to plaintiff. In order to secure his divorce in June 1966, plaintiff had to overcome the defense which defendant had alleged to his action and the cross action, both of which were based on his alleged abandonment of her. To do this, he had to obtain a jury verdict in his favor or a consent judgment from the court. He chose the latter as the safer course.

Although Judge Brock had sustained plaintiff's demurrer to the cross action (the correctness of that ruling is not before us), defendant's first statement of it reveals no reason to suppose that she could not allege a cause of action under G.S. 50-16 which would withstand demurrer. The court had allowed her thirty days in which to do so. Defendant's motion for alimony *pendente lite* and counsel fees was still before the court, which had general jurisdiction of the parties and their marital rights. Judge Brock could have vetoed the proposed decree. Instead, he adopted it and made it his own. The order that plaintiff pay defendant the sum of $150.00 on 5 June 1966 and on the 5th day of each month thereafter, through 5 May 1976, did not denominate the payments *alimony* or total the installments, yet the award was indutiably alimony in gross or "lump sum alimony," which is fundamentally the award of a definite sum of money for the wife's support and maintenance. 27A C.J.S., Divorce § 235 (1959). "Ordinarily, in the absence of express statutory authority or the consent of the parties, a court cannot award alimony in gross in lieu of a periodical allowance." 24 Am. Jur. 2d, Divorce and Separation § 615 (1966). North Carolina has no statute authorizing the court to award alimony in gross, but such alimony may be awarded with the consent of the parties. This was done in *Taylor v. Taylor,* 93 N.C. 418.

By and with the consent of the parties, the court may award permanent alimony as a sum in gross to be paid in periodic installments which shall terminate upon the wife's remarriage. 24 Am. Jur. 2d, Divorce and Separation § 616 (1966). As to the power of the divorce court to modify an award of alimony in gross, where no right to amend was reserved, see Annot., Alimony — Modifying

Decree, 127 A.L.R. 741, 743-744; 71 A.L.R. 723, 730-734; 24 Am. Jur. 2d, Divorce and Separation § 668 (1966).

Having entered its judgment awarding alimony, the court below had the power to enforce its order by contempt proceedings. 2 Lee, N. C. Family Law § 166 (3d Ed., 1963) and cases therein cited. The court would demean itself if it entered a decree providing that the husband support and maintain the wife upon terms which he himself had suggested (and to which he gave his written consent), then allowed him to get an absolute divorce upon the strength of that decree, and — upon his wilful failure to comply with its terms — announced that it was powerless to enforce its judgment by contempt proceedings. Defendant, in reliance upon the judgment which she now seeks to enforce, withdrew her defense to plaintiff's divorce action. He thereby secured an absolute divorce, which put it beyond the power of the court thereafter to enter an order for alimony. G.S. 50-11. To say now that, although the court ordered the payments, its judgment is nothing more than a contract between the parties and that defendant must — as plaintiff asserts — bring an action for breach of contract in order to collect the monthly payments it decreed, will not do.

This judgment was not worded with the care which this Court, in *Bunn v. Bunn, supra,* pointed out that counsel for the wife should use in dealing with similar situations. Nevertheless, we hold that the judgment will support an attachment as for contempt if it be shown to the satisfaction of the court that plaintiff has wilfully failed to make the payments ordered. On that question, no evidence has yet been heard.

Reversed.

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

NORTH CAROLINA STATE HIGHWAY COMMISSION, PLAINTIFF, v. IRVIN J. MYERS AND WIFE, SARAH V. MYERS; J. L. CARLTON, TRUSTEE; WINSTON-SALEM SAVINGS AND LOAN ASSOCIATION, DEFENDANTS.

(Filed 3 May, 1967.)

1. Husband and Wife § 15—

Even though rents and profits from an estate by the entirety are owned exclusively by the husband, such rents and profits, and even the actual possession of the land, may be made available for the support of the

wife; nevertheless, sale of land owned by the entirety may not be ordered to procure funds to pay alimony to the wife or to pay her counsel fees.

2. Husband and Wife § 17—

While an absolute divorce converts an estate by the entirety into a tenancy in common, a divorce *a mensa* does not do so; however, an estate by the entirety can be dissolved by the voluntary joint act of the husband and wife, as by conveyance.

3. Eminent Domain § 13—

Upon the filing of the complaint and the declaration of a taking, together with the making of a deposit in court, title and right to immediate possession of property condemned by the Highway Commission vests in the Commission. G.S. 136-104.

4. Eminent Domain § 14; Husband and Wife § 17—

Where title to land held by the entirety is transferred to the State Highway Commission upon the payment into court of a sum estimated by the Commission to be just compensation, such involuntary transfer of title does not destroy the estate by the entirety, and the compensation paid by the Commission has the status of real property owned by the husband and wife as tenants by the entirety, and the wife is not entitled to any part thereof unless and until there is a change of status, and there can be no disbursement for any purpose unless specifically authorized by order of the court entered after hearing pursuant to notice to all interested parties.

APPEAL by defendant Sarah V. Myers from *Gwyn, J.*, November 14, 1966 Civil Session of FORSYTH.

The North Carolina State Highway Commission (Commission) instituted this condemnation proceeding September 13, 1966, pursuant to G.S. Chapter 136, Article 9, to acquire for highway purposes a right of way over the portion of the real property owned by Irvin J. Myers and wife, Sarah V. Myers, as tenants by entirety, within the right of way of the Commission's Project 8.2832001. A portion of a building on the Myers property was within the right of way of said project. Another portion thereof was on the remainder of the Myers property. With reference thereto, the Commission condemned "the entire one-story commercial building located . . . together with the right to enter upon the lands surrounding said building or structure outside the right of way for the sole purpose of removing said building or structure and no permanent interest or estate is hereby taken in or to the land underlying that portion of said building or structure outside the right of way."

The Commission alleged the property appropriated by it is owned by Irvin J. Myers and wife, Sarah V. Myers, subject to (1) a deed of trust dated October 26, 1962, to J. L. Carlton, Trustee for Winston-Salem Savings and Loan Association, (2) 1966 *ad valorem* taxes, and (3) certain easements.

Upon filing its complaint and declaration of taking the Commission deposited with the clerk of the superior court the sum of $10,455.00, the sum estimated by it to be just compensation for said taking.

Irvin J. Myers and wife, Sarah V. Myers, have lived separate and apart since June 1964, but are not divorced. Issues as to their marital differences are involved in an action instituted July 14, 1964, under G.S. 50-16, entitled, *"Sarah Virginia Myers v. Irvin Jackson Myers,"* now pending in this Court on the plaintiff's appeal from an order filed therein on December 19, 1966. The opinion in said action is filed simultaneously with the filing of opinion herein.

On September 28, 1966, Sarah V. Myers filed in this cause a pleading entitled, "Application," in which she asserted $10,455.00 was "inadequate compensation" and that she declined to accept the amount as full compensation for the taking. She prayed that "the aforesaid deposit, or some appropriate portion thereof," be delivered to her "pursuant to the provisions of G.S. 136-105, as a credit against just compensation . . ." On October 13, 1966, Irvin J. Myers filed herein a pleading entitled, "Response to Application of Sarah V. Myers," in which, for reasons set forth, he denied Sarah V. Myers was entitled to any portion of the $10,455.00 deposit. He prayed that "the deposit at issue be distributed to him as a credit against just compensation and that he not be prejudiced by acceptance of said deposit or a portion thereof."

Judge Gwyn entered the following order:

"The application of Sarah V. Myers for disbursement of the money deposited in the office of the Clerk of this Court is hereby denied.

"This order is not intended to adjudicate any issue with relation to the right of the Respondent wife to support and maintenance."

Defendant Sarah V. Myers excepted to the court's denial of her application for distribution to her of a portion of said deposit and appealed.

Randolph & Drum for defendant appellant Sarah V. Myers.

Hayes & Hayes for defendant appellee Irvin J. Myers.

BOBBITT, J. The pleadings of defendants Sarah V. Myers and Irvin J. Myers relate primarily to their controversy *inter se* with reference to the $10,455.00 now on deposit with the clerk. Neither has filed answer to the allegations of the complaint. It would seem appropriate that they do so if they desire a judicial determination as to what constitutes adequate and just compensation for the property appropriated by the Commission. G.S. 136-105, 106, 107.

The sole question for decision is whether Sarah V. Myers is presently entitled to have distributed to her *any* portion of the $10,455.00 deposit. Decision turns upon whether this $10,455.00 (and any additional amount the Commission may be required to pay as compensation) has the status of real property owned by husband and wife as tenants by entirety.

The "properties and incidents of estates by the entirety" are summarized by Stacy, J. (later C.J.), in the oft-cited case of *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566.

"An absolute divorce destroys the unity of husband and wife, and therefore converts an estate by the entirety into a tenancy in common." *Davis v. Bass, supra; McKinnon v. Caulk,* 167 N.C. 411, 83 S.E. 559; *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530; *Lanier v. Dawes,* 255 N.C. 458, 121 S.E. 2d 857. However, a divorce *a mensa et thoro,* which does not destroy the marital relationship, does not convert an estate by the entirety into a tenancy in common. *Freeman v. Belfer,* 173 N.C. 581, 92 S.E. 486. Irvin J. Myers and Sarah V. Myers are husband and wife. There has been no divorce either absolute or from bed and board.

"(T)he husband is entitled during the coverture to the full possession, control and use of the estate, and to the rents and profits arising therefrom to the exclusion of the wife." *Nesbitt v. Fairview Farms, Inc.,* 239 N.C. 481, 486, 80 S.E. 2d 472, 477. However, "the rents and profits therefrom, which belong to the husband, may be charged with the support of his wife." *Porter v. Bank,* 251 N.C. 573, 577, 111 S.E. 2d 904, 908, and cases cited. In this respect, such rents and profits have the same status as other income and assets owned exclusively by the husband. *In re Estate of Perry,* 256 N.C. 65, 70, 123 S.E. 2d 99, 102. Whether Sarah V. Myers is entitled to alimony is determinable in her action under G.S. 50-16 referred to in the statement of facts.

Although the rents and profits therefrom and the actual possession thereof may be made available for the support of the wife, the court does not have the power to order the sale of land owned by husband and wife as tenants by the entirety in order to procure funds to pay alimony to the wife or to pay her counsel fees. *Holton v. Holton,* 186 N.C. 355, 119 S.E. 751; *Porter v. Bank, supra.*

An estate by the entirety can be destroyed or dissolved by the voluntary joint acts of the husband and wife. *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468. Hence, where husband and wife sell and convey real property owned by them as tenants by entirety the proceeds of sale, including a balance purchase money note and security therefor, are considered personal property, and the husband

and wife are tenants in common in respect of the ownership thereof. *Shores v. Rabon,* 251 N.C. 790, 793, 112 S.E. 2d 556, 559, and cases cited. Decisions in other jurisdictions relating to the effect of such sales are cited in Anno., 64 A.L.R. 2d 8, 47 *et seq.*

Upon the filing of the complaint and the declaration of taking and deposit in court, the title and the right to immediate possession of the portion of the Myers property within the right of way of said project vested in the Commission. G.S. 136-104. Voluntary action by the owners is not involved. The question for decision is whether such involuntary transfer of title effected by the condemnation proceeding operates to destroy or dissolve the estate by the entirety as if the condemned portion of the Myers property had been sold and conveyed by the voluntary joint acts of the owners thereof. Specifically, is the compensation paid by the Commission for the appropriated property constructively real property, owned by husband and wife as tenants by the entirety, or personal property owned in equal shares by husband and wife?

Unless otherwise provided by their joint and voluntary agreement, and in the absence of an absolute divorce, we are of opinion and so decide that such involuntary transfer of title does not destroy or dissolve the estate by the entirety in respect of the appropriated portion of the Myers land, and that the compensation paid by the Commission therefor has the status of real property owned by husband and wife as tenants by the entirety.

In *Whitlock v. Public Service Company of Indiana, Inc.,* 239 Ind. 680, 159 N.E. 2d 280, an eminent domain proceeding in which property owned by husband and wife as tenants by the entirety was condemned, the opinion states: "The Indiana law impresses the proceeds from property held by the entireties with the rights of survivorship, the same as the original property from which it came." The opinion of Arterburn, J., cites *In re Idlewild Airport, Second Addition,* 85 N.Y.S. 2d 617 (Sup. Ct.), and *In re Jamaica Bay, Boroughs of Brooklyn and Queens, City of New York,* 252 App. Div. 103, 297 N.Y.S. 415. In the *Idlewild Airport* case, it was held that the compensation award should be paid to the husband for land held by the entirety when the wife died after the award but before payment. In the *Jamaica Bay* case, where the husband died after the taking but before payment of the award, it was held that the wife was entitled to the entire principal sum. For additional decisions of like import, see Anno., 64 A.L.R. 2d 8, 61. No decision reaching a contrary conclusion has come to our attention.

The real property involved in *Perry v. Jolly,* 259 N.C. 305, 130 S.E. 2d 654, was owned by H. K. Perry and his wife, Florence

Johnson Perry, as tenants by the entirety. Mrs. Perry had been adjudged incompetent and W. M. Jolly had been appointed and was acting as her general guardian. A proceeding under authority of G.S. Chapter 35, Article 4, was under consideration. For present purposes, it is noted that *a* sale of the property under order of the court was approved by the husband and by the general guardian of the incompetent wife. It was held that such sale, as to the incompetent wife, was involuntary; and that such "involuntary sale of the lands does not destroy the tenancy by the entireties, but merely transfers the rights of the tenants from the land to the fund."

In *Perry v. Jolly, supra,* the sale, although involuntary as to the incompetent, was authorized only upon affirmative findings by the court that such sale was for the best interests of the husband and wife. Here, the transfer of title to the Commission is wholly involuntary. The appropriation of the Myers property in the condemnation proceeding is at the instance of the Commission and for the benefit of the public without regard to the wishes or best interests of the owners of the Myers property. *A fortiori,* such involuntary appropriation does not destroy the tenancy by the entirety, but merely transfers the rights of the tenants from the land to the funds.

Having reached the conclusion that Sarah V. Myers has no *present* right to any portion of the $10,455.00 deposit, the order of Judge Gwyn is in all respects approved and affirmed.

Questions relating to the rights of Irvin J. Myers with reference to said $10,455.00 deposit are not presented by this appeal. Suffice to say, there can be no disbursement of any portion thereof for any purpose unless specifically authorized by order of the court entered after hearing pursuant to notice to all interested parties.

Affirmed.

SARAH VIRGINIA MYERS v. IRVIN JACKSON MYERS.

(Filed 3 May, 1967.)

1. Divorce and Alimony § 18—

Affidavits that a married man visited plaintiff at her residence on two occasions for periods of less than two hours in the early evening, when considered with further evidence that the married man and his wife were both friends of the plaintiff, are insufficient to support a finding of adultery on the part of the plaintiff, and when it is apparent from the record that the judge denied plaintiff's application for subsistence and counsel fees *pendente lite* on the ground of adultery, the order denying the relief must be vacated and the cause remanded. G.S. 50-16.

2. Appeal and Error § 55—

Where it is apparent from the record that an order was entered under misapprehension of the applicable law, the cause must be remanded.

APPEAL by plaintiff from an order of *Johnston, Senior Resident Judge,* filed December 19, 1966, after a hearing in chambers, in action pending in FORSYTH Superior Court.

Plaintiff (wife) instituted this action July 14, 1964, under G.S. 50-16 for alimony without divorce and for custody and support of the two children born of her marriage with defendant. In gist, plaintiff alleged she had separated from defendant in June 1964 on account of his various acts of abuse and mistreatment. Answering, defendant denied plaintiff's essential allegations and alleged plaintiff had separated from him of her own volition and for her own purposes.

After successive hearings, Judge Johnston, Resident Judge, on September 25, 1964, "ORDERED, ADJUDGED, AND DECREED that the plaintiff is not entitled to alimony *pendente lite,* that the defendant is adjudged a fit and suitable person to be awarded the custody and control of Robert Jackson Myers and Timothy Irvin Myers, and is so awarded their custody and control; that the plaintiff is to have the right to have the children at any time she chooses to do so, consistent with their routine and school attendance duties."

There has been no trial on the issues raised by the pleadings. Plaintiff and defendant have lived separate and apart continuously since June 1964. Defendant has resided in the residence and store property owned by husband and wife as tenants by the entirety. Plaintiff, who has been employed, has maintained a separate place of residence. Defendant has made no contribution to the support of plaintiff since their separation in June 1964. During the pendency of this action, there have been various hearings and orders relating to the custody of the children. Under the last orders relating thereto, defendant now has custody of the two boys.

A motion filed by plaintiff on November 4, 1966, alleged facts pertinent to plaintiff's need of allowances for alimony *pendente lite* and counsel fees. In addition, she alleged facts involved in the condemnation proceeding entitled, *"North Carolina State Highway Commission v. Irvin J. Myers and wife, Sarah V. Myers; J. L. Carlton, Trustee; Winston-Salem Savings and Loan Association,"* now pending in this Court on her appeal from an order entered by Gwyn, J., at November 14, 1966 Civil Session. The opinion in said proceeding is filed simultaneously with the filing of opinion herein. In her motion herein, plaintiff prayed that the court enter an order "requiring defendant to pay temporary alimony to plaintiff, pend-

ing final determination of the issues in this cause or distribution of the deposit made by the North Carolina State Highway Commission on September 13, 1966, whichever shall first occur; that defendant be ordered to pay to plaintiff's counsel reasonable attorney fees in an amount of not less than $1,500; for such other and further relief as to the court may seem just and proper."

On November 12, 1966, defendant filed a "Response" to plaintiff's motion in which he asserted he was entitled "to have plaintiff's present motion dismissed because (1) she is barred by the order of October *(sic)* 25, 1964, (2) she is barred by her adulterous conduct and (3) she is barred by laches, having waited over two years before attempting to overturn the order denying her support."

Judge Johnston entered the following order: "Now, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED within the discretion of the court, that the court denies the second application for temporary alimony and counsel fees."

Plaintiff excepted to said order and appealed.

Randolph & Drum for plaintiff appellant.
Hayes & Hayes for defendant appellee.

BOBBITT, J. "The statute (G.S. 50-16) provides two remedies, one for alimony without divorce, and another for subsistence and counsel fees pending trial and final disposition of the issues involved." *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24; *Richardson v. Richardson,* 268 N.C. 538, 540, 151 S.E. 2d 12, 13, and cases cited.

"The remedy thus established for the subsistence of the wife pending the trial and final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband at the trial upon substantially equal terms." *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226.

G.S. 50-16 contains this provision: "(I)n all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees." Defendant pleaded the adultery of plaintiff in bar of her right to alimony. Defendant's said allegations do not relate to a counterclaim. Hence, they are deemed denied by plaintiff. *Creech v. Creech,* 256 N.C. 356, 123 S.E. 2d 793.

"On motion for alimony *pendente lite* made in an action by the wife against the husband pursuant to G.S. 50-16, the judge is not required to find the facts as a basis for an award of alimony *except* when the adultery of the wife is pleaded in bar." (Our italics.) *Creech v. Creech, supra; Deal v. Deal, supra.*

Although Judge Johnston did not make definitive findings of fact, this statement or recital, to which plaintiff excepted, immediately precedes his order: "(A)nd it further appearing from the evidence at this hearing that during the year 1966 there was evidence of unfaithful conduct on the part of the plaintiff with a married man before the court . . ." This evidence consists of a joint affidavit of two private detectives to the effect that on April 14, 1966, they observed Mr. J. R. Sparks arrive at plaintiff's residence at 8:10 p.m. and depart at 9:30 p.m.; and on May 12, 1966, they saw him arrive at 7:35 p.m. and depart at 9:10 p.m. Mindful of the evidence offered in the custody hearings to the effect that both Mr. and Mrs. Sparks were friends of plaintiff, the probative value of this affidavit is unimpressive. The order denying plaintiff's application for alimony *pendente lite* and counsel fees indicates plainly that substantial reliance was placed by the court upon the fact that there was *evidence* of plaintiff's alleged adultery. If said affidavit be so considered, it was insufficient to support a finding of adultery and insufficient to bar plaintiff's right to alimony *pendente lite* and counsel fees. In this respect, it seems clear the court, in entering the order from which plaintiff appeals, acted under a misapprehension of applicable law. *Allen v. Allen,* 258 N.C. 305, 310, 128 S.E. 2d 385, 388, and cases cited; *Davis v. Davis,* 269 N.C. 120, 127, 152 S.E. 2d 306, 312. Accordingly, the order is vacated and the cause remanded to the end there may be a hearing *de novo* with reference to plaintiff's second application for alimony *pendente lite* and counsel fees.

Error and remanded.

SAMUEL BITTLE v. WILLIAM JOSEPH JARRELL AND GUILFORD DAIRY COOPERATIVE, INC.

(Filed 3 May, 1967.)

1. Trial §§ 20, 53—

The court may not set aside the verdict of the jury on the ground that the court had committed error of law in denying defendant's motions for nonsuit aptly made, or for the insufficiency of the evidence as a matter of law to support the verdict.

2. Appeal and Error § 55—

Where the record discloses that the second issue submitted in a negligence action was whether defendant by his own negligence contributed to his injuries, the judgment must be vacated and the cause remanded for a new trial, notwithstanding stipulations of the parties that the second issue should correctly read whether plaintiff by his own negligence contributed to his injuries, since whether the jury understood that the second issue used the word "defendant" where it should have used "plaintiff" is not certain, and in any event judgment could not be rendered for plaintiff upon the verdict of record.

APPEAL by plaintiff from *Johnston, J.*, 7 November 1966 Session of RANDOLPH.

Gerald C. Parker for plaintiff appellant.

Lovelace, Hardin & Bain by Edward R. Hardin for defendant appellees.

PARKER, C.J. Civil action by plaintiff to recover damages for personal injuries and injury to an automobile allegedly proximately caused by the actionable negligence of William Joseph Jarrell in the operation of a truck owned by the corporate defendant, as an employee of the corporate defendant and acting in the course of his employment. Defendants filed a joint answer denying negligence, and, as a further answer and defense, conditionally pleading contributory negligence of plaintiff as a bar to any recovery upon his part.

Both plaintiff and defendant introduced evidence. After the charge of the court, the jury returned a verdict finding that the plaintiff was injured and his property damaged by the negligence of the defendants as alleged in the complaint, that the "defendant" was free from contributory negligence, and awarded plaintiff damages to his automobile in the sum of $800 and damages to his person in the sum of $50. After the verdict, the trial judge being of the opinion that the "verdict should be set aside as a matter of law for error by the Court in failing to grant the defendants' motion for nonsuit at the close of all the evidence," entered judgment adjudging and decreeing "that the jury's verdict be set aside for error of law by the Court in failing to grant the defendants' motion for nonsuit at the close of all the evidence and the cause continued for the term." From the judgment entered, plaintiff appeals.

Plaintiff assigns as error "that the Court erred in entering judgment of nonsuit (R. pp. 41-42) after the jury had answered the issues in favor of the plaintiff." This assignment of error is not hap-

pily worded, because the court did not enter judgment of nonsuit but set the jury's verdict aside for error of law for insufficiency of evidence and continued the case. Considering the record and the briefs of the parties, we interpret this assignment of error in effect as meaning that the judge erred in setting the verdict aside as a matter of law for insufficiency of the evidence to support it. This assignment of error is sustained.

In *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257, the Court said:

> "(A) trial judge may set aside a verdict in his discretion. He may set it aside as a matter of law for errors committed during the trial, and from this order the aggrieved party may appeal. *Culbreth v. Mfg. Co.,* 189 N.C. 208, 126 S.E. 419; *Akin v. Bank,* 227 N.C. 453, 42 S.E. 2d 518.
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> * * *
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> "When the issuable facts are settled by the verdict of the jury, the rights of the parties are thereby fixed and determined and the successful litigant is entitled to judgment on the verdict, subject only to (1) the right of the presiding judge to set aside the verdict, or to dismiss the action for want of jurisdiction or for failure of the complaint to state a cause of action, and (2) the right of the aggrieved litigant to appeal.
>
> "This rule applies to and forbids dismissal of the action by judgment as in case of nonsuit, after verdict, for insufficiency of the evidence. *Dickey v. Johnson,* 35 N.C. 450; *Riley v. Stone, supra* [169 N.C. 421, 86 S.E. 348]; *Vaughan v. Davenport,* 159 N.C. 369, 74 S.E. 967; *Nowell v. Basnight,* 185 N.C. 142, 116 S.E. 87; *Jernigan v. Neighbors, supra* [195 N.C. 231, 141 S.E. 586]; *Price v. Insurance Co.,* 201 N.C. 376, 160 S.E. 367; *Godfrey v. Coach Co., supra* [200 N.C. 41, 156 S.E. 139]; *Batson v. Laundry,* 202 N.C. 560, 163 S.E. 600; *Jones v. Insurance Co., supra* [210 N.C. 559, 187 S.E. 769]; *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822.
>
> "The power of the court to grant an involuntary nonsuit is altogether statutory and must be exercised in accord with the statute. G.S. 1-183. *Riley v. Stone, supra.* While the motion is *in fieri* until verdict is rendered, *Bruton v. Light Co., supra,* the ruling on the motion may not be reversed, *Price v. Insurance Co., supra,* or entered for the first time, *Jernigan v. Neighbors, supra; Batson v. Laundry, supra,* after the issuable facts are determined by the jury."

To the same effect, *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314; *Bethea v. Kenly,* 261 N.C. 730, 136 S.E. 2d 38; 1964 Pocket Parts

by Dickson Phillips, Dean, School of Law, University of North Carolina, 2 McIntosh, N. C. Practice and Procedure, 2d Ed., § 1598, p. 31.

In *Tayloe v. Telephone Company,* 258 N.C. 766, 129 S.E. 2d 512, the Court said:

> "The record discloses that after verdict the very able judge who tried this case came to the conclusion that the motions for nonsuit should have been allowed. However, he was then powerless to grant the motion under the rule in this State which forbids dismissal of an action after verdict by judgment as of nonsuit for insufficiency of evidence. *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257; *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314."

This is said in 88 C.J.S., Trial, p. 585: "Ordinarily, a nonsuit may not be granted after the jury have returned a verdict, even though the motion was made before the case was submitted to the jury and decision thereon reserved." *Corpus Juris Secundum* cites in support of this statement *Ward v. Cruse, supra,* and *Jones v. Insurance Co.,* 210 N.C. 559, 187 S.E. 769.

We adhere to the rule stated in *Riley v. Stone,* 169 N.C. 421, 86 S.E. 348, that "His decision, twice made, that there was evidence to go to the jury, was final upon that point, subject to exception made and entered at the time." The judgment setting aside the jury's verdict "for error of law by the Court in failing to grant the defendants' motion for nonsuit at the close of all the evidence" is vacated.

The record shows that the second issue submitted to the jury, taken to the jury room by them, and returned by them to the judge in open court answered "No" reads as follows: "If so, did the defendant, by his own negligence, contribute to his injuries and damages, as alleged in the Answer?" In its charge, the court in part charged as follows: "But, if you answer the first issue YES, then you will go and answer the second issue, which reads: 'If so, did the defendant by his own negligence contribute to his injuries and damages, as alleged in the Answer?' " We have before us an addendum to the record in the form of a stipulation signed by attorneys of record for the parties as follows:

> "Whereas the second issue in the above entitled matter erroneously referred to the defendant when reference should have been made to the plaintiff and it was the intention of all parties and proper instruction was made to the jury concerning said

issue as it was intended that such should have read; it is, therefore, stipulated between counsel for all parties to this action that the second issue read as follows:

"'2. If so, did the plaintiff, by his own negligence, contribute to his injuries and damages, as alleged in the Answer?'

"This 26th day of April, 1967."

The judge's charge was oral, the issues were in the jury room in writing. We can speculate or conjecture that the jury understood that the second issue used the word "defendant" where it should have used the word "plaintiff," but we cannot be sure. What effect it had upon the jury, and whether the jury's intention was to find the defendant free from contributory negligence or the plaintiff free from contributory negligence, we cannot know with certainty. The judgment, as it stands, nullifies the verdict; if it is vacated and the plaintiff requests a judgment in accordance with the verdict, he will be confronted with the second issue reading: "If so, did the defendant, by his own negligence, contribute to his injuries and damages, as alleged in the Answer?" In this confusing state of the verdict, we think the safest course to follow is this: The judgment is vacated, the verdict set aside by us, and a new trial ordered.

New trial.

STATE v. WADE AYCOTH AND JOHN SHADRICK, DEFENDANTS.

(Filed 3 May, 1967.)

1. Criminal Law § 34—

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.

2. Criminal Law § 91—

Whether the admission of incompetent evidence, including an unresponsive answer of a witness containing incompetent matter, may be cured by the withdrawal of such evidence by the court with instruction to the jury not to consider it, depends upon the nature of the evidence and the circumstances of each particular case.

3. Same; Criminal Law § 34—

In the cross-examination of a codefendant in this prosecution of defendants for armed robbery, the codefendant made an unresponsive answer disclosing that defendant had been indicted for murder. *Held:* Under the circumstances of the case withdrawal of the unresponsive answer by the court and the court's instruction to the jury not to consider it, were not sufficient to cure its prejudicial effect, and a new trial must be awarded.

APPEAL by defendant Aycoth from *McLaughlin, J.*, October 31, 1966 Session of UNION.

Criminal prosecution on a bill of indictment charging Wade Aycoth and John Shadrick with the armed robbery, as defined in G.S. 14-87, of Mrs. Keith Stevenson.

Evidence offered by the State tends to show Mrs. Stevenson, an employee, was in charge of Outen's Grocery on October 25, 1966, about 1:15 p.m., when Aycoth entered the store, armed with a pistol, and demanded and received the money in the cash register, approximately $100.00; that Shadrick was riding in the car, as a passenger, when Aycoth drove to and from Outen's Grocery; and that Aycoth and Shadrick were together when arrested in Union County about 9:00 p.m. the same day.

Evidence offered by Shadrick, consisting of his own testimony, tends to show he and Aycoth got together in Mecklenburg County about 3:00 p.m. and did not leave for Union County until 8:00 p.m.

Aycoth did not testify or offer evidence.

Each defendant was represented by separate court-appointed counsel; Aycoth by R. Roy Hawfield, Esq., and Shadrick by Robert Huffman, Esq.

As to each defendant, the jury returned a verdict of "guilty of armed robbery."

Judgment as to Shadrick is not in the record before us.

As to Aycoth, the court pronounced judgment that defendant "be confined in the State Prison for not less then eighteen (18) years nor more than twenty-five (25) years."

Aycoth excepted and appealed.

Attorney General Bruton and Staff Attorney White for the State.
R. Roy Hawfield for defendant appellant.

BOBBITT, J. There was plenary evidence to withstand Aycoth's motion for judgment as in case of nonsuit and to support the verdict. The only serious question presented is whether Aycoth was materially prejudiced by the incident set forth below.

During the cross-examination of Deputy Sheriff Frank Fowler, a witness for the State, by counsel for Shadrick, the following occurred:

"Q. Did you make any identification of the ownership of the automobile, do you know of your own knowledge who owns it? (The reference is to the automobile in possession of Aycoth and Shadrick at the time of their arrest.)

"A. Yes, sir, in my opinion I know who owns it.

"Q. Well, do you know?

"OBJECTION by the State.

"COURT: Well, the test is do you know who owns the automobile?

"A. Wade Aycoth at an earlier date said it was his car when we arrested him on another charge in his yard. His wife asked me to go search the car and see if I could find some articles that was left in the car setting in the yard when he was indicted for murder.

"OBJECTION by Mr. Huffman.

"MR. HAWFIELD: Objection and move to strike.

"MOTION ALLOWED.

"COURT: Don't consider what he said about what his wife said, or when he was indicted for murder. Don't consider that, ladies and gentlemen of the jury."

Fowler was the last witness for the State. At the conclusion of his testimony, the State rested and each defendant moved for judgment as in case of nonsuit. During the consideration of these motions, in the absence of the jury, counsel for Aycoth also moved for a mistrial on the ground the unresponsive statement of Fowler "purposely or inadvertently materially prejudiced the rights" of Aycoth to such extent that its prejudicial effect could not be removed by an instruction such as that given by the court. His motion for a mistrial was denied and Aycoth excepted.

"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; *S. v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362; Stansbury, North Carolina Evidence, Second Edition, § 91.

The unresponsive statement of Fowler informed the jury that Aycoth had been indicted for murder. The court allowed the motion to strike and instructed the jury as shown by the quoted excerpt from the record.

"In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the Court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is

withdrawn no error is committed." *S. v. Strickland,* 229 N.C. 201, 207, 49 S.E. 2d 469, 473; *S. v. Green,* 251 N.C. 40, 46, 110 S.E. 2d 609, 613, and cases cited. This is also the rule when unresponsive answers of a witness include incompetent prejudicial statements and the court on motion or *ex mero motu* instructs the jury they are not to consider such testimony. *S. v. Brown,* 266 N.C. 55, 145 S.E. 2d 297. Whether the prejudicial effect of such incompetent statements should be deemed cured by such instructions depends upon the nature of the evidence and the circumstances of the particular case. *S. v. Aldridge,* 254 N.C. 297, 118 S.E. 2d 766.

The trial judge was of opinion the trial could proceed without material prejudice to defendant. We are inclined to the opposite view. Upon the record before us, we apprehend the court's instruction did not remove from the minds of the jurors the prejudicial effect of the knowledge they had acquired from Fowler's testimony that Aycoth had been or was under indictment for murder.

Subsequent incidents tend to emphasize rather than dispel the prejudicial effect of Fowler's testimony. Shadrick testified the arresting officer answered his inquiry as to why he was being arrested by saying, "Running around with Aycoth is enough." Too, the solicitor, in cross-examining Shadrick, asked (1) whether Shadrick had become acquainted with Aycoth in prison, and (2) whether Shadrick knew Aycoth while Shadrick was in prison. Although Shadrick gave a negative answer to each of these questions, the questions themselves clearly imply that Aycoth had been in prison.

Being of the opinion the incompetent evidence to the effect Aycoth had been or was under indictment for murder was of such serious nature that its prejudicial effect was not erased by the court's quoted instruction, we are constrained to hold that Aycoth's motion for a mistrial should have been granted. For failure of the court to grant such motion, Aycoth is entitled to and is awarded a new trial.

New trial.

MARY PROVIDENCE HOUT, PLAINTIFF, v. JOHN HENRY HARVELL, JR., NINA SMITH HARVELL, AND AUBREY IGNATIUS HOUT, DEFENDANT.

(Filed 3 May, 1967.)

Automobiles §§ 35, 43— Negligence of one driver in turning left across path of other driver held sole proximate cause of collision.

In this action by a passenger in one vehicle against the drivers of both vehicles involved in the collision, plaintiff's allegations were to the effect that the driver of the car in which she was riding was traveling in an easterly direction and turned left across the highway to enter a filling station on the north side of the highway, directly in the path of the vehicle traveling in a westerly direction and operated by the other defendant, without allegation of any facts or circumstances disclosing that the operator of the other vehicle had timely notice that the vehicle in which plaintiff was riding intended to make a left turn directly in front of her. *Held:* Demurrer on the part of the driver of the other vehicle was properly sustained, notwithstanding allegations that such driver was negligent in operating her vehicle at excessive speed and in failing to keep a proper lookout, since under the allegations the sole proximate cause of the accident was the negligence of the driver of the car in which plaintiff was riding.

APPEAL by plaintiff from *Johnston, J.*, November 7, 1966 Civil Session of RANDOLPH.

Plaintiff, a passenger in a Chevrolet truck owned and operated by her husband, defendant Hout, brought this action against him and defendants Harvell to recover for personal injuries inflicted upon her in a collision between the Hout truck and a Plymouth automobile operated by defendant Nina Smith Harvell and owned by her husband, defendant John Henry Harvell, Jr. When the case was called for trial, defendants Harvell demurred *ore tenus* to the complaint upon the ground that it alleges no *facts* showing actionable negligence on the part of defendants Harvell but affirmatively discloses that the sole proximate cause of the collision was the negligence of defendant Hout.

In brief summary (except when quoted), the complaint alleges: On June 19, 1965, about 4:20 p.m., the *feme* defendant was operating the Harvell Plymouth automobile westerly on U. S. Highway No. 64, approaching the driveway of a filling station located on the north side of the road about one-tenth of a mile south of Asheboro. At the same time, defendant Hout was operating his Chevrolet truck in an easterly direction approaching the driveway of the same filling station.

> Defendant Hout "was operating his Chevrolet truck at a fast and dangerous rate of speed and in a careless and reckless manner and that he did not have his truck under proper con-

trol and that he did not keep a proper lookout. That as the said defendant, Aubrey Ignatius Hout, approached the private driveway of the service station in a careless and reckless manner, he proceeded to make a left turn directly into the path of the oncoming automobile which was being driven by the said Nina Smith Harvell and jointly caused a collision between the two motor vehicles and as a result caused the serious injuries to this plaintiff."

In addition to the negligence of defendant Hout, defendants Harvell were negligent in that, immediately prior to the collision, Mrs. Harvell was not keeping a proper lookout, did not have her automobile under proper control, and was driving recklessly and wantonly in violation of G.S. 20-140 and at an illegal rate of speed. Defendants' joint and concurring negligence proximately caused plaintiff injury, for which she is entitled to recover from them the sum of $20,126.50.

Judge Johnston sustained the demurrer, and plaintiff appeals.

Ottway Burton for plaintiff appellant.

Miller, Beck and O'Briant for defendants Harvell, defendant appellees.

SHARP, J. Under the circumstances detailed in the complaint, irrespective of her speed or failure to keep a proper lookout, Mrs. Harvell could not have avoided a collision with the Hout vehicle. As to defendant Hout, defendants Harvell, and plaintiff — a passenger in the Hout automobile — the conduct of Mrs. Harvell may not be held to constitute one of the proximate causes of the collision. The conduct of defendant Hout made the collision inevitable, insulated any prior negligence of Mrs. Harvell, and constituted the sole proximate cause of the collision.

The preceding paragraph is a paraphrase of the statement contained in *Loving v. Whitton,* 241 N.C. 273, 276, 84 S.E. 2d 919, 922, which involved an analogous situation. That case, and the cases cited therein, control decision here. In *Loving v. Whitton,* this Court sustained a demurrer *ore tenus* to a complaint containing substantially the same allegations as the one we consider here. The plaintiff in *Loving,* a passenger in Whitton's Cadillac, was injured when it collided in an intersection with an automobile operated by Gibson. Plaintiff alleged that Whitton, traveling on a servient street, failed to stop in obedience to the stop sign and " 'carelessly and negligently drove said Cadillac automobile in front of and into the path of the automobile driven by the defendant Gibson' 'so that there occurred

a collision between the two automobiles.' " *Id.* at 275, 84 S.E. 2d at 921. Plaintiff further alleged that Gibson's negligence was one of the proximate causes of the collision in that he drove his automobile in a careless and reckless manner, failed to keep it under control, failed to maintain a proper lookout, exceeded the speed limit, and failed to warn of his approach to the intersection.

In sustaining Gibson's demurrer, the Court pointed out that there was no allegation that Gibson, in the exercise of due care, could and should have timely observed that Whitton did not intend to stop and yield the right-of-way. In the absence of such circumstances, Gibson had the right to assume that he would obey the law.

Here, there is likewise no allegation of any fact or circumstance sufficient to give Mrs. Harvell timely notice that Hout intended to make a left turn directly in front of her in order to enter a filling station on his left side of the highway. On the contrary, she alleges that he turned without giving "a proper legal signal." Defendants Harvells' demurrer was properly sustained. *Capps v. Smith,* 263 N.C. 120, 139 S.E. 2d 19; *Loving v. Whitton, supra; Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808. See also *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193. The ruling of the court below was made without prejudice to plaintiff's right to move for leave to amend her complaint. Should she fail to obtain such leave within the time allowed by G.S. 1-131, defendants Harvell will be entitled to a judgment dismissing the action.

Affirmed.

ABRAHAM LINCOLN MABE, PLAINTIFF, v. WILLIAM CLYDE GREEN, RUTH TEAGUE O'QUINN, AND DANIEL HALFORD O'QUINN, DEFENDANTS.

(Filed 3 May, 1967.)

1. Automobiles §§ 35, 43—

Allegations *held* to show that sole proximate cause of accident was negligence of one defendant in making left turn across line of travel of second defendant.

2. Pleadings § 21.1—

Upon sustaining a demurrer for failure of the complaint to allege a cause of action, the action should not be dismissed until the pleader has had opportunity to amend. G.S. 1-131.

MABE *v.* GREEN.

APPEAL by plaintiff from *Johnston, J.*, October 24, 1966 Civil Session of RANDOLPH.

Action for personal injuries, heard on a demurrer to the complaint.

Except as quoted, the complaint is summarized as follows: On January 29, 1965, at 2:30 p.m., plaintiff was a passenger in the Chevrolet automobile owned and operated by defendant Green, who was traveling northwardly on U. S. Highway No. 220, approaching its intersection with N. C. Highway No. 705. At the same time, defendant Ruth Teague O'Quinn, operating the Ford automobile belonging to her husband, defendant Daniel Halford O'Quinn, was also approaching this intersection. She was traveling south. As a result of the joint and concurring negligence of Green and Mrs. O'Quinn, the two cars collided in the intersection, and plaintiff was injured. Defendant Green was negligent in that he operated his Chevrolet carelessly and heedlessly in violation of G.S. 20-140, without keeping it under proper control, without keeping a proper lookout, and at an illegal rate of speed. Mrs. O'Quinn was negligent in these same respects and also in that:

> "She violated G.S. 20-154 . . . in that while proceeding southward she turned across the right hand lane of traffic proceeding north and more particularly she turned immediately in front of the automobile being operated by William Clyde Green at an excessive rate of speed without first giving the proper signal and ascertaining that such a left hand movement could be made in safety."

When this case was called for trial, defendant Green demurred *ore tenus* to the complaint for that it alleges no facts constituting actionable negligence on his part and affirmatively discloses that the conduct of Mrs. O'Quinn was the sole proximate cause of the collision and plaintiff's resulting injuries. Judge Johnston sustained the demurrer and entered an order dismissing the action as to defendant Green. Plaintiff appeals.

Ottway Burton for plaintiff appellant.
Cooke & Cooke for William Clyde Green, defendant appellee.

PER CURIAM. The ruling of the court sustaining the demurrer is affirmed under the authority of *Hout v. Harvell, ante,* at 274, ... S.E. 2d ..... The court erred, however, in dismissing the action as to defendant Green. Plaintiff was entitled to move under G.S. 1-131 for leave to amend. The record shows no such motion and contains

no order denying such permission. In the event plaintiff fails to apply for and to obtain leave to amend within the time allowed by G.S. 1-131, defendant Green will then be entitled to a judgment dismissing the action as to him.

Error and remanded.

W. CARLTON SWICEGOOD v. PEGGY LOVING SWICEGOOD.

(Filed 3 May, 1967.)

1. Habeas Corpus § 3; Divorce and Alimony § 22—

A judgment awarding the custody of a child under the provisions of G.S. 17-39 does not oust the jurisdiction of the court to hear and determine a motion in the cause for custody of the child in a subsequent divorce action between the parties, and the court entering the divorce decree has exclusive jurisdiction to enter such order respecting the care and custody of the child as may be proper. G.S. 50-13.

2. Divorce and Alimony § 23—

The welfare of the child is always the paramount consideration in determining the right to the child's custody, and while the courts are reluctant to deny either parent all visitation rights, visitation rights should not be permitted to jeopardize the child's welfare.

3. Same—

The court, after entering a decree of divorce, directed that the custody of the child of the marriage should remain in the father in accordance with a prior decree entered under G.S. 17-39, with visitation rights to the mother. *Held:* The court in the divorce action had jurisdiction to award the custody of the child unaffected by the prior order under G.S. 17-39, and it was error for the court granting the decree of divorce to award the custody of the child without findings of fact from which it could be determined that the order was adequately supported by competent evidence and was for the best interest of the child.

APPEAL by plaintiff from *Shaw, J.*, 10 October 1966 Civil Session of DAVIDSON.

W. Carlton Swicegood filed with the court a petition verified by him on 19 July 1965 stating in substance: He is a resident of Davidson County, North Carolina. The petitioner and the respondent, Peggy Ann Swicegood, were married 9 July 1960, and to this marriage was born one child, Shelia Diane Swicegood, age two and one-half years. On the morning of 17 July 1965, at about 2 a.m., the respondent left the home of petitioner without cause and without advising petitioner where she was going or when she would be back.

Petitioner found her about 4 a.m. They have not lived together since that time. Prior thereto the respondent has shown interest from time to time in Benny Robertson, a cousin of the respondent, and others. For the last several months while petitioner was working, respondent stayed at home during the time he was away only a small part of the time. Petitioner at the present time has the custody of their minor daughter, but the respondent continues to molest petitioner and their daughter. Petitioner is a fit and suitable person to have the custody of said minor child. Petitioner prays the court, pursuant to the provisions of G.S. 50-13, to compel respondent to desist from interference with his custody of their daughter, and that the custody of their daughter be awarded to him.

Peggy Ann Swicegood filed an answer to the petition stating in substance: The residence of the parties, their marriage, and the birth of a minor daughter, Shelia Diane Swicegood, are admitted. The other allegations of the petition are denied. It is alleged that petitioner gave their daughter to the respondent on 19 July 1965, and that their daughter has been with her and under her care and control since then. She is a fit and suitable person to have the custody of their minor daughter. Wherefore, the respondent prays that the court award to her the permanent custody of their minor daughter, and that the court enter an order requiring petitioner to provide adequate support for their child.

In the record before us there is a judgment entered by Walter E. Crissman, Judge presiding, on 14 October 1965. This judgment recites, "Under order dated July 30, 1965, the defendant was granted the care, custody and control of Shelia Diane Swicegood, except the plaintiff was to have the care, custody and control of Sheila Diane Swicegood from 9 o'clock a.m. on Saturday until 5 o'clock p.m. on Sunday." A summary of the rest of this judgment is as follows: The above entitled special proceeding came on again to be heard respecting the custody of Shelia Diane Swicegood. It appeared to the court that notice of this hearing was served upon the defendant, Peggy Ann Swicegood, on 7 October 1965. It further appeared to the court that the respondent failed to appear pursuant to said notice, and Hubert E. Olive, Jr., formerly attorney for the respondent, advised the court that he no longer represented the defendant, but that he had talked with her concerning the same on 13 October 1965. It further appeared to the court that since 30 July 1965 there has been a material change in the facts concerning the conduct of respondent Peggy Ann Swicegood, and the court being of the opinion from affidavits presented on 13 October 1965 that Shelia Diane Swicegood should not be in the custody of respondent, the

court found as a fact that W. Carlton Swicegood is a fit, competent and capable person to have the care and control of Shelia Diane Swicegood, and that it would be for the best interest and welfare of Shelia Diane Swicegood to be in the care and custody of her father. It was, therefore, decreed and ordered that W. Carlton Swicegood be granted the exclusive custody of their said minor daughter.

By a complaint verified on 23 July 1966, W. Carlton Swicegood filed a complaint in the Superior Court of Davidson County praying for an absolute divorce from his wife, who is called in this complaint Peggy Loving Swicegood, on the ground of continuously living separate and apart for one year. The complaint recites that one child was born of the marriage, Shelia Diane Swicegood, who is now three and one-half years old, and who is in the custody of plaintiff. He prays that he be given an absolute divorce, and that he be granted the custody of Shelia Diane Swicegood.

The defendant filed an answer admitting the material allegations of the complaint, and for a further answer and defense she alleges in substance: Plaintiff has refused to allow the defendant to see or visit with Shelia Diane Swicegood since October 1965. Plaintiff and his father live together in Davidson County, and there is no woman in the house. Shelia Diane Swicegood is cared for by relatives of her father. Defendant is a fit and suitable person to have the care and custody of her daughter. Wherefore, she prays that she be granted the custody of her daughter, and that plaintiff be required to support said child. Her answer was signed by Hubert E. Olive, Jr., as her attorney. The divorce action was tried by Shaw, Judge presiding at the 19 September 1966 Civil Session of Davidson County. A judgment was entered granting the plaintiff an absolute divorce from the defendant. This judgment was signed on 23 September 1966.

On 13 October 1966, Shaw, Judge presiding, entered an order which is summarized as follows: The cause came on to be heard upon motion by defendant to determine the custody of Shelia Diane Swicegood. The court found as a fact that the court had theretofore awarded to W. Carlton Swicegood the custody of Shelia Diane Swicegood, and that the court had adjudged that the parties be granted an absolute divorce from each other, and it further appearing to the court that the custody of Shelia Diane Swicegood shall remain in her father, and that visiting privileges should be granted to the child's mother, it was ordered and decreed that the mother shall have the said Shelia Diane Swicegood with her from

10 a.m. until 6 p.m. every other Saturday beginning 15 October 1966.

Plaintiff excepted to the signing of this order and appeals.

Wilson and Beeker by Ned A. Beeker for plaintiff appellant.
No counsel for defendant appellee.

PER CURIAM. We have before us two addenda to the record. The first addendum is a petition of W. Carlton Swicegood verified by him on 19 July 1965, seeking the custody of his two and one-half year old daughter, Shelia Diane Swicegood, born of the marriage between him and respondent, and seeking an order requiring respondent to desist from interference with the custody of the said child. This petition states that it is brought pursuant to the provisions of G.S. 50-13, which is in error, because it was brought under the provisions of G.S. 17-39, as set forth in the order of Judge Crissman entered at the 30 July 1965 Session of the Superior Court of Davidson County, which appears in the second addendum to the record. The order dated 30 July 1965 and the judgment dated 14 October 1965 of Judge Crissman and the order of Judge Shaw dated 13 October 1966 in respect to the custody of Shelia Diane Swicegood were entered in the Superior Court of Davidson County, although in different cases.

G.S. 50-13 reads:

> "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately. . . ."

A judgment awarding the custody of a child under the provisions of G.S. 17-39 does not oust the jurisdiction of the court to hear and determine a motion in the cause for the custody of the children or a child in a subsequent divorce action between the

parties. *Robbins v. Robbins,* 229 N.C. 430, 50 S.E. 2d 183; *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71.

When plaintiff obtained an absolute divorce in the case heard by Judge Shaw, Judge Shaw after final judgment therein had exclusive jurisdiction by the specific terms of G.S. 50-13 to make such orders respecting the care and custody of Shelia Diane Swicegood as may be proper. *Coggins v. Coggins,* 260 N.C. 765, 133 S.E. 2d 700; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136; 3 Lee, N. C. Family Law, 3d Ed., § 222, p. 9. Professor Lee, *ibid,* p. 10, states: "A decree awarding the custody of a child in a *habeas corpus* proceeding does not oust the court of jurisdiction to hear and determine the custody of the child in a subsequent divorce proceeding under G.S. 50-13."

While the welfare of a child is always to be treated as the paramount consideration, the courts recognize that wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 133; 2 Strong's N. C. Index, Divorce and Alimony, § 24. We have frequently stated that the findings of the court in regard to the custody of children are conclusive when supported by competent evidence. 2 Strong's Index, *ibid.* Judge Shaw in his order dated 13 October 1966 found two facts, to wit, that the court has heretofore awarded to W. Carlton Swicegood the custody of the said Shelia Diane Swicegood and that the court has granted the parties an absolute divorce. Without finding any additional facts, Judge Shaw entered an order that the custody of the said Shelia Diane Swicegood shall remain with her father and that visiting privileges shall be granted to the child's mother, Peggy Loving Swicegood, from 10 a.m. until 6 p.m. every other Saturday beginning 15 October 1966. Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare. Annot. 88 A.L.R. 2d 148, §§ 3(d) and 6. Judge Shaw's order is fatally defective in that he has entered an order awarding the custody of Shelia Diane Swicegood to the father and visitation rights to the mother without any detailed findings of fact from which we can determine that his order is adequately supported by competent evidence, and is for the best welfare of Shelia Diane Swicegood. Judge Crissman's order and judgment in respect to the custody of Shelia Diane Swicegood did not oust the court of jurisdiction to hear and determine the custody of this child in the action in which the parties were subsequently divorced. Judge Shaw's order is vacated, and the case is remanded to the Superior Court of Davidson County

for detailed findings of fact by the judge of that court in the divorce action between the parties which was instituted and granted in the Superior Court of Davidson County, as to what is best for the welfare of this child, and for such orders as may be proper.

Error and remanded.

STATE OF NORTH CAROLINA v. HERBERT BLUE.

(Filed 3 May, 1967.)

1. Criminal Law § 162—

Where the record does not disclose what the answer of the witness would have been had the witness been permitted to testify, appellant has failed to show prejudicial error in the exclusion of the testimony, since the burden is upon appellant to show prejudicial error and it cannot be assumed that the answer of the witness would have been adverse to him.

2. Criminal Law § 161—

The charge of the court will be construed contextually, and exceptions to excerpts therefrom will not be sustained when the charge is free from prejudicial error when so construed.

APPEAL by defendant from *McLaughlin, J.,* November 1966 Session of the Superior Court of MOORE County.

The defendant was charged in a bill of indictment with the first degree murder of Eddie Cossom on 27 August 1966. Upon the call of the case for trial, the solicitor announced that he would not seek a verdict of murder in the first degree but would ask for a verdict of guilty of murder in the second degree or manslaughter. The defendant entered a plea of not guilty.

The State offered the evidence of Paul Brady, which was to the effect that the incident occurred at Alec Mason's Snack Bar; that he and the defendant were sitting on a bench talking when Eddie Cossom, the deceased, said "Keep your hands out of my face." Later, Eddie said in a louder tone, "Keep your hands out of my face, don't put your hands in my face," that the defendant then walked over and told the deceased, "Don't talk to my brother like that," to which Eddie replied, "I'm not talking. I ain't bothering you." The defendant again said "Just don't talk to my brother like that," and started firing; that the defendant had taken a pistol from his right pocket and had it in his right hand; that he fired four or five times. Eddie wasn't doing anything but just standing there. The last two times he (Blue) fired, Eddie threw up his hands and stood there for about

four or five seconds. On the last shot he threw up his hands like he was hit, then fell against the wall and slid on out in the floor. Blue left, telling the people not to come out in the yard. Eddie was on the floor making a noise, sort of groaning, and had a bloody spot on his left breast about as big as a nickel. The shooting was about 1 o'clock or 2 o'clock, and Eddie lived 25 or 40 minutes after he was shot. The undertaker removed his body about 4 o'clock in the morning.

The coroner testified that he found a bullet wound through the heart which caused the death of the deceased. There was another bullet wound through the neck. He examined the deceased on the floor and stated that Eddie had no weapon in his pockets.

Lonnie James testified that he was present at the time of the shooting, that Blue got up off the bench and told Eddie not to talk to his brother that way, walked about five feet until he got within three feet of Eddie when he pulled a pistol from his right pocket and started shooting in the direction of the deceased. He said he didn't hear Eddie say anything, or see him do anything, and did not see him with anything in his hand.

The defendant testified in his own behalf that the deceased had claimed he (Blue) was an undercover man and was there buying whiskey to turn people up, that the deceased opened his knife and that Brady, State's witness, told the deceased he had a knife and to cut him (Blue); that he, the defendant, started to go out the door, and he met Brady and took a gun from him, and that Brady told the deceased to cut him. The defendant denied that he owned a pistol or took one to the Snack Shop, and said he had never seen the deceased before that time. He said he fired because he couldn't get out of the place, that one man was coming on him with a knife, and that James was standing by the door and wouldn't let him get out, and that he took the pistol from James. The defendant's sister, Ruth Blue, and a brother, John Blue, gave similar accounts of the incident, saying that Cossom had a long knife and was coming on the defendant and got close enough to him to kick him in the stomach.

Upon a conviction of manslaughter, a prison sentence of not less than 15 nor more than 18 years was pronounced, and the defendant appealed.

Seawell & Seawell & Van Camp by H. F. Seawell, Jr., Attorneys for defendant appellant.

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

PER CURIAM. The defendant groups his exceptions into two categories. The first of them is to the action of the court in sustaining the State's objection to some eleven questions asked by his counsel, most of which were asked of the State's witnesses. On cross examination it would appear that the court was correct in all the rulings, but in none of them is the expected answer of the witness shown, and thus we are left to conjecture as to whether the answers would have been favorable to the defendant or unfavorable.

The ruling requiring that the proposed answers be shown is not a pure technicality — it is a practical requirement. Unless the answer would be favorable to the propounder, he has not been disadvantaged, and if he would have been, the trial court, and we, are entitled to that knowledge. Neither should be required to surmise what the answer might have been.

In *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342, Denny, J. (later C.J.) said:

> "The record does not disclose what the reply of the witness would have been if she had been permitted to answer; consequently, it is impossible for us to know whether the ruling was prejudicial to the defendant or not . . . the burden is upon the appellant not only to show error but to show that such error was prejudicial to her. We cannot assume that the answer of the witness would have been in the affirmative . . . it is what the witness would have said in response to the question, if she had been permitted to answer, that would enable us to determine whether the appellant was prejudiced by the ruling below."

Chief Justice Denny quotes from other cases:

> " 'Since the record fails to disclose what the witness would have said, we cannot assume that his answer would have been favorable to the defendant. It would be vain to grant a new trial upon the hazard of an uncertain answer by the witness.' " And " 'The record does not show what the answer of the witness would have been if permitted to answer. Competency of the testimony is not, therefore, presented by the assignments of error.' "

If the question and proposed answer are of substantial import, the answer can be supplied then by excusing the jury and having the witness make it for the stenographic record. If this procedure is not deemed practical and is too time-consuming, the answer may be supplied later by order of the court or upon agreement of counsel.

The court sustained the State's objection to two statements made by the defendant in his testimony but committed no error in doing so.

The other group of exceptions relate to the judge's charge. The criticism is directed towards the following summarized statements of the court: (1) that the solicitor was not seeking a verdict of first degree murder but a verdict of guilty of murder in the second degree or manslaughter; (2) that it was for the jury to determine the degree of guilt, if any, "or to say — that he is not guilty of either offense"; (3) the use of excessive force to repel an assault constitutes manslaughter; and (4) the court's reference to "perfect and imperfect right of self-defense."

An examination of the entire charge with particular reference to the exceptions reveals no error; and, in fact, it is a very clear, thorough and proper charge. Even taken alone, none of the exceptions are justified, and in each instance the quoted section is preceded, or followed by, full and correct statements of the law.

This was a typical case for determination by a jury. The State's evidence showed a completely unjustified killing, while the defendant's evidence would, if believed, justify a verdict of not guilty upon the grounds of self-defense. The evidence amply sustained a verdict of guilty of manslaughter, and in the trial we find

No error.

STATE v. FREDERICK ELDRIDGE MARTIN.

(Filed 3 May, 1967.)

1. Indictment and Warrant § 17—

Discrepancies in the appellation given by the witnesses to a commercial establishment do not constitute a fatal variance when it is apparent that the names were used interchangeably by the witnesses to identify the same establishment named in the bill of indictment.

2. Same—

Defendants were charged with breaking and entering and larceny from a building located at "1720 North Boulevard." The witnesses referred to the location as "1720 Louisburg Road." *Held:* Averments in the indictment as to the address were not descriptive of the offenses, and the bill of indictment being specific in describing the property taken, there was no fatal variance, the possibility of double jeopardy being obviated by the right to offer extrinsic evidence showing that both names were used for the same street.

3. Criminal Law § 31—

A court will take judicial notice of the names of streets, squares and public grounds of the municipality in which it is sitting.

APPEAL by defendant from *Braswell, J.*, 2 January 1967 Regular Criminal Session of WAKE.

Defendant, Fred Eldridge Martin, and three other defendants were charged in a bill of indictment with breaking and entering, larceny of property of the value of $10,000, and receiving stolen goods. A nonsuit was entered on the count of receiving. The count as to breaking and entering charged that defendant broke and entered a certain building "occupied by one Hill's Sporting Goods, Inc., a corporation, located at 1720 Louisburg Road, Raleigh." Martin entered a plea of not guilty. The three codefendants, Partozes, Hart and Griffin, each entered a plea of guilty as charged.

The State offered evidence of Edward Martin Hill, who testified, *inter alia,* substantially as follows: "I am Edward Martin Hill. My business is Hill's Inc. That business is incorporated. The business is located at 1720 North Boulevard, Raleigh." He stated that the building was entered through a rear window after the bars had been pried loose. He further testified to other damage to the building, and that guns, pistols, and other merchandise of the value of $10,000 were removed from the premises.

Defendants Griffin and Hart testified that they went out to Hill's in defendant Martin's car, and that Griffin and Partozes broke and entered the building while Martin and Hart kept a lookout. A door was broken from the inside and Martin backed his car up to the door, where the merchandise was loaded into the car and carried away by defendants.

Defendant Martin offered no evidence. The jury returned verdict of guilty of breaking, entering and larceny as charged in the bill of indictment.

The counts were consolidated for the purpose of judgment and defendant was sentenced to the State Prison for a term of eight years. Defendant appealed.

Attorney General Bruton and Staff Attorney Wilson B. Partin, Jr., for the State.

Boyce, Lake & Burns for defendant appellant.

PER CURIAM. Defendant contends there was a fatal variance between the indictment and proof, in that the indictment charges defendant broke and entered "Hill's Sporting Goods, Inc., 1720

Louisburg Road, Raleigh," and in the proof the corporation was variously referred to as "Hill's, Inc.," "Hill's Sporting Goods," or "Hill's," located at 1720 North Boulevard. The names were used interchangeably by the witnesses to identify the same occupant of the building and the same owner of the property.

In *State v. Wyatt,* 254 N.C. 220, 118 S.E. 2d 420, the indictment for embezzlement alleged ownership in the "Pestroy Exterminating Company." The bill of particulars laid the ownership in "Pestroy Exterminators, Inc.," and the witnesses in their testimony referred to both of those names and "Pestroy Exterminating Corporation" interchangeably. The court there held no fatal variance existed between the allegations and proof, it being apparent that all the witnesses were referring to the same corporation. In the instant case, it is apparent from the record that all the witnesses were talking about the same corporation. See also *State v. Wilson,* 264 N.C. 595, 142 S.E. 2d 180.

Defendant further contends fatal variance between the address alleged in the indictment and the proof offered. "Where an indictment alleges the particular place where an act took place, and such allegation is not descriptive of the offense, and is not required to be proved as laid in order to show the court's jurisdiction because such jurisdiction is established by other evidence admissible under other allegations, a variance which does not mislead accused or expose him to double jeopardy is not material." 42 C.J.S., Indictments and Informations, § 256, p. 1276.

Here, the allegations as to address were not descriptive of the offense of breaking, entering and larceny, and the bill of indictment was so specific as to contain as a part thereof an itemized, detailed "description of property taken." The bill of indictment described the building so as to remove it from the application of G.S. 14-72 and established jurisdiction in Wake County Superior Court. Thus defendant could not have been misled in the preparation of his defense.

The possibility of double jeopardy would be cured by extrinsic evidence that 1720 Louisburg Road and 1720 North Boulevard are one and the same place. In the case of *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871, the Court, speaking through Ervin, J., stated:

> "It is an ancient and basic principle of criminal jurisprudence that no one shall be twice put in jeopardy for the same offense.
>
> . . .
>
> "Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first is always to be determined by the court from an inspection of

the two indictments. *S. v. Nash, supra,* (86 N.C. 650). Whether the same evidence would support a conviction in each case is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offense charged in the first with that set forth in the last indictment. *S. v. Bell, supra* (205 N.C. 225, 171 S.E. 50)."

Moreover, the road referred to serves traffic from downtown Raleigh to Louisburg and other northern points, and is one of the most used thoroughfares in the City of Raleigh. Upon the Court taking judicial notice that Louisburg Road and North Boulevard are one and the same road, the number 1720 would specify the exact situs. "Courts sitting in a city judicially notice the streets, squares, the public grounds thereof, their location, and relation to one another, and the direction in which they run as laid down on an official map of the city." 20 Am. Jur., Evidence, § 54, p. 78. The variance was not fatal and did not require a nonsuit.

We have carefully examined those portions of the charge of the court which defendant assigns as error, and, reading the same contextually, we find no prejudicial error.

No error.

STATE v. HAROLD SMITH.

(Filed 3 May, 1967.)

1. Assault and Battery § 14—

Testimony of one witness to the effect that he saw defendant and his victim fighting, of another that he saw defendant chasing his victim with a knife, of a third that after defendant was subdued the victim was bleeding profusely, with medical testimony that the wounds were extensive and would have caused death but for prompt medical treatment, *held* sufficient to be submitted to the jury, notwithstanding testimony of the victim tending to exculpate defendant.

2. Constitutional Law § 30— Record held not to disclose violation of defendant's constitutional right to speedy trial.

Defendant contended that the prosecution against him should be dismissed because of the elapse of some thirty months from the time of the offense to the time of trial. The record disclosed that on two occasions when defendant was called for trial, mistrials were ordered on his motion because of unfavorable publicity, that after the second trial defendant requested that he be tried within 90 days, but that it was impossible to do so because of congestion of the docket and the necessity of giving

priority to prisoners in jail on default of bond, and that defendant was serving a life sentence and a concurrent 36 year Federal sentence at the time of the offense charged and was getting credit upon the service of these sentences during the delay. *Held:* The record discloses that defendant was tried as soon as practical after delays granted on his own motion, and that defendant was not prejudiced by the delay.

APPEAL by defendant from *Braswell, J.*, at the January, Regular Criminal Session, 1967, of WAKE County Superior Court.

On 26 August 1964 the defendant Harold Smith was serving a life sentence in the State Prison of North Carolina, and he was also serving a federal sentence of 36 years. On that date he was charged with committing an assault with a deadly weapon with the intent to kill Jessie Perry, who was also serving a life sentence.

The defendant was placed on trial on the felonious assault charge at the December Term 1964 of Wake County Superior Court. During the trial, and upon motion of his counsel, because of unfavorable newspaper articles, a mistrial was ordered.

He was again placed on trial for this offense at the July 1965 Term, and because of a repetition of the unfavorable publicity during the trial, the motion by his counsel for a mistrial was again granted.

The defendant was placed on trial for the third time at the January Term 1967. The State offered the evidence of L. V. Stephenson, a prison employee, that he saw the defendant and Jessie Perry fighting, that Stephenson attempted to separate them and Perry ran down the hall, that Smith ran after him, having a knife in his hand, and that during the fight Smith was swinging both his hands at Perry. Sgt. Rice testified that he saw Smith chasing Perry with a knife. Captain Garrison testified that he also saw Smith chasing Perry with a dagger and that after Smith had been subdued that Perry was bleeding extremely, that he had a cut on his forehead and left forearm. Doctor Charles Phillips attended Perry and testified that he was "bleeding profusely from four wounds — one on the left wrist, one on left forehead, left palm and left chest," and that in his opinion Perry would have died had he not received prompt treatment.

The defendant did not testify but called his alleged victim, Perry, as a witness. He said that "another guy," whom he had never seen before and whose name he did not know, started cutting him, that Smith came up and "grabbed at this guy and when he did, I ran into the back hall . . . If Smith had a knife, I did not see it . . . (he) did not cut me. . . ."

Upon a verdict of guilty of an assault with a deadly weapon, the

Court imposed an additional two-year prison sentence, and the defendant appealed.

George M. Anderson and E. Ray Briggs, attorneys for defendant appellant.

T. W. Bruton, Attorney General, and George A. Goodwyn, Assistant Attorney General, for the State.

PER CURIAM. The defendant excepts to the refusal of the court to allow his motion for nonsuit at the close of the State's evidence and at the close of all the evidence. However, from a consideration of the evidence related in the statement of facts, we hold that it was sufficient to support the verdict and repel the motions for nonsuit.

The defendant strenuously argues that the cause against him should have been dismissed for failure to grant a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. He offered evidence that between the date of the alleged offense and his last trial that a period of some thirty months had elapsed, during which time he was confined to a small cell on death row at the State's Prison. He testified that when the second mistrial occurred in July 1965 that he requested that he be tried again within ninety days, and that he wrote the solicitor, the judge, the Attorney General, and others, on numerous occasions, requesting a speedy trial, but sustained a burdensome delay.

The State in reply called attention to the fact that the defendant was tried promptly the first time, and that a mistrial resulted upon the defendant's motion; that he was tried again within a few months, and the second mistrial became necessary and was granted upon the defendant's motion.

In response to the defendant's motion to dismiss, the solicitor asserted that he had a limited number of terms of court during the period in question, that there were always many prisoners in jail because of their inability to give bond, that there were some 300 cases on the docket, that it was not practical to dispose of the case earlier, and that defendant has suffered no deprivation, since he was serving and getting credit upon his sentence while awaiting trial.

In the recent case of *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309, Justice Sharp discussed the subject of speedy trials in connection with the Sixth Amendment. She quoted from 22A C.J.S., Criminal Law, § 467(4) as follows:

> "Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportions: the

length of the delay, the reason for the delay, the prejudice to defendant, and waiver by defendant."

She further stated, "the right to a speedy trial is not violated by unavoidable delays nor by delays caused or requested by defendants."

While it is true that it was some thirty months from the time of the event until a jury trial was completed, it must be remembered that two other trials had been held earlier and that due to no fault on the part of the State, but in the interest of the defendant's welfare, mistrials were ordered. Had the defendant been held in jail as a prisoner because of his inability to make bond, we are quite sure that he would have received an earlier trial, since the solicitors generally attempt to try jail cases before getting to those where the defendants are at liberty on bond. In this case the defendant has suffered no prejudice by the delay. Having a life sentence imposed in 1961 to serve and a 36-year federal sentence, running concurrently with it, the defendant could have had no practical or substantial hope of pardon or parole prior to the time of his 1967 trial. Meanwhile, he was getting credit upon the service of these sentences so that we cannot find that he suffered any disadvantage by the delay.

In *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891, the following language was used:

> "The Court said in *Beavers v. Haubert,* 198 U.S. 77, 49 L. ed. 950, 954: 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'
>
> "The constitutional right to a speedy trial is designed to prohibit arbitrary and oppressive delays which might be caused by the fault of the prosecution. *Pollard v. United States,* 352 U.S. 354, 1 L. ed. 2d 393; *State v. Hadley, Mo.,* 249 S.W. 2d 857. The right to a speedy trial on the merits is not designed as a sword for defendant's escape, but as a shield for his protection."

In view of the above succinct statements of the purpose of the constitutional safeguard and the exhaustive and thorough opinion of Justice Sharp in the *Hollars* case, we find it unnecessary to discuss the question further.

No error.

GRACE FERGUSON GARNER v. JOHNIE D. GARNER.

(Filed 3 May, 1967.)

Divorce and Alimony § 18; Appeal and Error § 46—

An order of the court directing the husband to make specified payments to his wife until the birth of their child, without any provision for payments thereafter, expires upon the birth of the child, and upon the hearing of a motion for subsistence and counsel fees *pendente lite* made after the birth of the child it is error for the court to hold that the prior order should not be modified, and the discretionary order of the court that the matter should be continued under the prior order will be vacated and the cause remanded, since such discretion was not exercised with respect to the controlling factual conditions.

APPEAL by plaintiff from *Johnston, J.,* 24 October 1966 Civil Session of the Superior Court of RANDOLPH County.

The defendant's first wife died 28 September 1965. Less than six months later he married the plaintiff who was then pregnant with his child. The child was born within six months of the marriage. Some ten weeks later, the new marriage ended in separation, and the defendant and his bride entered into an agreement whereby the husband agreed to pay $60.00 per month to his wife for six months and to pay $30.00 per month for the support of the expected child. Each released the other from any more obligations. This agreement was approved in accordance with the statute in which a justice of the peace found that it was not unreasonable or injurious to the wife.

The plaintiff initiated this action on 19 July 1966 in which she sought support under the provisions of G.S. 50-16, alleging that the separation agreement was, on its face, unreasonable to her, and that the defendant was earning $1,000.00 per month. When the matter came on before Judge Latham, the parties agreed upon a payment to the wife of $100.00 per month, until the birth of the child, without prejudice to the claims of either. This agreement was put in the form of an order and was signed by Judge Latham. It contained the following:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, in the discretion of the court:

"I. That the defendant shall pay into the office of the Clerk of Superior Court of Randolph County the sum of One Hundred and 00/100 ($100.00) Dollars per month for the support of the plaintiff. That the first payment shall be due today and a like sum of One Hundred and 00/100 ($100.00) Dollars shall be paid on the 1st day of each successive month thereafter until the birth of the child. That the clerk of Superior Court shall disburse these sums to the plaintiff."

The order contained no provision for the support of the wife other than the section quoted above.

The defendant was cited for contempt for failing to comply with his agreement *and* the order of the court, and upon a hearing before Judge Walter E. Brock on 19 September 1966, the court found that "the defendant was in arrears on the payments due on said order at the time a warrant issued for him for issuing a worthless check, however, since said time the court further finds as a fact that the defendant has not only paid the payment due that was in arrears at the time of the issuing of this order but the September payment as well." The judge then ordered that the defendant pay plaintiff's attorney $25.00 for representing the plaintiff in this contempt matter. This is the import of the order, there being no finding as to contempt, or the lack of it, and no order discharging the defendant nor providing for future payments.

On the same date, but in an additional order, Judge Brock allowed the motion of the defendant that parts of Mrs. Garner's complaint be stricken and allowed her 20 days within which to file an amended complaint. This having been done, the plaintiff again sought an order of support, and a hearing was had before Judge Johnston on 25 October 1966. The resulting order was as follows:

> "This matter coming on to be heard before the undersigned Judge presiding at the October 24, 1966 Civil Session of Superior Court of Randolph County upon motion by the plaintiff for alimony *pendente lite,* custody and support of the minor child born of the marriage of the plaintiff and the defendant and for reasonable counsel fees in the above entitled action and it appearing to the court that an order has heretofore been filed in the cause on August 9, 1966, signed by his Honor James F. Latham and that no modification of that order should be made at this time.
>
> "THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED in the discretion of the court that this matter be continued under the order heretofore entered in the cause."

From the foregoing order of Judge Johnston, the plaintiff appealed.

Ottway Burton, Attorney for plaintiff appellant.

Walker, Anderson, Bell & Ogburn by Deane F. Bell, Attorneys for defendant appellee.

PER CURIAM. The law applicable to this case is well stated in *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745, where Seawell, J., speaking for the Court, said:

> "The allowance of support and counsel fees *pendente lite* in a suit by the wife against the husband for divorce or alimony without divorce is, in certain aspects, within the discretion of the court. It is not, however, an absolute discretion to be exercised at the pleasure of the court and unreviewable. It is to be exercised within certain limits and with respect to factual conditions which are controlling. Generally speaking (and excluding statutory grounds for denial), allowance of support to an indigent wife while prosecuting a meritorious suit against her husband under G.S. 50-16, for alimony without divorce — and in similar actions here and elsewhere — is so strongly entrenched in practice as to be considered an established legal right. In such case discretion is confined to consideration of the necessities of the wife on the one hand, and the means of the husband on the other. But to warrant such allowance the court is permitted and expected to look into the merits of the action, and would not be justified in allowing subsistence and counsel fees where the plaintiff, in law, has no case.
>
> "The Court is of opinion that the jurisdiction of the court invoked under G.S. 50-16, is not barred by the separation agreement pleaded, and that within the frame of her present action, the plaintiff may seek such relief as she may be entitled to have." (Citations omitted)

Judge Latham's order of 9 August 1966 had no provision for the support of the expected child which was born one month later, September 9, 1966. The order provided for the support of the mother "until the birth of the child." Consequently, the order had expired when the cause was heard before Judge Johnston on 25 October 1966.

Upon the admission of the defendant before Judge Johnston that he was making $200.00 a week and the allegation by the wife that she had no income whatever except from the charity of her people, the court was required to exercise its discretion. Although the order of Judge Johnston includes the phrase "in the discretion of the court," it would appear from this record that it was not "exercised with respect to factual conditions which are controlling," and that the plaintiff is entitled to an award for herself and her baby unless upon a further hearing facts are shown which do not appear in the present record.

The cause is remanded for a hearing upon the application of the plaintiff for support of herself and her child and for the exercise of the sound discretion of the court.

Error and remanded.

STATE v. JAMES F. KINLEY.

(Filed 3 May, 1967.)

Searches and Seizures § 1—

Where, upon the arrest of defendant upon a fugitive warrant, an incriminating article is in plain view of the officers upon entering the room to which defendant admitted them, such article is properly admitted in evidence, since where no search is required the constitutional guaranty is not applicable.

APPEAL by defendant from *Brock, S.J.*, 24 October 1966 Conflict (C) Criminal Session of MECKLENBURG.

Defendant was arrested on a fugitive warrant in York County, South Carolina, and upon waiver of extradition was returned to Mecklenburg County, North Carolina, to answer indictment charging forgery and a separate count of uttering a forged instrument. Upon the trial of the case, the State introduced evidence tending to show that defendant on or about 11 June 1966 went to the Shuffletown Grocery on Highway 16 in Mecklenburg County and presented a check in the amount of $62.33, payable to Samuel R. Martin and signed by Jack B. Hyland. Above the signature purporting to be that of Jack B. Hyland was printed: "Jack B. Hyland Plumbing Company." The name "Samuel R. Martin" was indorsed on the back of the check, and defendant presented a North Carolina driver's license issued to Samuel R. Martin as proof of identification. In return for the check, W. W. Turner, an employee of Shuffletown Grocery, delivered merchandise in the amount of five or six dollars, and the balance in cash.

W. W. Turner testified for the State, identified the defendant as being the person representing himself to be Samuel R. Martin, and further testified: "I am saying that at the time I did not recognize him, but the man that gave me this check is him, and that's who signed the check."

One Samuel R. Martin testified that he had lost his billfold containing his driver's license sometime in 1965.

Jack B. Hyland testified that he is the sole proprietor of a plumbing company located on Davidson Street, Charlotte, North Carolina, and that he did not make out and sign the check presented to the Shuffletown Grocery, nor did he authorize anyone to make out and sign the check. He further testified that during June 1966 his place of business was broken into and a check writing machine and a number of his payroll checks were stolen therefrom. He also gave testimony tending to show that the check writing machine taken from his premises was used in writing the check given to Shuffletown Grocery.

Two officers from South Carolina testified that they arrested defendant in a motel room in York County, South Carolina, under a fugitive warrant. One of the officers, John Straight, testified: "I knocked on the door. He admitted me to the room. When the defendant came to the door and let me in the room I served a fugitive warrant on him. When I got into the room I saw the check writing machine on the dresser. . . . When I walked in this machine was in plain sight."

Further evidence was introduced tending to show the handwriting on the forged check was the handwriting of defendant.

Defendant offered no evidence. The jury returned a verdict of guilty on both counts and judgment was entered thereon. Defendant appealed.

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

T. O. Stennett for defendant.

PER CURIAM. Defendant contends there was error in admitting State's Exhibit #2, the check writing machine, into evidence. The officer testified that the machine was in plain view and that he did not have to search to find the machine. In the case of *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394, Denny, J. (later C.J.), speaking for the Court, said:

> ". . . . it is said in 47 Am. Jur., Searches and Seizures, section 20, page 516: 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand.' "

Defendant further contends there is not sufficient evidence that

a forgery occurred in Mecklenburg County to repel his motion for nonsuit. The witness W. W. Turner identified the defendant and stated he was the person who signed the check cashed at Shuffletown Grocery. This evidence in connection with the other circumstances furnished plenary evidence to justify the denial of defendant's motion for nonsuit on the count of forgery.

We find no prejudicial error in the trial below.

No error.

LELIA CURTIS CAMPBELL v. MARCUS E. CAMPBELL.

(Filed 3 May, 1967.)

Divorce and Alimony § 13—

In this suit by the wife for divorce on the ground of separation, the husband's evidence is held insufficient to warrant the submission of the issue of the wife's wrongful abandonment of him, interposed by him as a defense to her action.

APPEAL by defendant from *Farthing, J.*, January 2, 1967 Conflict Civil Session, RANDOLPH Superior Court.

The plaintiff (wife) instituted this civil action on September 15, 1965 against the defendant (husband) for absolute divorce on the ground the parties are separated and have continuously lived separate and apart from each other since August 1, 1962. The parties were married June 3, 1934 and six children were born of the marriage, four are emancipated. The two youngest are ages 10 and 12. They spend most of the time with the defendant.

The defendant filed answer and testified as a witness. Both in the answer and as a witness, he admitted the marriage and the separation as alleged. As a further defense, however, he alleged the plaintiff, without cause or excuse, abandoned him. Some rather nebulous allegations of wrongdoing were set out in the further defense.

In his testimony, the defendant admitted the parties had some differences, that the plaintiff wanted to leave, and that he actually moved her household furnishings to her new apartment. He testified: "As to her taking the money she earned and buying clothing and food for the family and me, she was laying up; that's what the biggest trouble . . . I didn't try to keep her from leaving me on August 1, 1962, except that I said, 'You can stay on my terms and conditions; that you be a good wife and mother.'" The defendant

tendered the issue of abandonment which the Court refused to submit. The jury answered the other issues in plaintiff's favor. From the judgment of absolute divorce, the defendant excepted and appealed.

Ottway Burton for defendant appellant.

Walker, Anderson, Bell & Ogburn by John N. Ogburn, Jr., for plaintiff appellee.

PER CURIAM. The defendant's evidence showed a separation of the parties because the wife would not stay "on his terms". He admitted moving her and her furnishings to a new apartment. Thereafter, the parties lived separate and apart for more than three years before the wife instituted this action. For at least four months during the separation, the plaintiff kept and supported the two minor children. The defendant did not claim he contributed anything to the plaintiff's support, or the children's while they were with the plaintiff. He remained in the house both had purchased. These facts established by the defendant's evidence were insufficient to warrant an issue of wrongful abandonment.

No error.

STATE v. SAMUEL MONROE WILSON ALIAS COY SCARBORO.

(Filed 3 May, 1967.)

APPEAL by defendant from *McLaughlin, J.,* 28 November 1966 Criminal Session of STANLY.

At the November-December 1966 Criminal Session of Stanly County Superior Court the Grand Jury returned a true bill in case No. 1713, charging the defendant, Samuel Monroe Wilson, alias Coy Scarboro, along with Robert M. Greer and Frank Wallace, in a three-count bill of indictment with the (1) felonious breaking and entering of a building occupied by one John Cranford, d/b/a Richfield Farm Supply, (2) larceny therefrom of personal property of the value of more than $200, and (3) receiving said personal property knowing the same to have been feloniously stolen.

At the same term, a true bill was returned in case No. 1714, charging Samuel Monroe Wilson with the felonious breaking and entering, larceny of property of the value of more than $200, and

with receiving personal property knowing the same to have been stolen, from a building occupied by Herbert Franklin Eudy and Albert J. Eudy. The State took a nol pros with leave in case No. 1714.

Upon a finding of indigency, the court appointed counsel to represent defendant. Defendant, through his counsel, entered a plea of guilty on the count of felonious breaking and entering of Richfield Farm Supply building and on the count of larceny therefrom of personal property of a value of more than $200. Upon entry of the pleas, the court examined defendant concerning his pleas, and the court examination disclosed, among other things, that defendant voluntarily and freely authorized his attorney to enter the pleas, that he was satisfied with his attorney, and, realizing the court could impose a sentence of 20 years, he still of his own free will assented to the entry of the pleas.

Jack B. Richardson, Special Agent of the State Bureau of Investigation, testified, *inter alia,* that Richfield Farm Supply had been broken into by prying open a rear window. He further testified as to the items taken from the building, and that when defendant was arrested he had a watch in his possession which had been taken from the building.

Defendant testified and admitted that he broke into Richfield Farm Supply, but denied being guilty of other charges referred to during the trial. He also testified as to his past criminal record.

The court entered judgment sentencing defendant to ten years on the charge of breaking and entering, and to ten years on the charge of larceny, the sentence in the larceny count to run consecutively and not concurrently with the judgment pronounced in the breaking and entering count. Defendant appealed.

Attorney General Bruton and Asst. Attorney General Millard R. Rich, Jr., for the State.

Charles P. Brown for defendant.

PER CURIAM. The two questions presented for review are:

1. Was the sentence of ten years imposed in this case upon the defendant's plea of guilty to breaking and entering "cruel and unusual punishment" within the prohibition of the Eighth Amendment to the Federal Constitution?

2. Was the sentence of ten years imposed in this case upon the defendant's plea of guilty to larceny of property of a value of more than two hundred dollars, to run consecutive to the

sentence in the breaking and entering case, "cruel and unusual punishment" within the prohibition of the Eighth Amendment to the Federal Constitution?

The sentences imposed by the court do not exceed the statutory maximum. 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; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; *State v. Daniels,* 197 N.C. 285, 148 S.E. 244.

Defendant was represented by court-appointed counsel and aware of the sentences that could be imposed on him upon his pleas of guilty. He intelligently, understandingly and intentionally pleaded guilty as charged to two counts of the bill of indictment.

We find no violations of defendant's constitutional rights and no error appears on the face of the record proper.

No error.

ELLA MAE TEDDER v. PEPSI-COLA BOTTLING COMPANY OF RALEIGH, N. C., INC. AND COLONIAL STORES, INC., T/A K-MART FOODS.

(Filed 10 May, 1967.)

1. Food § 1—

Negligence on the part of the bottler is not established by the showing that one bottle alone out of some eight million contained a deleterious substance.

2. Food § 2—

The retailer of food sells to the consumer under implied warranty of fitness for human consumption, and may be held liable by the consumer for damages resulting from breach of such warranty.

3. Food § 3—

A retailer buying a product for human consumption in a sealed container may hold the jobber liable for breach of implied warranty of fitness, and the jobber, in turn, by showing loss, may hold the manufacturer, processor or bottler liable.

4. Food § 1— Evidence in this case held for jury on issue of bottler's liability to ultimate consumer on implied warranty.

The evidence tended to show that defendant bottler advertised its product by appeals to consumers, that the bottler's agent delivered to the

retailer bottles prepared by the bottler and placed them on the retailer's shelves, that plaintiff took a pack from the shelf, paid the retailer, and placed the bottles in a cabinet at his home, and, the following day, opened a bottle, drank a part therefrom, and became sick as a result of a deleterious substance therein. *Held:* The evidence is sufficient to be submitted to the jury on the theory of the bottler's liability to plaintiff on implied warranty in view of the manner in which the drink was advertised and traveled from the bottler to plaintiff.

PARKER, C.J., concurs in result.

APPEAL by plaintiff from *Mallard, J.*, Second October Regular Civil Session, 1966, WAKE Superior Court.

The plaintiff, Mrs. Ella Mae Tedder, instituted this civil action for damages against Pepsi-Cola Bottling Company of Raleigh, N. C., Inc., the bottler, and Colonial Stores, Inc., t/a K-Mart Foods, also of Raleigh, the retailer of Pepsi-Cola.

The plaintiff alleged she was seriously injured and damaged as a result of having consumed part of a bottle of Diet Pepsi-Cola which contained contaminated and deleterious matter. She alleged defendant Pepsi-Cola Company, by way of promotion and advertising addressed directly to the consumer over radio, television and in the press, impliedly warranted Diet Pepsi-Cola as wholesome and fit for human consumption.

As against the retailer, plaintiff alleged she purchased the contaminated Diet Pepsi-Cola from defendant Colonial Stores, Inc. and by offering the same for sale and selling it to her, knowing it would be used as a beverage and for no other purpose, Colonial impliedly warranted its wholesomeness and fitness for that purpose. The plaintiff alleged breach of warranties against both defendants and her damages as a result of her having relied upon them.

The defendant Pepsi-Cola Bottling Company of Raleigh, N. C., Inc. filed answer, admitting the identity of the parties, their location, residences and places of business as alleged in the complaint, but denying all its other material allegations. The co-defendant, Colonial Stores, Inc., on March 18, 1966, filed a demurrer based upon the alleged failure of the complaint to state a cause of action for that the complaint alleged the deleterious substance was in the bottle when it left the bottler's plant and remained in the same condition until it was opened in the plaintiff's home. However, the record does not disclose the disposition of the demurrer, but on the contrary, does show that on September 27, 1966 the Colonial Stores, Inc. filed an answer denying liability and alleging a cross-action against the co-defendant based on the bottler's implied warranty of the drink as fit for human consumption and, for any breach of

that warranty, the bottling company should be adjudged primarily responsible.

The evidence disclosed the Pepsi-Cola Bottling plant and Colonial Stores are both located on the Wake Forest Road in Raleigh. Colonial sells 12,000 to 15,000 bottles of Pepsi per week. All are bottled by the co-defendant in its Raleigh plant and delivered by it and placed on the Colonial Stores shelves where Colonial's customers serve themselves, pick up the packs of bottles and pay as they check out.

On June 30, 1965 the plaintiff and her husband purchased a six pack of Diet Pepsi from Colonial Stores, took the pack home and placed it in a cabinet. About noon the next day the plaintiff's husband opened one of the bottles, poured part of the contents over clean ice cubes, in a clean glass, and handed it to the plaintiff, who drank part of it before she detected anything wrong with the drink. She was not accustomed to the taste of Diet Pepsi-Cola and did not realize until she had taken a quantity of the drink that it contained a deleterious substance.

On making the discovery, she called a doctor, who treated her and testified as to her suffering and distress resulting from the contaminated drink. A chemist analyzed the remaining contents of the bottle and described the contamination to the Court and jury.

The plaintiff offered the adverse examination of Mr. Gaddy, President of Pepsi-Cola Bottling Company of Raleigh, who testified that his plant bottles 200,000 drinks per day. "Our company has advertised and promoted Diet Pepsi to the public. The advertisement consisted primarily of TV commercials. . . . we did run commercials, . . . on both of the stations (Raleigh and Durham). . . . the advertising commercial, it is a song or jingle . . . 'Come alive, you are in the Pepsi Generation' . . . the purpose of these advertisements and commercials were *(sic)* to increase the consumption of Diet Pepsi-Cola by the public in this area. . . . Our company delivers to the K-Mart (Colonial) and puts them on the rack."

Mr. Garris, manager of K-Mart (Colonial) testified Pepsis are delivered to the store and placed in the racks by the bottler. "We never touch the Pepsis."

Plaintiff's husband testified he picked up the six pack of Pepsis and carried them home and at the time he opened the bottle, it was in the same condition as when it came from the store. At the conclusion of testimony, the Court entered judgments of involuntary nonsuit against both defendants. The plaintiff excepted and appealed.

Yarborough, Blanchard, Tucker & Yarborough for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by I. Edward Johnson for defendant Bottling Company.

Smith, Leach, Anderson & Dorsett by Henry A. Mitchell, Jr., for defendant Colonial Stores.

HIGGINS, J. The testimony presented at the trial was free from material conflict. The President of Pepsi-Cola Bottling Company of Raleigh, N. C., Inc. was adversely examined as plaintiff's witness. He testified: "During the month of June, 1965, we would run 200,000 bottles per day. It is not uncommon to run 10,000 cases or 240,000 bottles a day on the equipment. . . . during the month of June, 1965, to my knowledge we received no complaint from anyone saying that they had purchased Pepsi or Diet Pepsi containing foreign or deleterious substance." During the month, approximately 8 million bottles were filled. Under the rules heretofore applied, liability of the bottler on the basis of negligence is not established by showing that one bottle out of 8 million contained a deleterious substance. *Enloe v. Bottling Co.*, 208 N.C. 305, 180 S.E. 582; *Collins v. Bottling Co.*, 209 N.C. 821, 184 S.E. 834; *Jenkins v. Hines Co.*, 264 N.C. 83, 141 S.E. 2d 1.

If the bottling company is to be held liable in this case, it must be on implied warranty. The cases are many which hold that warranty of fitness, either express or implied, is contractual; that the contract extends no further than the parties to it and that privity to the contract is the basis of liability. *Murray v. Aircraft Corp.*, 259 N.C. 638, 131 S.E. 2d 367; *Terry v. Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753. However, our Court has heretofore relaxed the privity rule in certain cases involving food and drink because of their importance to health. "Authorities generally hold that the manufacturer, processor and packager of goods and the bottler of drinks intended for human compumption are held to a high degree of responsibility to the ultimate consumer to see to it that the food and drink are not injurious to health." *Terry v. Bottling Co., supra.* The liability generally has been based on negligent failure to discharge this high degree of responsibility. However, in *Terry,* liability to the consumer on warranty (contract law) may arise if the warranty is by representation addressed to the ultimate consumer by label attached to the container. See also *Service Co. v. Sales Co.*, 261 N.C. 660, 136 S.E. 2d 56.

To a certain extent, the Court has already chipped away some of the rigidity which heretofore has limited warranty liability to the

parties to the contract. The limitation of warranty to the contracting parties has been under vigorous assault over all the country. The assault has been successful in all but a few jurisdictions. See Prosser, THE ASSAULT UPON THE CITADEL, 69 Yale L.J. 1099; 50 Minn. L. Rev. 791; 18 Hastings L. J. 9; 36 S. Cal. L. Rev. 291; 16 Baylor L. Rev. 337; 37 Mich. L. Rev. 1; 19 N. C. L. Rev. 551; 24 Va. L. Rev. 134; 74 A.L.R. 2d 1111. In addition, see many authorities cited and discussed by Sharp, J., concurring in *Terry v. Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753, 77 A.L.R. 2d 215. In these citations, hundreds of cases are listed.

Under our present rules, this is where we are in the sale of food and drink for human consumption. The retailer sells to the consumer under implied warranty of fitness. For breach of that warranty the damaged consumer may recover. The retailer bought the product under an implied warranty of fitness from the jobber, whom he may hold for breach of warranty. The jobber, in line, by showing loss, may go back to the manufacturer, processor, or bottler on whom the final responsibility rests. Step by step the liability goes back to the source. *Service Co. v. Sales Co., supra; Ashford v. Shrader,* 167 N.C. 45, 83 S.E. 29; 77 C.J.S., Sales, Sec. 384, p. 1338. Admittedly there are some objections to holding the manufacturer, processor, or bottler of food or drink as implied warrantors in favor of the ultimate consumer: (1) Lack of control over the product after the first delivery and (2) extending the implied warranty from the producer to the ultimate consumer opens the door for fraudulent claims. Most appellate courts have brushed aside these objections on the ground they apply horse and buggy law to the jet age.

In this case these are the facts before us: Pepsi-Cola Bottling Company of Raleigh, N. C., Inc. advertised its product over TV stations in Raleigh and Durham, addressing its appeal to the consumer, intending thereby to promote sales. The bottler's agent completed the delivery of the bottles to Colonial's store by placing them on Colonial's shelves. The plaintiff took a six pack of Diet Pepsi from the shelf, paid Colonial, placed the bottles in the cabinet at home, and the following day plaintiff drank the deleterious substance, became sick, and suffered the harmful result. Only the bottler and the plaintiff actually handled the drink. The Colonial Store sold it to the claimant who drank it. Implied warranty attached and made out a case for the jury against Colonial. Under the authorities and for the reasons herein discussed, we hold the bottler, by advertising and sales promotion addressed to the consumer, induced her to "Come Alive" and that she was "in the Pepsi Generation". The advertising was intended to promote the use by the consumer to

whom the advertising was addressed. The evidence in this case was sufficient to go to the jury on the theory of implied warranty resulting from the manner in which the Pepsi-Cola was advertised and traveled from the bottler to the plaintiff.

The questions whether by marketing food and drink in sealed containers the processor thereby impliedly warrants fitness for human use and whether the warranty extends directly to the ultimate consumer who breaks the seal, are questions not fully presented on this record. The answers will come when the facts present the questions.

If damages are to be assessed, the question of primary and secondary liability may be fixed by the judgment. The case should go back for a jury trial as to both defendants.

Reversed.

PARKER, C.J., concurs in result.

STATE v. ALBERT CHAVIS.

(Filed 10 May, 1967.)

Narcotics § 4; Criminal Law § 101— Circumstantial evidence held insufficient to show that defendant had marijuana in his possession.

The evidence tended to show that the officers followed defendant and his companion along a street and through a vacant lot, that defendant was then wearing a hat, that they observed defendant continuously except when a car passed with headlights, that they saw defendant and his companion stand talking for a period of some thirty seconds to a minute, and that they arrested defendant when he came back toward them, searched defendant and found no narcotics on him, but later found a hat with 11 envelopes of marijuana in it in the grass four or five feet from where defendant and his companion had been talking. The officers testified that the hat in which the envelopes containing marijuana were found was the identical hat defendant was wearing when he passed them. There was no evidence that the marijuana was in the hat while defendant was wearing it or that the marijuana was put in the hat at defendant's direction. *Held:* The evidence is insufficient to support a finding that the marijuana found in the hat was in the possession of defendant, and nonsuit should have been entered. G.S. 90-88.

APPEAL by defendant from *Bailey, J.*, November 1966 Regular Criminal Term of CUMBERLAND.

Criminal prosecution on a bill of indictment charging that de-

fendant, on or about April 30, 1966, "did wilfully, unlawfully and feloniously, have in his possession a quantity of narcotic drugs, to wit: Eleven (11) envelopes 2 by 3½, containing 27.01 grams of marijuana," etc., a violation of G.S. 90-88.

The State's evidence, summarized except where quoted, tends to show the following:

On the night of Saturday, April 30, 1966, F. M. Boone, a police officer in uniform and on duty in a different area, answered a call to meet F. L. Truitt, "a plain-clothes man," in the Hillsboro Street area. Boone had known defendant for five or six years and during that period had seen him three or four times a week.

Boone and Truitt met on the west side of Hillsboro Street in front of the Plaza Motel. About 8:15 or 8:30 p.m., defendant, when first observed by Boone and Truitt, was walking north along the sidewalk on the west side of Hillsboro Street. They observed him as he walked in and out of Mabel's Restaurant, and Boone observed him through the window as defendant passed through the restaurant. Upon leaving the restaurant, defendant continued his walk north along the sidewalk and in so doing passed between Boone and Truitt and the building adjacent to the sidewalk. When he passed by the officers, he was so close Boone "could have laid a hand on him." Defendant was wearing "gray trousers, a three-quarter length coat and a gray felt hat."

When defendant got approximately twenty-five feet north of the officers, "another man walked up to him." These two men "took a few steps, then stood there near the front of R and W Motor Company on Hillsboro Street and talked." There is a vacant lot, about sixty feet by one hundred feet, north of the place of business of R and W Motors and between it and Walter Street. Walter Street is a dirt street about twenty feet wide extending west approximately three hundred feet from Hillsboro Street to Bragg Boulevard.

Following their conversation in front of R and W Motors, defendant and his companion "proceeded on across the vacant lot to the end of Walter Street and moved by two houses" located on the south side of Walter Street. The house nearest Hillsboro Street was a frame house; the house to the west of it was a smaller cinder block house.

After defendant and his companion had started walking slowly in a westerly direction across the vacant lot toward Walter Street, and before they had "turned the corner," the officers, walking slowly, proceeded across the vacant lot in the direction taken by defendant and his companion. Defendant and his companion were observed by the officers continuously except for "two or three seconds" when

the headlights of an eastbound car on Walter Street caused the officers "to step back out of the glare of the headlights" to avoid disclosure of their presence. Boone testified: "Detective Truitt and myself crossed the vacant lot to the corner of the first of the two houses and observed the defendant and the other man standing at a point beyond the second house. They remained at that point at the edge of Walter Street approximately 30 seconds to a minute, this point being about 300 feet from Mabel's Restaurant. I then observed Albert Chavis coming back towards Hillsboro Street and he was stopped by Officer Truitt and myself when he reached our position. At this time the defendant had on gray trousers, a black leather three-quarter length coat, and was bareheaded. At that time, we took him into custody, searched him and asked him where was his hat." There was evidence "(t)he other man . . . had no hat on whatsoever; from the first time we saw him he was without a hat."

According to Truitt: "When he came back to where we were, I placed him (Chavis) under arrest, informed him that I was searching him for marijuana. He readily assented, stating that he did not have any. I searched him and I did not find anything on him so I released him. The other subject was Military Personnel." There was evidence this unidentified "other subject," who was in civilian clothes, did not have a valid pass from Fort Bragg and was taken into custody by a Military Policeman. There is no evidence of any further investigation concerning this "other subject."

The court admitted, over defendant's objections, statements attributed to defendant, in response to interrogation by the officers at the time of such arrest and search, to the effect the hat he had been wearing was a borrowed hat, that he had given it back to the fellow to whom it belonged, and that he did not know the name of the fellow to whom he had given it. The officers had no warrant of arrest, no search warrant and did not warn defendant as to his constitutional rights.

Following the arrest, search and interrogation of defendant, Boone began a search for the hat, leaving defendant in the custody of Truitt. Shortly thereafter he was assisted in the search by Truitt and a Military Policeman. Their search included the area on the north side (all vacant) as well as the area on the south side of Walter Street. About 8:50 p.m., Boone found a hat and eleven envelopes, containing a total of 27.01 grams of marijuana. The hat was lying "with the crown of the hat down towards the ground and the bottom of the hat sticking up." Boone testified: "The envelopes were in the crown of the hat. The crown of the hat was on the ground

with the brim up. The envelopes were scattered about in the brim of the hat." Defendant had been released before the hat was found and was not present when it was found.

The hat and the envelopes containing marijuana were found "just beyond those two dwelling houses" on the left side of Walter Street "going towards Bragg Boulevard," approximately four or five feet from where Boone had observed "the defendant and the other subject talking." The grass was approximately knee high and the hat was found "in a little tussle of grass."

There were no street lights (or sidewalks) on Walter Street. There was a street (mercury) light on the east side of Hillsboro Street near Walter Street, in front of R and W Motors. There were lights on Bragg Boulevard in the area of its intersection with Walter Street. The evidence is silent as to lights, if any, at the R and W Motors premises or at either of the two residences on Walter Street.

Each of said officers testified positively the hat on which the envelopes containing marijuana were found was the identical hat defendant was wearing when he passed them on the sidewalk and thereafter proceeded with his bareheaded companion across the vacant lot. There was no evidence either officer had seen defendant wear the hat on any other occasion.

Defendant did not testify. He offered evidence tending to show the hat found by the officers and identified as State's Exhibit No. 1 was not his hat. A witness for defendant testified he was in defendant's car, parked in the vacant lot at the southwest corner of Hillsboro and Walter Streets, and that defendant had left his hat in the car; that he (witness) drove defendant's car away on an errand of his own; and that, upon his return about 9:00 or 9:30 p.m. from such errand, defendant got his hat. Defendant's witnesses identified Defendant's Exhibit No. 1 rather than State's Exhibit No. 1 as defendant's hat.

The evidence was in conflict as to the extent of vehicular and pedestrian travel in the vicinity during the period the officers were following and observing defendant and his companion and thereafter until the hat and envelopes were found.

The jury returned a verdict of guilty as charged. Judgment, imposing a prison sentence of five years, was pronounced.

Defendant excepted and appealed.

Attorney General Bruton and Staff Attorney White for the State.
James R. Nance, Jr., for defendant appellant.

BOBBITT, J. G.S. 90-88 provides: "It shall be unlawful for any person to manufacture, *possess,* have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article." (Our italics.) Marijuana (marihuana) is a narcotic drug and so defined in G.S. 90-87(1) and (9). Defendant is charged with the unlawful *possession* thereof.

The State contends envelopes containing marijuana found in an upturned hat in a grassy area between the cinder block dwelling and Bragg Boulevard *had been* in the possession of defendant. Obviously, defendant did not have possession of the hat or envelopes or marijuana at the time of his arrest on Saturday, April 30, 1966.

The State's case rests primarily upon evidence tending to show that the hat in and on which the envelopes containing marijuana were found was the identical hat defendant was wearing when he, walking along the sidewalk, passed in front of Officers Boone and Truitt. Obviously, proof of this evidential fact beyond a reasonable doubt was a prerequisite to the establishment of defendant's guilt.

If the circumstantial evidence in its entirety were deemed sufficient to withstand defendant's motion for judgment as in case of nonsuit, an application of the law to the facts arising on the evidence as provided in G.S. 1-180 would require that the presiding judge instruct the jury that proof of such fact beyond a reasonable doubt was a prerequisite to a verdict of guilty. However, proof of such evidential fact would not, standing alone, warrant a verdict of guilty. To establish defendant was guilty as charged, it was incumbent upon the State to satisfy the jury from the evidence beyond a reasonable doubt that the marijuana in the envelopes found by Officer Boone was in defendant's possession either in the hat he was wearing or elsewhere about his person. With reference to nonsuit, the critical inquiry is whether marijuana found by Officer Boone was in the possession of defendant when he was first observed and followed by the officers.

There is no evidence that either officer observed defendant make any disposition of the hat he had been wearing or of any article or articles he may have had in his possession. Officer Truitt testified: "I did not see the defendant place his hat in any particular place. I just saw him minus his hat."

The identity of the person who had possession of the marijuana prior to the discovery thereof by Officer Boone is not disclosed. Did defendant put the marijuana in the hat found by the officers? Was it put there by defendant's unidentified companion? Was it put there before or after defendant and his companion left the area where the hat was found, walked back towards Hillsboro Street and were ac-

costed by the officers? There was no evidence the marijuana was in a hat while defendant was wearing it. Nor was there evidence the marijuana was put in the hat found by the officers at defendant's direction.

The rule for determining the sufficiency of circumstantial evidence to withstand a motion for judgment as in case of nonsuit as set forth in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, and approved in many subsequent decisions, is established law in this jurisdiction. Frequently, the application of the rule presents difficulty. Here, the evidence, in our opinion, falls short of being sufficient to support a finding that the marijuana found by the officers in and on a hat in the high grass was in the possession of defendant when he was first observed and followed by the officers. Although the evidence raises a strong suspicion as to defendant's guilt, we are constrained to hold the motion for judgment as in case of nonsuit should have been allowed. Accordingly, the judgment of the court below is reversed.

The foregoing disposition renders unnecessary discussion of assignments of error relating to (1) the competency of the testimony as to statements made by defendant when arrested, searched and interrogated, and (2) the sufficiency of the court's instructions with reference to the application of the law to the facts arising on the evidence.

Reversed.

JANET HARPER WANDS, EXECUTRIX OF THE ESTATE OF JOHN WANDS, DECEASED, v. MARION FRANKLIN CAUBLE, EUGENE OLIVER AND DAN OLIVER.

(Filed 10 May, 1967.)

1. Appeal and Error § 20—

In this action against both drivers involved in a collision, each driver attempted to get his version of the accident in evidence by cross-examination over plaintiff's objection of plaintiff's witness, the investigating patrolman. *Held:* Plaintiff may not be charged for responsibility by one defendant for any error made by the other defendant in this respect.

2. Trial § 16—

In this action for wrongful death, a witness testified that the deceased left a wife and son. The court prevented the witness from answering a further question as to the condition of the son, and instructed the jury to disregard the testimony as to deceased's survivors. *Held:* By withdrawing the evidence the court cured any error.

3. Death § 6—

Eligibility to share in retirement funds is in the nature of delayed compensation for former years of service and, in an action for wrongful death, deceased's right in a retirement fund is competent in evidence on the question of damages.

4. Automobiles §§ 17, 43—

Evidence that right turns were permitted at the intersection in question only from the right lane, that one defendant, at the last moment, undertook a right turn from the middle lane, and that the other defendant sideswiped him on the right, continued across the street, broke down a power pole in the utility strip beyond the opposite corner, and killed testator, who was standing near the pole, *is held* to require the court to charge the jury on the question of the negligence of the one driver in attempting to switch traffic lanes at the intersection without seeing that the movement could be made in safety, and of the other defendant in attempting to speed through the intersection.

APPEAL by defendants from *Falls, J.*, November, 1966 Session, ROWAN Superior Court.

The plaintiff, Executrix of John Wands, instituted this civil action to recover damages for the wrongful death of her testator, proximately caused by the actionable negligence of the defendants. The plaintiff alleged and offered evidence tending to show the following.

On December 5, 1965, at about 4:40 p.m., John Wands, age 63, was standing beside a power pole in the utility strip 18 inches wide between the sidewalk and the east side of Long Street, north of its intersection with Henderson Street in the City of Spencer. Long Street is paved, 32 feet wide and carries traffic north and south. It intersects at right angles with Henderson Street which is paved, 38 feet wide and carries traffic east and west. Approaching the intersection from the south, Long Street has three traffic lanes marked by white lines painted on the street surface. The lane on the right, or east, is 10.2 feet wide. White arrows in the center of this lane point north and east, indicating that traffic may pass through the intersection or may turn right on Henderson Street. The middle lane is 8.8 feet wide. The arrows painted on the surface of the street within this lane indicate that it is exclusively for traffic turning to the left on Henderson Street. The third lane is 12 feet wide and is intended to carry traffic south on Long Street.

The plaintiff alleged and offered evidence tending to show that the defendant, Marion Franklin Cauble, drove his Buick north on Long Street in the middle traffic lane (intended for a turn left), but at the last moment undertook to turn right on Henderson Street. In making the change over and while the Buick partially blocked both lanes at the entrance to the intersection, Eugene Oliver, driving Dan Oliver's Ford, sideswiped the Buick on the right. The debris indi-

cated the Buick stopped within a few feet. The Ford continued across Henderson Street, flattened a stop sign at the northwest corner of the intersection, and continued for 19 feet beyond the intersection, broke down a power pole in the utility strip and killed the plaintiff's testator who was standing near the pole.

Each defendant, by answer, denied negligence and as a further defense alleged the other driver was solely responsible for the accident. Neither of the defendants, however, offered evidence. The highway patrolman who investigated the accident testified as a witness for the plaintiff as to the physical facts at the scene of the accident. Each defendant cross-examined him with respect to the statements made by the defendants. The plaintiff objected to this evidence. The Court, however, permitted the witness to testify as to the statements made by each driver with respect to what took place at the time of the accident. At the close of plaintiff's evidence the Court submitted these issues, which the jury answered as indicated:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant Marion Franklin Cauble, as alleged in the Complaint? ANSWER: Yes.
2. Was the plaintiff's intestate injured and killed by the negligence of the defendant Eugene Oliver, as alleged in the Complaint? ANSWER: Yes.
3. Was the defendant Eugene Oliver, at the time of the accident, acting as the agent and servant of the defendant Dan Oliver, as alleged in the Complaint? ANSWER: Yes.
4. What amount, if any, is the plaintiff entitled to recover? ANSWER: $25,000.00."

From judgment in accordance with the verdict, the defendants appealed.

Woodson, Hudson & Busby by Grady Ferrell, Jr., for defendant Cauble.

Shuford, Kluttz & Hamlin by Lewis P. Hamlin, Jr., for defendants Oliver.

J. Allan Dunn, Kessler and Seay by John C. Kesler for plaintiff appellee.

HIGGINS, J. The defendant Cauble interposed three objections to the trial: (1) the Court, over his objection, permitted the plaintiff's witness Anthony to testify to the defendant Eugene Oliver's admissions with respect to how the collision occurred; (2) the Court refused to order a mistrial after having permitted plaintiff's witness Bingham to testify the deceased left a widow and son; and (3) the

Court failed correctly to charge with respect to G.S. 20-150(c) and G.S. 20-153(a).

The plaintiff's witness Anthony, a member of the highway patrol, arrived at the scene of the accident within a few minutes after it occurred. He described in detail the physical evidence, including the position of the vehicles, the damages to them and other pertinent facts. For the purpose of illustrating his testimony, he drew a diagram on the blackboard. A photostat of the drawing is included as one of the exhibits filed here. He testified the front of the Cauble vehicle was in the marked crosswalk on the south side of the intersection. The damage was along the right front fender and the bumper. The plaintiff did not make any inquiry as to statements of either driver. In fact, when the Olivers' attorney sought to elicit Eugene Oliver's statement to the witness, plaintiff's counsel objected. Also, Cauble objected. However, Cauble's counsel also obtained admissions as to statements made by Cauble. Obviously each was attempting to get before the jury his own explanation to the investigating officer as to how the accident occurred. The defendants seem to have broken about even in these inquiries. Plaintiff objected and should not be charged with responsibility for any error either defendant made in trying to get before the jury a statement made in exculpation of his conduct.

Plaintiff's attorney asked plaintiff's witness Bingham about the family of the deceased. The witness answered, "He had a wife and son." Then counsel asked, "Do you know the condition of the son?" Without permitting the witness to answer as to the condition of the son, Judge Falls gave this instruction:

> "COURT: Ladies and gentlemen of the jury, you will disregard any questions or answers elicited from this witness upon how many people the deceased, Mr. Wands, had in his family. You will disregard that evidence in its entirety. You will, however, remember what the testimony tends to show as to what the deceased's earnings were at the time of his death."

Immediately after the instruction, each defendant moved for a mistrial. The Court denied the motion. The Court's instruction cured any error. "It is undoubtedly approved by our decisions that the trial court may correct a slip in the admission of isolated or simple points of evidence by withdrawing such evidence at any time before verdict and instructing the jury not to consider it." *In Re Will of Yelverton*, 198 N.C. 746, 153 S.E. 319; McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. 2, Sec. 1513.

In addition to objections similar to those interposed by the defendant Cauble and already discussed, the defendants Oliver con-

tended the Court committed error in permitting the witness Bingham to testify that Mr. Wands would soon be able to retire from his regular employment, and the amount of retirement pay he would be eligible to receive. The objection is based upon the ground that this evidence is not properly admissible as an element of damages. However, eligibility for retirement and the right to share in a fund for that purpose are in the nature of delayed compensation for former years of faithful service. *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E. 2d 241; *Bridges v. Charlotte*, 221 N.C. 472, 20 S.E. 2d 825. The evidence relating to retirement rights was properly admitted.

The drivers of the vehicles involved argued Judge Falls improperly charged the jury with respect to the rights and duties in traversing the intersection. The physical facts described in the testimony of patrolman Anthony (and illustrated by the diagram) painted a clear picture of the manner in which the collision occurred. Cauble tried to switch traffic lanes at the intersection without seeing the movement could be made in safety. Oliver tried to speed through the intersection. The Court did not go afield in the charge. In fact, the instructions covered the legal rules arising on the evidence. In the trial and judgment, we find

No error.

STATE v. JOHN FISHER AND BRADFORD LITTLE.

(Filed 10 May, 1967.)

1. Criminal Law § 16—

In those counties in which the Superior Court has concurrent jurisdiction of misdemeanors, G.S. 7-64, the court first acquiring jurisdiction of a particular case retains jurisdiction thereof, subject to appellate review.

2. Same—

Warrant was issued in the Recorder's Court of Columbus County charging a misdemeanor. Defendant paid into that court the jury fee and demanded a jury trial. Through inadvertence the case was transferred to the Superior Court, and defendant moved that the cause be remanded to the Recorder's Court. *Held:* The motion to remand to the Recorder's Court should have been allowed.

3. Courts § 2—

Jurisdiction of a court over the subject matter may not be conferred by the parties by consent, waiver, or estoppel.

4. Property § 4—

A warrant which fails to charge that defendants unlawful and wilful injury or damage to property was malicious, is fatally defective, and judgment thereon will be arrested *ex mero motu.* G.S. 14-127.

APPEAL by defendant Fisher from *Carr, J.,* September Criminal Session 1966 of COLUMBUS.

Criminal prosecution upon an indictment containing two counts. The first count charges John Fisher and Bradford Little on 22 April 1966 with unlawfully and wilfully assaulting I. A. Matthews with deadly weapons, to wit, a rifle and a shotgun, and inflicting upon him "great damage." The second count charges the same defendants at the same time with unlawfully and wilfully (the second count leaves out the word "maliciously") greatly injuring, defacing and damaging a certain *store building* (emphasis ours), the property of one I. A. Matthews, by shooting the said store building with a rifle and a shotgun, the said damage being in an amount in excess of $10.00.

When the case was called for trial, before pleading to the indictment, defendants made a motion to remand the case to the Recorder's Court of Columbus County for trial for the following reasons: The criminal prosecution in the instant case was initiated by a warrant sworn out 23 April 1966 in the court of a justice of the peace of Columbus County by I. A. Matthews charging defendants on 22 April 1966 with unlawfully and wilfully assaulting I. A. Matthews with deadly weapons, to wit, a rifle and a shotgun, with the felonious intent to kill and murder I. A. Matthews, "causing an estimated damage of one hundred fifty and no/100 dollars to the *personal* property of I. A. Matthews." (Emphasis ours.) This warrant was executed on 26 April 1966.

On 26 April 1966 defendants requested in writing that the hearing of the case against them be transferred to the Recorder's Court of Columbus County. On 16 May 1966 defendants, pursuant to Chapter 147, Session Laws 1947, demanded a jury trial in the Recorder's Court of Columbus County of the case against them in that court, and paid into that court a jury fee of $25.00 each as required by that statute. The request for a jury trial was granted.

At the next sitting of the Recorder's Court for jury trials, the "jacket" of the case against defendants in that court shows that in the Recorder's Court "jury trial was waived and the case was transferred to Superior Court." Counsel for defendants stated in his motion aforesaid that defendants were in custody and that it did not make any difference to him whether or not the case against defendants was tried in the Recorder's Court or the Superior Court. Coun-

sel for defendants stated to Judge Carr in his motion that the Recorder's Court had the case first and had jurisdiction.

Judge Carr denied defendants' motion, and defendants excepted.

Then the defendants pleaded not guilty. At the end of the State's evidence, defendant Little's motion for judgment of compulsory nonsuit was allowed. A similar motion by defendant Fisher was denied. Verdict as to Fisher: guilty as charged of assault with a deadly weapon and "guilty of malicious injury to real property of $10.00 or less."

From a judgment of imprisonment for eighteen months on the first count in the indictment, and from a judgment of imprisonment for thirty days on the second count in the indictment to run concurrently with the first count in the indictment, defendant Fisher appeals.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwyn for the State.

D. F. McGougan, Jr., for defendant appellant.

PARKER, C.J. Defendant Fisher assigns as error the denial of the motion by both Little and himself to remand the proceeding back to the Recorder's Court of Columbus County for a jury trial. Little does not appeal.

Defendant Fisher in his brief contends, and the State in its brief admits, that the Recorder's Court of Columbus County and the Superior Court of Columbus County have concurrent jurisdiction over all misdemeanor cases arising in Columbus County.

G.S. 7-64 reads in relevant part:

> "In all cases in which by statute original jurisdiction of criminal action has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof."

This statute applies to Columbus County.

We have held repeatedly and uniformly, and G.S. 7-64 expressly states, in criminal actions where two courts have concurrent jurisdiction the court first acquiring jurisdiction of a case, its power being adequate to the administration of complete justice, retains its jurisdiction of the case and may dispose of the whole case, subject to appellate review, and no court of co-ordinate authority is at liberty to interfere with its action. This principle is essential to the orderly administration of the law, and is enforced to avoid un-

seemly, expensive and dangerous conflicts of jurisdiction and process. *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907, and cases cited; *S. v. Reavis,* 228 N.C. 18, 44 S.E. 2d 354; *S. v. Everhardt,* 203 N.C. 610, 166 S.E. 738; 1 McIntosh, N. C. Practice and Procedure, 2d ed., § 162; 20 Am. Jur., Courts, § 128; 21 C.J.S., Courts, § 492. See also, *S. v. Clayton,* 251 N.C. 261, 111 S.E. 2d 299.

The Recorder's Court of Columbus County took jurisdiction over the offenses charged in the warrant in the instant case against defendants before the Superior Court of Columbus County did, and both offenses charged in the warrant were misdemeanors, to wit: an assault upon I. A. Matthews with deadly weapons, to wit, a rifle and a shotgun, with the felonious intent to kill and murder him, *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Braxton,* 265 N.C. 342, 144 S.E. 2d 5, and damage to personal property of I. A. Matthews, G.S. 14-160. The warrant does not charge "a wanton and malicious" injury to personal property. Consequently, the Recorder's Court of Columbus County acquired exclusive jurisdiction over the subject matter of the case set forth in the warrant to proceed further in the case.

It is well established law that the parties cannot, by consent, give a court jurisdiction over *subject matter* of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver or estoppel. *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673, and the numerous cases there cited; *In re Custody of Sauls,* 270 N.C. 180, 154 S.E. 2d 327; 20 Am. Jur. 2d, Courts, § 95; 21 C.J.S., Courts, § 85; 1 Strong's N. C. Index, Courts, § 2. Where a court lacks jurisdiction over *a party,* see 20 Am. Jur. 2d, Courts, § 97.

Jurisdiction is essential to a valid judgment. *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757. The Superior Court of Columbus County was without jurisdiction to render the judgment of imprisonment for eighteen months as to Fisher on the first count in the indictment, and the verdict and judgment are vacated. Jurisdiction to try the charge of assault with deadly weapons, to wit, a rifle and a shotgun, upon I. A. Matthews with intent to kill and murder him is vested in the Recorder's Court of Columbus County.

The warrant in the instant case defectively charges damage to personal property of I. A. Matthews, a violation of G.S. 14-160. The indictment in the instant case in the second count defectively charges damage to real property of I. A. Matthews, a violation of G.S. 14-127 — two different offenses. All the evidence in the case showed damage to a building. The Superior Court of Columbus County first took jurisdiction over the offense defectively charged

in the second count in the indictment of an injury to a building, real property.

The judgment on the second count in the indictment is arrested, *ex mero motu,* for the reason that the second count in the indictment is fatally defective in failing to charge a malicious injury to real property, G.S. 14-127, and the verdict as returned on the second count in the indictment of "guilty of malicious injury to real property of $10.00 or less" is not sufficient to support the judgment on the second count in the indictment, a fatal defect appearing on the face of the record proper. *S. v. Barefoot,* 254 N.C. 308, 118 S.E. 2d 758.

Judgment on the first count in the indictment vacated. Judgment on the second count in the indictment arrested.

STATE v. JAMES EUGENE GLOVER.

(Filed 10 May, 1967.)

1. Automobiles § 76—

Knowledge by a motorist that he had struck a pedestrian is an essential element of the offense of failing to stop and give such pedestrian aid. G.S. 20-166(a)(c).

2. Same—

Testimony of a motorist that he had been drinking rather heavily, that, when he ran off the road in passing another vehicle with blinding lights, he looked up and saw a pedestrian in the vicinity of his truck or out in front of him, but that after he overturned he did not see the pedestrian, together with evidence that the pedestrian was seriously injured and that defendant fled the scene, *is held* sufficient to be submitted to the jury in a prosecution under G.S. 20-166(a)(c).

3. Criminal Law §§ 85, 99—

The introduction by the State of the testimony of a defendant which includes an exculpatory statement does not prevent the State from introducing other evidence tending to show the facts to be to the contrary in regard to the exculpatory statement, and on motion to nonsuit only the evidence favorable to the State will be considered.

4. Criminal Law § 104—

When the evidence is sufficient to overrule defendant's motions for nonsuit, the evidence is also sufficient to overrule defendant's motion for a directed verdict of not guilty, since the motions have the same legal effect.

APPEAL by defendant from *Armstrong, J.,* 16 January 1967 Criminal Session of GUILFORD (High Point Division).

STATE *v.* GLOVER.

Criminal prosecution upon an indictment charging defendant on 21 May 1966 with being the driver of an automobile involved in an accident resulting in injury to Willie Quick, and that after the accident he unlawfully and feloniously failed immediately to stop the motor vehicle involved in the accident at the scene of the accident, and feloniously failed to give his name, address, operator's license number and the registration number of said motor vehicle to the said Willie Quick, and feloniously failed to render to the said Willie Quick, the person injured in the aforesaid accident, reasonable assistance, including the carrying of the said Willie Quick to a physician or surgeon for medical or surgical treatment when it was apparent that such treatment was necessary, a violation of G.S. 20-166(a), (c).

Defendant, who was represented by counsel, entered a plea of not guilty. Verdict: "Guilty as charged."

From a judgment of imprisonment for not less than eighteen nor more than twenty-four months, defendant appeals.

Attorney General T. W. Bruton, Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.

Morgan, Byerly, Post & Keziah for defendant appellant.

PER CURIAM. The State introduced evidence. The defendant introduced no evidence. The record shows that when defendant rested he moved for a directed verdict of not guilty. The motion was overruled and the defendant excepted. Defendant assigns as error the court's denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence.

The State's evidence tends to show the following facts: About 8:45 P.M. on 21 May 1966, Willie Quick was walking on the shoulder of Underhill Street in High Point, North Carolina, towards town. There was no sidewalk there. The street is wide enough for two lanes of travel going in opposite directions. There had been a slight drizzle of rain. He was coming up the street and saw an automobile approaching. He turned around and kept walking down the street. The automobile was coming up behind him, and the next thing he knew he had been run over by this automobile and was lying in a ditch beside the street.

He was in a kind of daze. The automobile was up across the bank out in the field. His right arm was broken, his left leg was skinned up badly, his back was hurt and his lip was torn off and hanging out of his mouth. No one came and assisted him after the accident. After he got out of the ditch he was walking around there, an officer arrived, and he was carried in an ambulance to a hospital. Some-

time later he saw defendant at the hospital, but he does not rightly know how long that was after the accident. He does not know who was driving the automobile. The driver of the automobile did not come and give him his name and show him his automobile license and help to take him to the hospital.

About 8:50 P.M. on the same night, L. J. Boyd, an officer with the High Point Police Department, arrived at the scene of the accident. He observed a Chevrolet pickup truck sitting on the north side of Washington Street, off the road and on an embankment there, with debris, and a windshield and glass scattered around it. He found Willie Quick standing by the side of the pickup truck shaking his head. He had his lip cut completely off and it was hanging down below his chin. There was no one around the truck at the time other than Willie Quick. No one knew who was driving the truck. He called an ambulance and sent Willie Quick to the hospital. Later he went to the hospital to check on Willie Quick, and when he arrived there defendant Glover and one Jimmy Byers were being brought into the hospital by ambulance. Defendant stated in substance to L. J. Boyd that he was involved in an accident out on Washington Street; that it was raining, and he was not used to driving the truck; that he was meeting an oncoming car, he had tried to dim his lights, and as he was trying to dim his lights the truck ran off the road and hit the ditch; that he lost control of it and it turned over. He further stated in substance that as he ran off the road and looked up he saw a pedestrian in the vicinity of the front of his truck, or out in front of him, but after he overturned he did not see the pedestrian any more and he did not know that he had hit a pedestrian; that he got scared and left; that he had been drinking rather heavily; that he got Jimmy Byers, who was a passenger in the truck with him, and carried him from the scene on his back as far as he could carry him; he did not know where he had put him down, but remembered that it was between two houses; he continued on foot until he could not go any further, and then he walked up on the front porch of a house on East Street, knocked on the door, and when someone came to the door he fell over in the door. Defendant said he asked them to call an ambulance, which brought him to the hospital; and he did not have any driver's license. The officer testified that he saw defendant on East Street as the ambulance attendants were picking him up off the front porch on that street. That was roughly eight to ten blocks from the scene of the accident.

Defendant contends that he had no knowledge that he had struck Willie Quick with a motor vehicle and that Willie Quick had received any injury. Both reason and authorities declare that such

knowledge is an essential element of the crime created by the statute now under consideration, and charged in the indictment. *S. v. Ray,* 229 N.C. 40, 47 S.E. 2d 494.

The State offered in evidence the statement of the defendant that he had no knowledge that his vehicle had struck Willie Quick and no knowledge that Willie Quick received any injury. This statement does not prevent the State from showing that the facts and circumstances were different. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904. The defendant's statement tends to exculpate the defendant, but the State does not rest entirely on such statement. Defendant also stated that as he ran off the road and looked up he saw a pedestrian in the vicinity of the front of his truck, or out in front of him, and after he overturned he did not see the pedestrian any more and did not know that he had hit a pedestrian. The testimony of Willie Quick is to the effect that he had been run over by a motor vehicle, and the next thing he knew he was lying in a ditch with his right arm broken, his left leg skinned up badly, his back hurt and his lip torn off. The totality of the State's evidence would permit a jury to find that just before the defendant turned over he saw a pedestrian in front of him, that he ran over this pedestrian and inflicted upon him serious injuries, that he must have known that he had been involved in an accident and had injured this person by striking him with his automobile. The evidence also shows defendant left the scene of the accident without any investigation as to whether a pedestrian had been injured, and without giving him any information or aid. In our opinion, and we so hold, while the State's evidence is conflicting — some tending to incriminate and some tending to exculpate him — considering the State's evidence in the light most favorable to it, and giving to it the benefit of every reasonable inference to be fairly drawn therefrom, the State's evidence reasonably conduces to the conclusion, as a fairly logical and legitimate deduction, that the defendant is guilty as charged, and it is sufficient to repel a motion for judgment of compulsory nonsuit, and was properly submitted to the jury. The State's evidence shows far more than a mere conjecture or suspicion of defendant's guilt. *S. v. Horner,* 248 N.C. 342, 103 S.E. 2d 694.

Defendant moved for a directed verdict of not guilty. This motion challenges the sufficiency of the evidence to go to the jury. *S. v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913. ". . . (T)he objection that the evidence is not sufficient to carry the case to the jury . . . 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." *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d

311. Under the circumstances here the motion for a directed verdict of not guilty and the assignment of error for the denial of his motion for judgment of compulsory nonsuit have the same legal effect, and the motion was properly denied, and the assignment of error is overruled.

The assignments of error to the charge of the court have been carefully examined, and no one of them is sufficiently prejudicial to justify disturbing the verdict and the judgment below. In the trial we find

No error.

STATE OF NORTH CAROLINA ON RELATION OF THE NORTH CAROLINA MILK COMMISSION v. NATIONAL FOOD STORES, INCORPORATED, A NORTH CAROLINA CORPORATION.

(Filed 24 May, 1967.)

1. Agriculture § 14; Constitutional Law § 23—

The State Milk Commission has statutory authority to fix a uniform rate for the transportation of milk from farm to the processing plant and to maintain a fair price to the producer, and such statutory provisions have reasonable relationship to the assurance of an adequate supply of wholesome milk, and are constitutional.

2. Agriculture § 15—

The State Milk Commission has not fixed a price to be charged by retail grocery stores in the sale of milk to consumers, and therefore the authority of the Commission to do so is not involved in an action to restrain a grocery chain from selling milk below cost. G.S. 106-266.8(2)(3).

3. Agriculture § 17—

The enumeration by G.S. 106-266.21 of the facts which may be shown by a retailer selling milk below cost in order to rebut the presumption that such sale was made for the purpose of injuring, harassing or destroying competition, *held* not exclusive, and the *prima facie* case arising from sale below cost may be rebutted by proof of any circumstances which would tend to disprove an intent on the part of the retailer to injure, harass or destroy competition. To construe the statute otherwise would raise grave question as to its constitutionality.

4. Statutes § 4—

A statute will not be construed so as to raise a serious question as to its constitutionality when a reasonable construction will avoid such question.

5. Constitutional Law § 6; Evidence § 4—

The General Assembly may provide that the proof of one fact shall be deemed *prima facie* evidence of a second fact, provided there is such re-

lation between the two facts in human experience that proof of the first may reasonably be deemed some evidence of the existence of the second.

6. Agriculture § 14—

G.S. 106-266.1 *et seq.*, including amendments, must be construed in the light of its purpose to protect the public interest in a sufficient, regularly flowing supply of wholesome milk and, to this end, to provide a fair price to the milk producer, and the act is not for the purpose of regulating competition among retail grocery stores *per se*.

7. Statutes § 5—

While a statute must be construed to carry out the legislative intent, that intent must be found from the language of the act, its legislative history, and circumstances surrounding its adoption which will throw light upon the evil sought to be remedied, and such intent may not be established by testimony of members of the Legislature which adopted the statute nor by the affidavits of witnesses as to their opinion of the purpose of the act.

8. Agriculture § 14—

In this action to restrain a retail grocery chain from selling milk below cost, affidavits of the Commissioner of Agriculture and others, to the effect that the purpose of the Milk Act was to prevent the use of milk by grocery stores as a "loss leader," are incompetent, since the legislative purpose cannot be established by such evidence.

9. Same—

G.S. 106-266.21 prohibits the sale of milk below cost with the purpose on the part of the seller to injure, harass or destroy competition in the marketing of milk, and the statute does not make the sale of milk below cost a violation in the absence of such illegal purpose.

10. Same—

The provisions of G.S. 106-266.21 making proof of the sale of milk by a retailer below cost *prima facie* evidence of the purpose of such retailer to injure, harass or destroy competition in the marketing of milk, is not beyond the constitutional power of the Legislature.

11. Same—

The illegal purpose proscribed by G.S. 106-266.21 is more than a mere intent to attract customers from those who are actual or potential customers of a rival, since all successful competition necessarily harasses to some degree others engaged in the same business activity in the same territory, and our economic system is built upon the theory that such competion is desirable; the illegal purpose constituting a violation of the statute is a malevolent purpose to eliminate a rival or so hamper him as to achieve, or approach, a monopoly, and thus control prices to the harm of the public.

12. Constitutional Law § 6; Monopolies § 1—

The use of a "loss leader" as a competitive device in the retail grocery business is not generally unlawful and may not generally be restrained unless in violation of a contract permitted under the Federal Fair Trade Act, and in this State the Legislature has not prohibited such practice as contrary to public policy, and such determination is as binding on the

courts of this State as a contrary legislative determination is binding on the courts of other states having such legislative policy.

13. Pleadings § 19—

Upon a demurrer for failure to state a cause of action, a complaint must be liberally construed in favor of the pleader.

14. Agriculture § 17—

In this suit to enjoin defendant retailer from selling milk below cost, allegations that defendant was so selling milk for the purpose of destroying competition *is held* sufficient as against demurrer.

15. Appeal and Error § 5—

Upon appeal from an order granting an interlocutory injunction, the Supreme Court is not bound by the findings of fact made by the court below, but may review the evidence and find facts for itself.

16. Agriculture § 17— Evidence held not to sustain finding that defendant was selling milk below cost to create monopoly.

In this action to enjoin defendant retailer from selling milk below cost, evidence that defendant operates a supermarket chain, that it sold milk below cost but limited the purchase of each customer to one half gallon, that there was no competition between retail grocery stores and other types of distributors of milk, and that the use of milk as a "loss leader" is an accepted merchandising practice in marketing chains, etc., *is held* to compel the conclusion that the purpose of defendant in selling milk below cost was not to monopolize the business of selling milk in grocery stores, or elsewhere, but was to attract customers in the hope that they would purchase other items in sufficient volume to yield the defendant a profit from its entire operation, and since the sale of milk below cost for such purpose is not a violation of G.S. 106-266.21, it was error to enjoin defendant from doing so.

APPEAL by defendant from *Hobgood, J.*, at the 12 September 1966 Civil Session of ALAMANCE.

The plaintiff sued to enjoin the defendant from selling milk "below cost, as that term is defined in the statute, for the purpose of injuring, harassing or destroying competition in violation of G.S. 106-266.21, as amended."

The complaint alleges:

The defendant is engaged in the retail grocery business in Alamance and nearby counties under the name of Big Bear Supermarkets and sells milk and other food products; it "advertised and sold to the public a large number of half-gallons of milk at a price of 39 cents per half-gallon, plus sales tax"; which price was "below cost as that term is defined in G.S. 106-266.21, as amended (said milk having been purchased by defendant at a price of 55 cents per half-gallon)"; such sale was "for the purpose of injuring, harassing or destroying competition, to wit, others selling milk and other food products at retail and others operating supermarkets and retail

grocery stores within the trading area of defendant's said stores"; in furtherance of its plan so to sell milk, "the defendant caused newspaper advertisements to be published in * * * newspapers circulated in said counties * * * advertising the sale of half-gallon cartons of fresh milk at 39 cents"; and it "intends and plans to continue selling milk below cost," in violation of the said statute, and "it is necessary in order to protect the public interest and in order to prevent further violations of said statute by the defendant that an injunction be issued * * * enjoining the defendant from further violations of said statute."

A temporary restraining order was issued and the defendant was ordered to appear and show cause why the injunction should not be continued to the final hearing of the matter in the superior court.

Prior to the hearing on the order to show cause, the defendant filed its answer admitting that at its stores it advertised and sold to the public a large number of half-gallons of milk at a price of 39 cents per half-gallon, plus sales tax, which price was below cost, but denying that such sales were for the purpose of "injuring, harassing or destroying competition." The answer also admits the publication of newspaper advertisements advertising the sale of half-gallon cartons of fresh milk at 39 cents. As a further answer, the defendant alleges that in such advertisements it advertised the sale of half-gallon cartons of milk, as well as other items, at less than cost as "loss leaders" for the purpose of attracting customers into its stores so that they would purchase other items in addition to those so advertised. It is alleged that such advertisements and sales for such purpose are "in accordance with the ordinary, usual and accepted method of merchandising by supermarkets and other retail grocery stores"; and were "not for the purpose of destructive competition and was not with the intent to injure, harass or destroy competition with others selling milk and other food products at retail and others operating supermarkets and retail grocery stores within the trading area of defendant's stores."

At the hearing upon the order to show cause, the defendant demurred *ore tenus* to the complaint, which demurrer was overruled. The matter was then heard upon affidavits. The trial court entered an order containing its findings of fact and conclusions of law, and continuing the preliminary injunction in effect until the final hearing of the cause in the superior court. It is from this order that the defendant appeals.

The court found that the defendant is engaged in the retail grocery business and had made sales and published advertisements, as alleged in the complaint, the advertisements stating, "Choice of any brand of fresh MILK — ½ GALLON CARTON 39¢ — LIMIT ONE

½ GAL. PER CUSTOMER PLEASE!" The court also found that the defendant so sold the milk "as a loss leader, for the purpose of attracting customers away from its competitors and luring them into defendant's stores; that the luring of said customers away from its competitors would naturally tend to harass or injure the defendant's competitors and the court finds that the sale of milk by defendant below cost was made for the purpose of injuring, harassing or destroying competition." The court further found: "There has been a stated decrease in the number of Grade A milk producers in North Carolina in recent years. There is a growing shortage of milk in North Carolina and in the nation. Producer and consumer prices for milk in North Carolina are in line with average prices in the southeastern portion of the United States." It further found that "the widespread use of milk as a loss leader would be likely to create a chaotic condition in the marketing of milk which would be contrary to the public interest in view of the perishable nature of milk," and that "it is in the public interest for the said injunction to be continued until the final hearing of this cause."

The assignments of error brought forward into the appellant's brief, others being deemed abandoned, are: (1) The overruling of the demurrer *ore tenus;* (2) the findings and conclusions that the sale of milk as a "loss leader" would naturally tend to harass or injure competition and that the sales by the defendant below cost were made for the purpose of "injuring, harassing or destroying competition"; and (3) the signing of the order continuing the injunction.

One of the affidavits introduced by the plaintiff shows that on July 28 and 29, 1966, the defendant's stores sold a total of 4,107 half-gallons of milk, on August 4 and 5 (the days on which the sales were made below cost), sold 14,611 half-gallons, and on August 11 and 12 sold 4,495 half-gallons. Sales of milk by "major stores competing" with the defendant in the same cities totaled 8,631 half-gallons on July 28 and 29, 7,932 on August 4 and 5, and 8,543 on August 11 and 12. That is, on the two days of "loss leader" selling, the defendant sold approximately 10,000 half-gallons more than it sold on days when its prices were not below cost, whereas on those days its "major" competitors sold only some 700 half-gallons less than on the other days. The explanation of the remaining 9,300 half-gallons of additional sales by the defendant is not indicated by the evidence.

Other affidavits introduced by the plaintiff tend to show that the defendant was advised of the provisions of the Milk Commission law following the appearance of its newspaper advertisement, and its president thereupon stated that the defendant was "going to use milk as a loss leader by selling it below cost at 39 cents per half-gallon."

The affidavit of Honorable James A. Graham, Commissioner of Agriculture of the State of North Carolina, states:

> "[T]he North Carolina Milk Commission sets minimum prices to be paid to dairy farmers for their milk, but does not establish prices at any other level; that the law gives the Commission the power in certain situations to set the price of milk at other levels, but the Commission has never found it necessary or advisable to take control of milk prices at other levels; that producer and consumer prices for milk in North Carolina are in line with average prices in the rest of the southeastern portion of the United States * * *"

This affiant, and others, expressed his opinion that the enforcement of G.S. 106-266.21 is in the public interest and that the widespread use of milk as a loss leader would create a chaotic condition which would have a depressing effect upon producer prices and cause many producers to go out of business.

The defendant introduced 15 affidavits by owners or operators of other supermarkets or retail stores of various sizes and locations in the trading area served by the defendant's stores. Each of these stated:

> "The retail sale of any food or milk product below cost as a 'loss leader' is an accepted and customary practice among supermarkets and other retail grocery stores, is not for the purpose of destructive competition with other retail grocers, and is not intended and does not injure, harass or destroy competition among other supermarkets and retail grocery stores. *The retailer of milk cannot and does not compete with any distributor or producer-distributor of milk.*" (Emphasis added.)

Each of these affiants stated that the advertisements and sales by the defendant, of which the plaintiff complains, "did *not* injure, harass or destroy competition among others selling milk and other food products at retail and particularly the business of your affiant." (Emphasis added.)

The plaintiff offered no affidavit from any operator or owner of any grocery store stating that the business of such affiant, or any other person, had been injured, harassed or destroyed or threatened with such injury, harassment or destruction by such advertisement and sales by the defendant.

Morgan, Byerly, Post & Keziah for defendant appellant.
Holding, Harris, Poe & Cheshire for plaintiff appellee.

LAKE, J. The act creating the Milk Commission was first before this Court in *Milk Commission v. Galloway*, 249 N.C. 658, 107 S.E. 2d 631, in which an order of the Commission fixing a uniform hauling charge to the producer by the processor for the transportation of milk from the farm to the processing plant was sustained. Parker, J., now C.J., speaking for the Court, said:

> "The considerations which impelled the General Assembly to adopt the Act were found in its preamble on page 1323, Acts of 1953. * * * Among the facts set forth in the preamble to the Act are these: 'Milk is a primary and necessary food for the children and adult population of the State. * * * [I]t is necessary to suppress unfair, unjust and destructive trade practices which are now being carried on in the production, marketing and distribution of milk and which tends to create a hazardous and dangerous condition with reference to the health and welfare of the people of the State.' Other facts stated in the preamble, as well as the Act itself, make it plain that the General Assembly was also concerned with suppressing unfair and destructive trade practices, and with stabilizing the milk industry, *so as to enable the producers to secure a fair price for their milk.* These recitals in the preamble set the framework for the legislation." (Emphasis added.)

Since *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, it has been recognized that the Fourteenth Amendment to the Constitution of the United States does not forbid a state to confer upon an administrative agency the power to fix minimum and maximum retail prices to be charged for the sale of milk in grocery stores to consumers for the purpose of assuring the steady flow of an adequate supply of clean, wholesome milk from the producing farms to the consumer. In that case, Mr. Justice Roberts, speaking for the Court, said:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.
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> * * *
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> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed

to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. * * * And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary and discriminatory it does not lie with the courts to determine that the rule is unwise. * * *

"The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

Milk Commission v. Galloway, supra, establishes that neither Article I, § 7, nor Article I, § 17, of the Constitution of North Carolina, forbids the Legislature of this State to confer upon the Milk Commission authority to fix a uniform rate for the transportation of milk from the farm to the processing plant so as to enable the producers of milk to secure a fair price for their product. This Court there recognized the relation between such transportation charge and the assurance to the producers of milk of a fair price for that which they sell. It also recognized, as the Supreme Court of the United States had done in *Nebbia v. New York, supra,* that the Legislature might reasonably conclude that the maintenance of a fair price to the producer of milk is necessary to the assurance of an adequate supply of milk produced, transported and marketed under sanitary conditions. The constitutionality of the entire Milk Commission Act was not before this Court in the *Galloway* case, *supra,* and has never been determined by this Court. It is not before us in the present case.

The act must be construed in the light of its objective, which the *Galloway* case, *supra,* states. It empowers the Commission "to investigate all matters pertaining to the production, processing, storage, distribution, and sale of milk for consumption," and "to supervise and regulate the transportation, processing, storage, distribution, delivery and sale of milk for consumption." G.S. 106-266.8(2), (3). The Commission has not determined that conditions surrounding the production and marketing of milk in this State require a fixing of the price to be charged by a retail grocery store for the sale of milk to consumers in order to accomplish the purposes for

which the act was adopted. The Commission has not undertaken to fix the price to be charged in such a sale. Consequently, its authority to do so is not now before us. The affidavit of Honorable James A. Graham, Commissioner of Agriculture, offered in evidence by the plaintiff, states "[T]he North Carolina Milk Commission sets minimum prices to be paid to dairy farmers for their milk, but does not establish prices at any other level."

The question before us requires the construction of G.S. 106-266.21, which provides:

> "The sale of milk by any distributor or producer-distributor or retailer below cost for the purpose of injuring, harassing or destroying competition is hereby prohibited. At any hearing or trial on a complaint under this section, evidence of sale of milk by a distributor or subdistributor or retailer below cost shall constitute *prima facie* evidence of the violation or violations alleged, and the burden of rebutting the *prima facie* case thus made, by showing that the same was justified in that it was not, in fact, made below cost or that it was not for the purpose of injuring, harassing or destroying competition, shall be upon the person charged with a violation of this section. * * * The *prima facie* case of a violation of this section, made by proof of sale below cost, may be rebutted by proof of any of the following facts * * *"

The provision in this section of the act that the statutory *prima facie* case of violation may be rebutted by proof of specified circumstances, none of which applies to the present case, does not mean that these are the only circumstances which may be relied upon to rebut such *prima facie* proof of violation. See *Milk Commission v. Dagenhardt,* 261 N.C. 281, 134 S.E. 2d 361. To construe the statute otherwise would raise a serious question as to its constitutionality and it is well settled that a statute will not be construed so as to raise such question if a different construction, which will avoid the question of constitutionality, is reasonable. *State v. Barber,* 180 N.C. 711, 104 S.E. 760; *Labor Board v. Jones & Laughlin,* 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352, 1361; *Crowell v. Benson,* 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598; *Fed. Trade Comm. v. Amer. Tobacco Co.,* 264 U.S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A.L.R. 786; *Re Keenan,* 310 Mass. 166, 37 N.E. 2d 516, 137 A.L.R. 766, 773; 16 Am. Jur. 2d, Constitutional Law, § 146; 16 C.J.S., Constitutional Law, § 98(b).

It is well settled in this State that it is within the power of the Legislature to change the rules of evidence and, within constitutional limits, to provide that the proof of one fact shall be deemed

prima facie evidence of a second fact. *Drainage Commissioners v. Mitchell,* 170 N.C. 324, 87 S.E. 112; *State v. Dowdy,* 145 N.C. 432, 58 S.E. 1002; *State v. Barrett,* 138 N.C. 630, 50 S.E. 506. Notwithstanding the contrary opinion of Professor Wigmore, set forth at length in the *Barrett* case, *supra,* it is now also well established in this State, and in other jurisdictions, that the exercise of such power by the Legislature is subject to the limitation that there must be such relation between the two facts in human experience that proof of the first may reasonably be deemed some evidence of the existence of the second. *Drainage Commissioners v. Mitchell, supra; State v. Dowdy, supra; Tot v. United States,* 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519; *Bandini Co. v. Superior Court,* 284 U.S. 8, 52 S. Ct. 103, 76 L. Ed. 136, 78 A.L.R. 826; *Mobile, J. & K. C. R. R. v. Turnipseed,* 219 U.S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78; *People v. Pay Less Drug Store,* 25 Cal. 2d 108, 153 P. 2d 9; *State v. Kelly,* 218 Minn. 247, 15 N.W. 2d 554; Anno., 162 A.L.R. 495, 505; 29 Am. Jur. 2d, Evidence, § 10. There are many circumstances in addition to those specified in the above statute, which would tend to disprove an intent to injure, harass or destroy competition by a sale of an article at less than its cost to the seller. To deprive the seller of the right to disprove the intent which is part of the conduct forbidden by the statute, by proof of such other circumstances, would raise grave doubt as to the constitutionality of the provision as an arbitrary interference with the liberty of contract. See 29 Am. Jur. 2d, Evidence, § 11. We, therefore, hold that one charged, either in a civil or in a criminal proceeding, with the violation of G.S. 106-266.21 may rebut the statutory *prima facie* case, resulting from proof of a sale of milk at less than cost, by proof of any fact from which absence of the evil intent may be rationally inferred.

As this Court noted in *Milk Commission v. Galloway, supra,* the purpose of the act creating the Milk Commission was to protect the public interest in a sufficient, regularly flowing supply of wholesome milk and, to that end, to provide a fair price to the milk producer for his product. G.S. 106-266.21, though added to the original act by an amendment at a subsequent session, must be construed in the light of that purpose.

While the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry out the intent of the Legislature, that intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied. Testimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence

upon which the court can make its determination as to the meaning of the statutory provision. *D & W, Inc., v. Charlotte,* 268 N.C. 577, 151 S.E. 2d 241; *Goins v. Indian Training School,* 169 N.C. 736, 86 S.E. 629. Consequently, the affidavits introduced by the plaintiff, purporting to show that it was the purpose of the Legislature to prevent the use of milk by grocery stores as a "loss leader," were not competent for that purpose and must be disregarded.

It is obvious, from the reading of this act in its entirety, that the Milk Commission was not established as an agency to regulate competition among retail grocery stores *per se.* The Commission was established as a State agency to protect the interest of the public in a regularly flowing supply of wholesome milk and is authorized, for that purpose, and that purpose only, to regulate, under proper circumstances and to a proper degree, the price of milk. It is the destruction of competition in the handling of milk, not in the grocery business generally, which G.S. 106-266.21 was designed to prevent. The Milk Commission is not to be deemed a legislatively appointed guardian for the retail grocery business. G.S. 106-266.21, which is part of the Milk Commission Act, is not to be given a construction leading to such result.

The conduct prohibited by G.S. 106-266.21 is the sale of milk, as defined in G.S. 106-266.6, below cost, as defined in G.S. 106-266.21, coupled with the purpose on the part of the seller to injure, harass or destroy competition in the marketing of milk. The evil motive or purpose is an essential element of the offense, as truly as is the sale of milk below cost. There is no violation of this statute unless both elements concur. By virtue of the statute, evidence of the sale below cost is evidence of the wrongful purpose, but it is evidence only. Standing alone, it permits but does not compel a finding of the necessary motive or purpose. *Milk Commission v. Dagenhardt, supra; State v. Wilkerson,* 164 N.C. 431, 79 S.E. 888. It cannot be said that there is no rational basis for inferring the existence of a purpose to injure, harass or destroy competition in the marketing of milk from a sale of milk below the cost thereof to the seller. Thus, the statute making proof of such sale *prima facie* evidence of such purpose is not beyond the constitutional power of the Legislature. The statute does not, however, make a sale of milk below cost in and of itself a violation of the law.

The very purpose and nature of competition involves the intent to attract to one's self customers who might otherwise trade with a rival producer or seller. All successful competition necessarily harasses to some degree others engaged in the same business activity in the same territory. Our economic system is built upon the theory

that this is a desirable spur to better service and lower cost to the consumer. The results achieved through long adherence to this system indicate it has merit exceeding that of a system controlled by either a private monopoly or a governmental administrator. The purpose required to establish a violation of G.S. 106-266.21 is more than a mere intent to attract customers from those who are actual or potential customers of a rival. The intent or purpose required to show a violation of this statute is a malevolent purpose to eliminate a rival or so hamper him as to achieve, or approach, a monopoly and thus control prices to the harm of the public after the rival is eliminated or crippled. Unquestionably, trade practices, including price cutting, designed to accomplish such an end may be forbidden by statute. *Bennett v. R. R.*, 211 N.C. 474, 191 S.E. 240; *State v. Coal Co.*, 210 N.C. 742, 188 S.E. 412; *Manning v. R. R.*, 188 N.C. 648, 125 S.E. 555.

Many states have enacted statutes forbidding, as unfair competition, the sale of any merchandise at less than cost with the intent thereby to induce the purchase of other merchandise or to divert trade from a competitor. The Supreme Court of the United States has sustained such legislation. *Safeway Stores v. Oklahoma Grocers*, 360 U.S. 334, 79 S. Ct. 1196, 3 L. Ed. 2d 1280. See also: *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109; *Wholesale Tobacco Dealers B. v. National Candy & T. Co.*, 11 Cal. 2d 634, 82 P. 2d 3; Anno., 118 A.L.R. 506. In the *Safeway Stores* case, Mr. Justice Frankfurter, speaking for the Court, said:

> "One of the chief aims of state laws prohibiting sales below cost was to put an end to 'loss-leader' selling. The selling of selected goods at a loss in order to lure customers into the store is deemed not only a destructive means of competition; it also plays on the gullibility of customers by leading them to expect what generally is not true, namely, that a store which offers such an amazing bargain is full of other such bargains."

In *Wholesale Tobacco Dealers B. v. National Candy & T. Co., supra,* Chief Justice Waste, speaking for the Supreme Court of California, said:

> "The use of 'loss leaders' for the purpose of injuring a competitor has been condemned by many economists. It has been urged that their use is injurious to the consumer in that the losses so sustained will either have to be made up by higher prices charged on other commodities, or by the enforcing of various economies, such as the lowering of wages, discharge of

employees, lowering of rents, depressing the wholesale prices, etc. It has many times been urged that such practices are destructive of competition and tend to create monopolies."

In *Old Dearborn Co. v. Seagram Corp., supra,* Mr. Justice Sutherland, speaking for the Court, in sustaining the right of a state to enact "fair trade" legislation, said:

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; * * * True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned."

The North Carolina Legislature, on the contrary, has not seen fit to adopt as the policy of this State the prohibition of the sale of any merchandise below cost as a "loss leader" to attract customers to the store of the seller in the hope that they will buy there other commodities in sufficient volume to enable the seller to overcome the loss incurred in the sale of the article used as a "loss leader." This determination by the Legislature is also conclusive upon the courts. Thus, the use of "loss leaders" as a competitive device in the retail grocery business generally is not unlawful and may not be restrained, in the absence of a contract permitted under the Fair Trade Act such as was sustained in *Lilly & Co. v. Saunders,* 216 N.C. 163, 4 S.E. 2d 528, 125 A.L.R. 1308.

G.S. 106-266.15 provides that in the event of violation of any provision of the Milk Commission Act, the Commission may apply to the courts "for relief by injunction, *if necessary, to protect the public interest* without being compelled to allege or prove that any adequate remedy at law does not exist." (Emphasis added.)

The public interest sought to be protected by G.S. 106-266.21 is the public's interest in the regular flow of an adequate supply of wholesome milk from the producer to the consumer, not a possible public interest in the protection of retail grocery stores from the use by other retail grocery stores of milk as a "loss leader." Since the Commission, under its statutory authority, has fixed the minimum price to be paid to the producer by the distributor, a circumstance

which was not present in *Nebbia v. New York, supra* (see dissenting opinion by Mr. Justice McReynolds, 89 A.L.R. 1484, 1487), there is no reasonable basis for a finding by the courts that a sale of milk by a retail grocery store at less than the cost of the milk to it will endanger the public's interest in an adequate flow of wholesome milk, nothing else appearing.

Upon a demurrer for failure to state a cause of action, a complaint must be liberally construed in favor of the pleader. *Patterson v. Lynch, Inc.*, 266 N.C. 489, 146 S.E. 2d 390; *Homes, Inc., v. Holt*, 266 N.C. 467, 146 S.E. 2d 434; *Hall v. Coble Dairies*, 234 N.C. 206, 67 S.E. 2d 63; *Wells v. Wells*, 227 N.C. 614, 44 S.E. 2d 31; *Hearn v. Erlanger Mills, Inc.*, 219 N.C. 623, 14 S.E. 2d 675. So construed, we find in this complaint an allegation of a sale of milk below cost for the purpose of destroying competition in the sale of milk. While the allegation that the issuance of an injunction is necessary in order to protect "the public interest," standing alone, is a mere conclusion of the pleader, it may be inferred from the preceding allegation as to the purpose to destroy competition in the sale of milk that the public interest alleged to require injunctive relief is the public's interest in monopoly free marketing of milk. We also interpret the allegation in the complaint that the defendant sold "milk" to mean it sold milk as defined in the highly restrictive definition contained in G.S. 106-266.6. We, therefore, hold that the demurrer *ore tenus* to the complaint was properly overruled.

Upon an appeal from an order granting an interlocutory injunction, this Court is not bound by the findings of fact made by the court below, but may review and weigh the evidence and find the facts for itself. *Milk Commission v. Dagenhardt, supra.*

The plaintiff's own evidence is not sufficient to support a finding that the sales of milk by the defendant were for the purpose of destroying competition in the marketing of milk. Milk was but one of many items listed in the newspaper advertisement published by the defendant and introduced in evidence by the plaintiff. Presumably, the price therein specified for each article named was such as to be attractive to the housewife. The advertisement specifically states that only one half-gallon of milk was to be sold at this price to a customer. This is not the action of one seeking to drive competitors from the milk business. The plaintiff's evidence also shows that while the defendant increased its sales of milk by 10,000 half-gallons for the two days in which the below cost selling took place, its principal competitors' aggregate sales declined only about 700 half-gallons for the two day period. It would appear that the primary effect of the defendant's action upon the flow of milk was to in-

crease the consumption of milk, not to divert the milk business from rival stores. This is not contrary to the public interest in the maintenance of an adequate supply of wholesome milk. There is no evidence from any competing seller of milk that he was injured, harassed or eliminated from competition for the milk market or would be so affected by the further sales of milk by the defendant at less than the cost thereof to the defendant.

The defendant's evidence, which is uncontradicted, is that there is no competition between retail grocery stores and other types of distributors of milk. The defendant's evidence is that the use of milk as a "loss leader" is an accepted merchandising practice among retail grocery stores and is not for the purpose of injuring, harassing or destroying competition among other supermarkets and retail grocery stores. Fifteen competing merchants stated in their affidavits, introduced by the defendant, that they had not been injured by the advertisement and sales in question.

We think that the record leads inescapably to the conclusion that the purpose of the defendant in selling milk below cost was not to monopolize the business of selling milk in grocery stores, or elsewhere, but was to attract customers to its stores in the hope that they would purchase there other items in sufficient volume to yield the defendant a profit from its entire operation. Since this is not a violation of G.S. 106-266.21, it was error to issue the injunction and the judgment so doing is hereby

Reversed.

MEBANE LUMBER COMPANY v. AVERY & BULLOCK BUILDERS, INC., THADIUS A. COATES, JR., AND WIFE, DARLENE COATES; GEORGE S. GOODYEAR, TRUSTEE OF THE GOODYEAR MORTGAGE CORPORATION.

(Filed 24 May, 1967.)

1. Pleadings § 12—

A demurrer admits for its purpose the truth of the facts alleged in the complaint and relevant inferences of fact deducible therefrom, but it does not admit legal inferences or conclusions.

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

The claim of lien is the foundation of an action to enforce the lien, and if the claim of lien is fatally defective when filed there is no lien, and such defect cannot be cured by amendment after the filing period has expired, nor by allegations in an action to enforce the lien. G.S. 44-38, G.S. 44-39.

3. Same—

A claim of lien for materials furnished under an entire and indivisible contract for a specified job for a gross contract price need not itemize the materials furnished; however, if the contract is divisible, the materials furnished must be itemized in sufficient detail to put interested parties, or parties who may become interested, on notice as to the materials furnished and the time they were furnished and the amount due therefor.

4. Same—

Allegations that materials were furnished under an entire and indivisible contract is a mere conclusion, since whether a contract is entire or divisible must be determined by construction of the instrument.

5. Contracts § 13—

An entire contract is one in which all material provisions are interdependent and the consideration is entire on both sides; a severable contract is one susceptible of division and apportionment and one capable of performance in part.

6. Laborers' and Materialmen's Liens § 5—

A claim of lien based on separate statements respectively specifying the date materials were furnished and the amount due therefor, but describing the materials only as loads delivered on the respective dates, *held* to disclose that the materials were furnished under a severable and not an entire contract, and the materials were not itemized as required by statute for a valid lien. G.S. 44-38.

APPEAL by plaintiff from *Brock, S.J.*, February 1967 Nonjury Assigned Civil Session of WAKE.

This is a civil action to perfect a materialman's lien.

On 7 July 1966 claimant filed notice and claim of lien on real property and dwelling located in Wake County, North Carolina, for materials supplied in the construction of said dwelling. The first three paragraphs of the claim of lien give the names and addresses of the party asserting the lien and the party against whom the lien is asserted, and a description of the property on which said dwelling is located. Paragraph 4 of said notice and claim of lien reads as follows:

> "4. That the material and labor on account of which this lien is filed was furnished to and performed for said owners by said claimants under and pursuant to the terms of an entire and indivisible contract made and entered into by claimant and said owners on or about the 15 day of March, 1966 by the terms of which said claimants furnished certain materials and performed certain labor in the erection and improvement of a building and improvements upon said land, and the owners agreed to pay for the same the sums set out in 'Exhibit A' hereto attached and made a part of this notice. That said owners have not paid the full amount due on said contract for said labor and materials,

and there is still due to claimants in the sum of $5,389.68, a detailed statement showing said prices and credits being attached in 'Exhibit A'. Said labor was performed and materials furnished and use in the building and improvements upon said land owned by said owners pursuant to said contract. Claimants began to furnish said materials and to perform said labor on or about the 15 day of March, 1966, and finished the same on or about the 25 day of April, 1966, and the amount still due by said owners to claimants under said contract for which this notice is filed is $5,389.68, with interest on same from the 10th day of May. 1966."

Attached to the lien notice as a part thereof are four statements. The first of these is a total of the amounts due on the other three.

The second statement, dated 15 March 1966, describes the materials supplied as "Load 1, 2, 3, 4," and shows the amount due therefor as $4,282.41.

The third statement, dated 6 April 1966, describes the materials delivered as "2/8x1/8 QH Door unit w/sill, 4/16 jamb, 3-lts/3 panel" and gives the price therefor as $36.67.

The fourth statement, dated 25 April 1966, describes the material delivered as "Load #2" and gives the price therefor as $1070.60.

Plaintiff filed complaint on 30 December 1966 alleging, in substance, the following:

That defendant Builders was in the business of constructing houses on property owned by it and then selling the property to various purchasers, and on 15 March 1966 plaintiff entered into a contract with defendant builder to supply an unassembled building consisting of pre-cut lumber, pre-hung doors, siding, flooring, roofing, nails, and other such supplies necessary in the construction of the building. Pursuant to the contract, plaintiff alleges that it supplied materials on different dates between 15 March and 25 April 1966, for a total price of $5,389.68; that plaintiff had made repeated demands on defendant Builders to pay for the material supplied, but that defendant had failed, neglected and refused to pay any amount on the sum alleged to be due; that by deed recorded 27 May 1966 defendant Builders sold and conveyed the land and house herein referred to defendants Thadius A. Coates, Jr., and his wife, Darlene Coates, who in turn had executed and delivered a deed of trust on the property described in the claim of lien and complaint to George S. Goodyear, Trustee, for the benefit of Goodyear Mortgage Corporation, and that said deed of trust was duly recorded in Book 1716, page 407, of the Wake County Registry on 27 May 1966. Plaintiff prays for judgment against each of the defendants in the sum of $5,389.68,

and further prays that the judgment be declared a lien on the property described in the complaint, from and after 15 March 1966, and that execution issue against said property to the end that the property be sold according to law.

Defendants Coates and Goodyear demurred. The demurrers were sustained by the trial judge. Plaintiff appeals.

Sanford and Cannon for plaintiff.

Lassiter, Leager, Walker & Banks for defendant Goodyear, Trustee, and Goodyear Mortgage Corp.

Jordan, Morris & Hoke for defendants Coates.

BRANCH, J. It is well established in this jurisdiction that for there to be an effective labor or materialman's lien relating back to the date the work was begun or the materials furnished, the claim of lien must be filed in the office of the Clerk of Superior Court of the county in which the land is located within six months from and after the date the work was completed or the materials furnished. *And the claim shall specify in detail the work done, the materials furnished, and the time thereof*, provided: if a special contract for such labor performed is made by the parties, or if such materials and labor are specified in writing, it shall be decided agreeably to the terms of the contract, provided the terms of the contract do not affect the lien for such labor performed or materials furnished. G.S. 44-38; G.S. 44-39; *Lowery v. Haithcock*, 239 N.C. 67, 79 S.E. 2d 204; *Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E 2d 390.

Whether the action was instituted within the time limit is not at issue, and plaintiff has alleged no facts tending to show a contract between it and the demurring defendants which would entitle it to a personal judgment against them. Rather, the decisive question relates to the sufficiency of the statement in the claim of lien of materials furnished. Its sufficiency is before us on defendants' demurrers.

> ". . . The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. We are required on a demurrer to construe the complaint liberally with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. G.S. 1-151; *Barber v. Wooten*, 234 N.C. 107, 66 S.E. 2d 690; *Cathey v. Construction Company*, 218 N.C. 525, 11 S.E. 2d 571; *Joyner*

v. Woodard, 201 N.C. 315, 160 S.E. 288." *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440.

A defect in a lien cannot be cured by amendment after the filing period has expired, nor by alleging the necessary facts in the pleadings in an action to enforce the lien. *Jefferson v. Bryant,* 161 N.C. 404, 77 S.E. 341, and *Cook v. Cobb,* 101 N.C. 68, 7 S.E. 700.

In determining the sufficiency of a claim of lien, this Court has made a distinction as to the particularity required in specifying the materials furnished, prices charged, and the time of furnishing where the claim is based on a divisible contract or open account, and where the materials or labor were contracted for as an entirety. The more particular statement is required in the case of a divisible contract or open account. However, where the contract is to *complete a building for one sum,* it is not required that the labor and materials furnished shall be itemized. *Jefferson v. Bryant, supra.* And where the plaintiff contracted to do certain work for the defendant for "a stated amount," or to furnish materials for a "gross sum," the contract is entire, and particular itemization of the claim of lien is not required, as is required for divisible contracts for materials or labor. *King v. Elliott,* 197 N.C. 93, 147 S.E. 701. However, where itemization is required, a listing of materials item by item or the labor hour by hour is not required, but there must be a substantial compliance with the statute, *i. e.,* a statement in sufficient detail to put interested parties, or parties who may become interested, on notice as to labor performed or materials furnished, the time when the labor was performed and the materials furnished, the amount due therefor, and the property on which it was employed. *Lowery v. Haithcock, supra; King v. Elliott, supra; Cameron v. Lumber Co.,* 118 N.C. 266, 24 S.E. 7; *Cook v. Cobb, supra.*

The claim of lien is the foundation of the action to enforce the lien, and if such lien is defective when filed, it is no lien. *Jefferson v. Bryant, supra.* Thus, the answer to the question presented by this appeal must be found in the claim of lien and the exhibits made a part thereof.

It is necessary to determine whether the contract which is the basis of the lien is an entire contract or a severable or divisible contract. In the case of *Wooten v. Walters,* 110 N.C. 251, 14 S.E. 734, Chief Justice Merrimon, speaking for the Court, said:

> "A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent. Such a contract possesses essential oneness in all material respects. The consid-

eration of it is entire on both sides. Hence, where there is a contract to pay a gross sum of money for a certain definite consideration, it is entire, and not severable or apportionable in law or equity. Thus, where a particular thing is sold for a definite price, the contract is an entirety, and the purchaser will be liable for the entire sum agreed to be paid. And so, also, when two or more things are sold together for a gross sum, the contract is not severable. The seller is bound to deliver the whole of the things sold, and the buyer to pay the whole price, in the absence of fraud. . . .

"On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. Hence, an action may be maintained for a breach of it in one respect and not necessarily in another, or for several breaches, while in other material respects it remains intact. In such a contract the consideration is not single and entire as to all its several provisions as a whole; until it is performed it is capable of division and apportionment. . . . If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable."

It is alleged here that there was an "entire and indivisible contract." The use of the terms "entire" and "indivisible" is not an averment of fact, but is simply a statement which expresses the conclusion of the pleader. The demurrers interposed by defendants do not admit conclusions of law. *Gillispie v. Service Stores*, 258 N.C. 487, 128 S.E. 2d 762.

The claim of lien alleges that pursuant to the terms of the contract entered into between claimant and defendant, claimant furnished *certain* materials and performed *certain* labor in the erection and improvement of a building; that the owners agreed to pay sums set out in Exhibit "A" thereto attached and made a part of the notice, and that claimant began to furnish said materials and perform said labor on 15 March 1966 and finished the same on or about 25 April 1966. There is no showing that any labor was performed.

Although the record does not identify any exhibit as "Exhibit A", the exhibits in the record, when taken with and made a part of the claim of lien, do not reveal the nature of the materials furnished or when the owner agreed to pay the sums alleged to be due. Nor do they allege *facts* to show there was a contract to complete a

building for one sum or to furnish materials for a gross sum. There is no inference of a single consideration. In fact, the exhibits offered by claimant, being on different dates and for varying unidentified "loads," negative any inference of an entire contract or a complete job for a fixed price. There is nothing before the Court to make it appear that the purpose was to take the whole or none, or that there was a purpose to sell the materials as an inseparable whole. The claim of lien, including the statements attached thereto, being insufficient to show the existence of an entire and indivisible contract, it was incumbent upon plaintiff to substantially specify in detail the materials furnished, as required by G.S. 44-38. Clearly claimant has failed to comply, even substantially, with the requirements of the statute.

The judgment of the court below is

Affirmed.

MEBANE LUMBER COMPANY v. AVERY & BULLOCK BUILDERS, INC., DONALD E. FRYE AND WIFE, LOU H. FRYE; GEORGE S. GOODYEAR, TRUSTEE OF THE GOODYEAR MORTGAGE CORPORATION.

(Filed 24 May, 1967.)

APPEAL by plaintiff from *Brock, S.J.*, February 1967 Nonjury Assigned Civil Session of WAKE.

This is a civil action to perfect a materialman's lien.

On 7 July 1966 claimant filed notice and claim of lien on real property and dwelling located in Wake County, North Carolina, for materials supplied in the construction of said dwelling. The first three paragraphs of the claim of lien give the names and addresses of the party asserting the lien and the party against whom the lien is asserted, and a description of the property on which said dwelling is located. Paragraph 4 of said notice and claim of lien reads as follows:

> "4. That the material and labor on account of which this lien is filed was furnished to and performed for said owners by said claimants under and pursuant to the terms of an entire and indivisible contract made and entered into by claimant and said owners on or about the 1 day of March, 1966 by the terms of which said claimants furnished certain materials and performed certain labor in the erection and improvement of a

building and improvements upon said land, and the owners agreed to pay for the same the sums set out in 'EXHIBIT A' hereto attached and made a part of this notice. That said owners have not paid the full amount due on said contract for said labor and materials, and there is still due to claimants in the sum of $4,202.98, a detailed statement showing said prices and credits being attached in 'Exhibit A'. Said labor was performed and materials furnished and use in the building and improvements upon said land owned by said owners pursuant to said contract. Claimants began to furnish said materials and to perform said labor on or about the 1 day of March, 1966, and finished the same on or about the 25 day of March, 1966, and the amount still due by said owners to claimants under said contract for which this notice is filed is $4,202.98, with interest on same from the 10th day of April, 1966."

Attached to the lien notice as a part thereof are three statements. The first of these shows a total of the amounts due on the other two, as: $3362.39
840.59
$4202.98

The second statement, dated 1 March 1966, describes the materials supplied as "Load 1, 2, 3, 4, 5M," and shows the amount due therefor as $3,362.39.

The third statement, dated 25 March 1966, describes the materials delivered as "Load #5" and gives the price therefor as $840.59.

Plaintiff filed complaint on 30 December 1966 alleging, in substance, the following:

That defendant Builders was in the business of constructing houses on property owned by it and then selling the property to various purchasers, and on 1 March 1966 plaintiff entered into a contract with defendant builder to supply an unassembled building consisting of pre-cut lumber, pre-hung doors, siding, flooring, roofing, nails, and other such supplies necessary in the construction of the building. Pursuant to the contract, plaintiff alleges that it supplied materials on different dates between 1 March and 25 March 1966, for a total price of $4,202.98; that plaintiff had made repeated demands on defendant Builders to pay for the material supplied, but that defendant had failed, neglected and refused to pay any amount on the sum alleged to be due; that by deed recorded 6 May 1966 defendant Builders sold and conveyed the land and house herein referred to defendants Donald E. Frye and his wife, Lou H. Frye, who in turn had executed and delivered a deed of trust on the property described in the claim of lien and complaint to George S. Goodyear,

Trustee, for the benefit of Goodyear Mortgage Corporation, and that said deed of trust was duly recorded in Book 1713, page 217, of the Wake County Registry on 6 May 1966. Plaintiff prays for judgment against each of the defendants in the sum of $4,202.98, and further prays that the judgment be declared a lien on the property described in the complaint, from and after 1 March 1966, and that execution issue against said property to the end that the property be sold according to law.

Defendants Frye and Goodyear demurred. The demurrers were sustained by the trial judge. Plaintiff appeals.

Sanford and Cannon for plaintiff.

Lassiter, Leager, Walker & Banks for defendant Goodyear, Trustee, and Goodyear Mortgage Corp.

Thomas A. Banks for defendants Frye.

PER CURIAM. The decisive facts in the instant case and in *Lumber Company v. Avery & Bullock Builders, Inc., Thadius A. Coates, Jr., et al.*, decided this day, are the same. Upon authority of that case, and the cases therein cited, the judgment of the court below is

Affirmed.

MEBANE LUMBER COMPANY v. AVERY & BULLOCK BUILDERS, INC., JOHN PHILLIP PRICE AND WIFE, METTA B. PRICE; RICHARD O. GAMBLE, TRUSTEE OF THE FIRST PROVIDENT CORPORATION OF SOUTH CAROLINA.

(Filed 24 May, 1967.)

APPEAL by plaintiff from *Brock, S.J.*, February 1967 Nonjury Assigned Civil Session of WAKE.

This is a civil action to perfect a materialman's lien.

On 7 July 1966 claimant filed notice and claim of lien on real property and dwelling located in Wake County, North Carolina, for materials supplied in the construction of said dwelling. The first three paragraphs of the claim of lien give the names and addresses of the party asserting the lien and the party against whom the lien is asserted, and a description of the property on which said dwelling is located. Paragraph 4 of said notice and claim of lien reads as follows:

"4. That the material and labor on account of which this lien is filed was furnished to and performed for said owners by

said claimants under and pursuant to the terms of an entire and indivisible contract made and entered into by claimant and said owners on or about the 3 day of January, 1966 by the terms of which said claimants furnished certain materials and performed certain labor in the erection and improvement of a building and improvements upon said land, and the owners agreed to pay for the same the sums set out in 'Exhibit A' hereto attached and made a part of this notice. That said owners have not paid the full amount due on said contract for said labor and materials, and there is still due to claimants in the sum of $4,033.83, a detailed statement showing said prices and credits being attached in 'Exhibit A'. Said labor was performed and materials furnished and use in the building and improvements upon said land owned by said owners pursuant to said contract. Claimants began to furnish said materials and to perform said labor on or about the 3 day of January, 1966, and finished the same on or about the 4 day of February, 1966, and the amount still due by said owners to claimants under said contract for which this notice is filed is $4,033.83, with interest on same from the 10th day of May, 1966."

Attached to the lien notice as a part thereof are four statements. The first of these shows a total of the amounts due on the other three as:

	$4070.34
	1017.57
	$5087.91
Less: Credit	54.08
	$5033.83
Less: Paid	1000.00
	$4033.83

The second statement, dated 3 January 1966, describes the materials supplied as "Load 1, 2, 3, 4," and shows the amount due therefor as $4,070.34.

The third statement, dated 29 April 1966, describes the materials delivered as "three rh door 2/6", gives the price therefor as $54.08, and is marked "Credit."

The fourth statement, dated 4 February 1966, describes the material delivered as "Load #5" and gives the price therefor as $1017.57.

Plaintiff filed complaint on 30 December 1966 alleging, in substance, the following:

That defendant Builders was in the business of constructing houses on property owned by it and then selling the property to various purchasers, and on 3 January 1966 plaintiff entered into a con-

tract with defendant builder to supply an unassembled building consisting of pre-cut lumber, pre-hung doors, siding, flooring, roofing, nails, and other such supplies necessary in the construction of the building. Pursuant to the contract, plaintiff alleges that it supplied materials on different dates between 3 January and 4 February 1966, for a total price of $5,087.91; that the balance due on said sum is $4,033.83; that plaintiff had made repeated demands on defendant Builders to pay for the material supplied, but that defendant had failed, neglected and refused to pay any amount on the sum alleged to be due; that by deed recorded 28 June 1966 defendant Builders sold and conveyed the land and house herein referred to defendants John Phillip Price and his wife, Metta B. Price, who in turn had executed and delivered a deed of trust on the property described in the claim of lien and complaint to Richard O. Gamble, Trustee, for the benefit of First Provident Corporation of South Carolina, and that said deed of trust was duly recorded in Book 1721, page 347, of the Wake County Registry on 28 June 1966. Plaintiff prays for judgment against each of the defendants in the sum of $4,033.83, and further prays that the judgment be declared a lien on the property described in the complaint, from and after 3 January 1966, and that execution issue against said property to the end that the property be sold according to law.

Defendants Price and Gamble demurred. The demurrers were sustained by the trial judge. Plaintiff appeals.

Sanford and Cannon for plaintiff.

Poyner, Geraghty, Hartsfield & Townsend for defendants Richard O. Gamble and First Provident Corporation of South Carolina.

Thomas A. Banks for defendants Price.

PER CURIAM. The decisive facts in the instant case and in *Lumber Company v. Avery & Bullock Builders, Inc., Thadius A. Coates, Jr., et al.*, decided this day, are the same. Upon authority of that case, and the cases therein cited, the judgment of the court below is

Affirmed.

STATE v. JOHN HENRY HEWETT.

(Filed 24 May, 1967.)

1. Appeal and Error § 2—

The Supreme Court may exercise its constitutional supervisory jurisdiction to clarify an important question of practice, even though the question is not properly presented by exception duly entered and an assignment of error properly set out.

2. Criminal Law § 135—

Probation or suspension of sentence is not a right granted by either the Federal or State Constitutions, but is a matter of grace conferred by statute in this State. G.S. 15-197.

3. Same—

Probation relates to judicial action before imprisonment, while parole relates to executive action after imprisonment.

4. Criminal Law § 136—

A proceeding to revoke probation is not a criminal prosecution but is a proceeding solely for the determination by the court whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered, and while notice in writing to defendant and an opportunity for him to be heard are necessary, the court is not bound by strict rules of evidence, and all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the defendant had without lawful excuse wilfully violated a valid condition of probation.

5. Same; Constitutional Law § 32—

A defendant has no constitutional right to be represented by counsel at a hearing to determine whether his probation should be revoked for his wilful violation of a lawful condition of probation, and G.S. 15-4.1 is not applicable.

6. Criminal Law § 154—

An exception which appears nowhere except under the assignments of error is ineffectual.

7. Criminal Law § 136—

Where the record discloses that a bill of particulars setting forth defendant's alleged violation of condition of probation was duly served upon defendant, and that order revoking probation was not entered until the hearing after notice some four days thereafter, no abuse of discretion is shown in the refusal by the court of defendant's motion for continuance.

8. Same—

Defendant was put on probation on condition that he not engage in injurious and vicious habits. Upon the hearing to revoke probation there was plenary competent evidence that on repeated occasions defendant had threatened law enforcement officers and had wilfully engaged in assaults upon specified persons, etc. *Held:* The evidence supports the court's finding that defendant had engaged in injurious or vicious habits in violation of the terms of probation and such finding supports the court's judgment revoking defendant's probation.

9. Same—

In determining whether the evidence warrants revocation of probation, the credibility of the witnesses and the evaluation and weight of their testimony are for the judge, and, if there is competent evidence in the record to support the court's finding of violation of condition of probation, the fact that the court also admitted incompetent hearsay evidence is not fatal, the crucial findings being supported by competent evidence.

10. Criminal Law § 164—

Where sentences of defendant are made to run concurrently, any error relating to the shorter sentence alone cannot be prejudicial.

APPEAL by defendant from *Carr, J.*, November 1966 Criminal Session of COLUMBUS.

At the September 1964 Session of Columbus County Superior Court, defendant, who was represented by his court-appointed attorney J. B. Lee, Jr., an able and experienced member of the Columbus County Bar, entered pleas of guilty to two indictments, Nos. 259-E and 260-E on the docket, each indictment charging the defendant with a felonious breaking and entry into a store building and larceny. At the same time, defendant, who was represented by his court-appointed attorney J. B. Lee, Jr., entered pleas of guilty to an escape from jail as charged in docket No. 229-G, and injury to a building as charged in docket No. 262-E.

The judgment of the court upon the pleas of guilty to the two indictments charging a felonious breaking and entry and larceny was imprisonment for a term of not less than five years nor more than seven years. The judgment of the court upon the pleas of guilty upon an escape from prison and injury to a building was imprisonment for six months "to take effect at a time and as further ordered by the court." Pursuant to the provisions of G.S. 15-197 *et seq.*, the court suspended the execution of the prison sentences and placed defendant on probation for a period of five years on certain conditions of probation. Among the conditions of probation, it was ordered by the court in the judgment that the defendant shall "avoid injurious or vicious habits."

At the November 1966 Criminal Session of Columbus County Superior Court, this criminal proceeding came on to be heard upon a written verified report by Edmond O. Wall, a State probation officer, alleging a violation of a condition of defendant's probation, to wit, that he had not avoided injurious or vicious habits. A bill of particulars alleging a violation by defendant of the condition to "avoid injurious or vicious habits" had been duly served on defendant prior to the hearing, as provided by G.S. 15-200.1. Defendant, at the beginning of the hearing before Judge Carr, requested Judge Carr to appoint counsel to appear for him, and Judge Carr denied

his request. Defendant did not except. After hearing the evidence in the case presented by the State and the testimony of defendant, Judge Carr entered an order finding as a fact that the defendant had willfully violated a condition of the probation judgment, in that he had engaged in injurious and vicious habits, and found with particularity that he had engaged in six series or acts of injurious and vicious habits. Based upon his findings of fact, he ordered in his discretion that the probation be revoked and the prison sentences be put into immediate effect. At the end of his order appears the following language: "That this probationer was in Dorothea Dix Hospital twice in 1965 because of emotional instability as appears from above findings of fact. By reason of this fact the court recommends that he be closely observed in prison and given such attention, because of his tendency to become emotionally disturbed, as the circumstances require."

Defendant appealed from the order entered by Judge Carr. Judge Carr entered an order finding that defendant is an indigent and appointing J. Wilton Hunt, a member of the Columbus County Bar, to represent the defendant on appeal. Later, Bailey, Judge presiding, entered the following orders: (1) An order allowing defendant to give a bail bond in the sum of $7,500 pending the outcome of his appeal; (2) an order discharging J. Wilton Hunt as defendant's attorney for the reason that there was a conflict of interest; (3) an order appointing J. B. Lee, Jr., to represent the defendant and to perfect his appeal; and (4) an order that Columbus County at its expense furnish a transcript of the record and evidence to defendant's counsel, and that the record and brief of counsel on appeal should be mimeographed. Mr. Lee is the same lawyer who represented defendant at the September 1964 Session of Columbus County Superior Court.

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

J. B. Lee, Jr., for defendant appellant.

PARKER, C.J. Defendant through his counsel, Mr. Lee, assigns as error that Judge Carr failed to appoint counsel to represent defendant, an indigent, at the hearing before him, though the defendant had requested counsel, and that his failure to do so was a flagrant abuse of discretion. This assignment of error is overruled.

Ordinarily, the Supreme Court will not consider questions not properly presented by objections duly made, exceptions duly entered, and assignments of error properly set out, though it may do so in exceptional circumstances in the exercise of its supervisory and

controlling jurisdiction over the proceedings of the other courts vested in it by Article IV, section 10(1), of the North Carolina Constitution. To clarify an important question of practice frequently arising in the trial courts of this State, this Court, by virtue of the constitutional supervisory and controlling power vested in it over the other courts, deems it appropriate to consider defendant's assignment of error, as if an exception had been noted in apt time by defendant. *In re Renfrow,* 247 N.C. 55, 100 S.E. 2d 315; 1 Strong's N. C. Index, Appeal and Error, §§ 2, 19, and Supplement thereto.

A person convicted of crime is not given a right to probation by the United States Constitution. *Burns v. United States,* 287 U.S. 216, 77 L. Ed. 266 (1932); *Escoe v. Zerbst,* 295 U.S. 490, 79 L. Ed. 1566 (1935); *Brown v. Warden, U. S. Penitentiary,* 351 F. 2d 564 (7th Cir. 1965); *Welsh v. United States,* 348 F. 2d 885 (6th Cir. 1965); *Gillespie v. Hunter,* 159 F. 2d 410 (10th Cir. 1947); *Jones v. Rivers,* 338 F. 2d 862 (4th Cir. 1964); *Bennett v. United States,* 158 F. 2d 412 (8th Cir. 1946); *Shum v. Fogliani,* ..... Nev. ..... , 413 P. 2d 495 (1966).

Probation or suspension of sentence comes as an act of grace to one convicted of crime. *Escoe v. Zerbst, supra.* The rights of an offender in a proceeding to revoke his conditional liberty under probation are not coextensive with the Federal constitutional rights of one on trial in a criminal prosecution. *Hyser v. Reed,* 115 U.S. App. D. C. 254, 318 F. 2d 225 (1963); *Richardson v. Markley,* 339 F. 2d 967 (7th Cir. 1965); *Brown v. Warden, U. S. Penitentiary, supra; Jones v. Rivers, supra.*

In *Welsh v. United States, supra,* defendant pleaded guilty to various Federal offenses. He was not sentenced at the time the pleas were entered. Later, he appeared in court in person and by counsel, at which time imposition of sentences was suspended and he was placed on probation for a period of five years in each case. At a later hearing probation was revoked and the sentences were imposed. On 5 June 1964 defendant filed a motion to vacate the sentences, the district judge denied the motion without a hearing, and an appeal followed. The court said in part:

> "Petitioner also contends that he was deprived of his constitutional right to assistance of counsel at the hearing when probation was revoked. In addition to the fact that petitioner made no request for counsel at that hearing, the constitutional right to the assistance of counsel in the defense of a criminal prosecution, given by the Sixth Amendment, does not apply to a hearing on a motion to revoke probation. *Bennett v. United States,* 158 F. 2d 412, 415, C.A. 8th, *cert. denied,* 331 U.S. 822,

67 S. Ct. 1302, 91 L. Ed. 1838; *Gillespie v. Hunter,* 159 F. 2d 410, 411, C.A. 10th; *United States v. Huggins,* 184 F. 2d 866, 868, C.A. 7th; *Crowe v. United States,* 175 F. 2d 799, 801, C.A. 4th, *cert. denied* 338 U.S. 950, 70 S. Ct. 478, 94 L. Ed. 586, *rehearing denied,* 339 U.S. 916, 70 S. Ct. 559, 94 L. Ed. 1341; *Richardson v. United States,* 199 F. 2d 333, 335, C.A. 10th; *Cupp v. Byington,* 179 F. Supp. 669, 670, S.D. Ind. See: *Gilpin v. United States,* 265 F. 2d 203, and cases cited at p. 204, C.A. 6th; *Barker v. State of Ohio,* 330 F. 2d 594, and cases cited, C.A. 6th.

"Judgment affirmed."

To the same effect *Jones v. Rivers, supra.*

A person convicted of crime is not given a right to probation under the North Carolina Constitution. G.S. 15-197 provides in relevant part: "After conviction or plea of guilty or *nolo contendere* for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or the execution of a sentence and place the defendant on probation. . . ." Probation relates to judicial action taken before the prison door is closed, whereas parole relates to executive action taken after the door has closed on a convict. G.S. 15-199 provides, among other things, that as a condition of probation the probationer shall "avoid injurious or vicious habits." G.S. 15-200.1 provides in relevant part: Upon its findings of fact that a valid condition of probation was wilfully violated, the Superior Court shall enforce the judgment of the lower court, with an exception not pertinent here. Whether defendant has violated valid conditions of probation is not an issue of fact for a jury, but is a question of fact for the judge to be determined in the exercise of his sound discretion. *S. v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376.

When a person accused of crime has been tried, defended, sentenced, and, if he desires, has exhausted his rights of appeal, the period of contentious litigation is over. Although revocation of probation results in the deprivation of a probationer's liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty. The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence, but to the truth of the accusation of a violation of probation. The crucial question is: Has the probationer abused the privilege of grace extended to him by the court? When a sentence of imprisonment in a criminal case is suspended upon certain valid conditions expressed in a probation judgment, defendant has a right to rely upon such conditions, and as long as he complies therewith the

suspension must stand. In such a case, defendant carries the keys to his freedom in his willingness to comply with the court's sentence.

A proceeding to revoke probation is not a criminal prosecution, and we have no statute in this State requiring a formal trial in such a proceeding. Proceedings to revoke probation are often regarded as informal or summary. The courts of this State recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. *S. v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53, and cases cited. Upon a hearing of this character, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. *S. v. Robinson, supra; S. v. Morton,* 252 N.C. 482, 114 S.E. 2d 115; *S. v. Brown,* 253 N.C. 195, 116 S.E. 2d 349; Supplement to 1 Strong's N. C. Index, Criminal Law, § 136.

All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. Judicial discretion implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and "is directed by the reason and conscience of the judge to a just result." *S. v. Duncan, supra; Langnes v. Green,* 282 U.S. 531, 541, 75 L. Ed. 520, 526; *S. v. Robinson, supra; S. v. Morton, supra; S. v. Brown, supra.*

G.S. 15-4.1 is not applicable, for the simple fact that it applies to the appointment of counsel for indigent defendants in criminal trials. It does not apply to the appointment of counsel for indigent defendants in a proceeding to revoke probation.

Decisions concerned with the constitutional right to counsel of an accused at various stages of criminal prosecutions are not controlling. *Cf. Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799.

We do not find in the United States Constitution or in the North Carolina Constitution any constitutional right to counsel for a defendant in a proceeding to revoke probation. We find no statute in this State giving a defendant the right to counsel in such a proceeding. The difference between hearings as to whether probation shall be revoked and criminal trials is so great that procedural requirements in criminal trials, such as the right to counsel, ought not to be imposed in absolute terms in hearings to revoke probation. A possible extension to hearings upon whether probation should be revoked of an absolute and universal requirement of counsel at every such

hearing ought not to be taken without a legislative determination of the impact of such a requirement on the probation system.

This is said in 24 C.J.S., Criminal Law 1618(11) d (d), p. 917, in respect to representation by counsel in a hearing to revoke probation: "It is not required that the probationer be represented by counsel at the hearing, or that he be informed that he had a right to counsel, although under some statutes he is entitled to be represented by counsel." A number of cases are cited in support of the text. In accord: *State v. Edge,* 96 Ariz. 302, 394 P. 2d 418; *People v. Wimberly,* 215 C.A. 2d 538, 30 Cal. Rptr. 421; *Shum v. Fogliani, supra; Kennedy v. Maxwell,* 176 Ohio St. 215, 198 N.E. 2d 658.

Defendant assigns as error that there was an abuse of discretion on the part of Judge Carr in failing to continue the hearing of the proceeding to revoke probation. This assignment of error has no exception to support it, except under the assignment of error. This Court has repeatedly held that an exception which appears no where in the record, except under the assignment of error, is ineffectual, since an assignment of error must be supported by an exception duly noted. However, an examination of the record before us shows that the order revoking probation recites in substance that a bill of particulars setting forth the alleged violation of the condition of probation was duly served on the defendant on 28 November 1966, and the order revoking probation was entered on 2 December 1966. The motion for continuance was addressed to the sound discretion of Judge Carr, and no abuse of discretion is shown and the ruling will be upheld. *S. v. Culberson,* 228 N.C. 615, 46 S.E. 2d 647; *S. v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666.

Defendant assigns as error that there is no competent evidence to support the judge's findings of fact; that the facts found by the judge do not support the judgment; and that errors of law appear on the face of the record.

Judge Carr found as a fact in his order revoking probation that defendant has willfully violated the conditions of the probation judgment by engaging in injurious and vicious habits as follows:

(1) "Threats to law enforcement officers: Once to Police Chief Freeman if he stuck his head in the police car where subject was sitting; once to the mother of Policeman Harold Fipps that he (the probationer) was going 'to get' Fipps; and a pattern of hostility to law enforcement officers in general." Police Chief Freeman testified in substance, except when quoted. Since defendant has been on probation, one Sunday night he walked up to the police car where Officers Heye and Fipps had defendant. "As I walked up he made a statement to Chief Heye that if I stuck my head in the car he would cut it off." The finding of fact that probationer said to the mother

of Policeman Harold Fipps that he was going "to get" Fipps is based on hearsay, and has no competent evidence in the record to support it. There is plenary competent evidence from Policemen Heye, Joyner, Fipps, and Freeman to support the finding that probationer has exhibited a pattern of hostility to law enforcement officers in general. It is also supported by defendant's testimony: "I did threaten to hit Harold Fipps [an officer] in the mouth. On the night they picked me up for cutting Brown, I was trying to get on Rudolph Norris, the officer. He has done something to me. It is a long story. He had not done anything to me on that night. He walked in and asked me what they had me for. It kind of made me mad and I was already mad to start with. The reason I jumped on him was because I was mad."

(2) The court found as a fact that defendant has willfully violated the terms of probation by engaging in injurious and vicious habits by committing assaults upon persons, to wit, by slapping on the street a salesman from Charlotte, by drawing a knife and cutting Terry Brown on the finger, and by throwing a bottle at a passing car. These findings of fact find support in the testimony of defendant as follows: "Yes, I work for Mrs. Ward part time. I did not slap her down. I slapped her across the face and she slapped me. I was not drunk. I was about to have a nervous breakdown. I do not remember that she told me to go home because I had had too much to drink. I did walk right out of the store and slap a man I had never seen before. He had not done anything to me." This finding of fact also is supported by the testimony of Policeman Joyner as follows: "I was present when he [defendant] had his altercation with this Negro in Chadbourn. I came on the scene and John Henry and Terry Brown were having words or swinging at each other. Officer Heye was with me. John Henry and this Negro were standing on the street. John Henry had his pocketknife in his hand. I didn't actually see a blow or who did the cutting or how the colored gentleman was cut. One of his fingers was cut and bleeding." There is no evidence but hearsay in the record that defendant threw a bottle at a passing car. However, defendant testified in substance that he got into an altercation with people in a car from South Carolina and one of them threw a bottle and hit him on the arm and bruised it badly, and then he went and got a bottle and threw it at him, but he contends that he acted in self-defense.

Among its other findings of fact the court found that probationer had engaged in injurious and vicious habits. This finding finds support in the testimony of Officer Joyner, who testified: "I see John Henry about seven days a week. . . . And numerous times I have

seen him when in my opinion he had been drinking some kind of alcoholic *(sic)* or either on drugs. I couldn't tell. This has been since he was put on probation in '64." This finding also finds support in the testimony of Officers Fipps as follows: "He [probationer] is a dangerous man when he is drinking. He is a big man." This finding of fact finds support in the testimony of Officer Heye, who testified as follows: "I was there when he was tried in Justice of Peace Wilson's court last year. It would be hard to describe what happened. He was tried for assaulting H. L. Buffkin. When one witness in particular testified John Henry interrupted the trial by telling the witness that it wasn't so. They became argumentative and next thing I knew we had to remove John from the courtroom. . . . During the same month he was brought back for a hearing. At the time I was referring to Attorney Wilton Hunt was there. I do not know whether he attempted to slug Attorney Hunt, but there was a lot of fist swinging. . . . This was the case of the peace warrant and the assault with a pocketknife on H. L. Buffkin. . . . The altercation was not between he (the defendant) and Buffkin. It was with the witness Shelton Wade Anderson who was testifying for Buffkin. John made a statement to Shelton Wade and they became argumentative. Shelton Wade Anderson is known as Snuffy Anderson. When they became argumentative they soon came to blows. . . . There was one blow after the other and John Henry was calmed down and ordered to be taken out of the courtroom."

Some of Judge Carr's findings of fact are based on hearsay evidence, and should not have been considered by the judge. However, there is enough competent evidence in the record to support the judge's crucial findings of fact that the defendant has willfully failed to avoid injurious or vicious habits as found by him with particularity as above set out, and these crucial findings of fact support the judgment revoking probation and putting the prison sentences into effect.

In determining whether the evidence warrants the revocation of probation or a suspended sentence, the credibility of the witnesses and the evaluation and weight of their testimony are for the judge. *S. v. Robinson, supra.* There is competent evidence in the record such as to reasonably satisfy the judge in the exercise of his sound discretion that probationer has violated a valid condition upon which his sentences were suspended. The condition that he avoid injurious or vicious habits is a valid condition of probation, G.S. 15-199, and no abuse of discretion on Judge Carr's part is shown in revoking the probation judgment and putting the prison sentences into effect.

Competent evidence in the record is plenary that defendant, particularly when drinking or taking drugs, engages in injurious and vicious habits, is dangerous, and when in such condition is hostile to police officers who attempt to restrain him. The original sentence, when defendant was put on probation, on the misdemeanor charges was six months in prison "to take effect at a time and as further ordered by the court." This seems irregular, but defendant has suffered no prejudicial harm by the order revoking probation and putting the sentences of imprisonment into effect, because that sentence of six months imprisonment is to run concurrently with the sentence of imprisonment for not less than five years nor more than seven years upon his pleas of guilty to the felony indictments.

No error of law appears on the face of the record proper. The order of the lower court is

Affirmed.

STATE v. RONALD MAXIE COLEMAN.

(Filed 24 May, 1967.)

1. Criminal Law § 155—

An assignment of error to the exclusion of evidence should set forth the evidence excluded so as to disclose within itself the question sought to be presented.

2. Criminal Law § 7—

Entrapment is the inducing of a person to commit a crime he did not contemplate doing, and the setting of a trap to catch a person in the execution of a crime of his own conception is not entrapment and is not a defense except in those cases in which the victim consents to the commission of the offense and want of consent is an essential element of the offense.

3. Same; Telephone Companies § 5— Entrapment held not available to defendant charged with making indecent telephone calls.

A number of indecent telephone calls had been made to women in the municipality in question who had placed advertisements in a newspaper indicating a woman would answer the call. Telephones were installed in the police department and an ad run in the paper seeking to sell a used mink stole. A policewoman was assigned to answer the telephone, and a diode device was placed on the line to trace calls. Defendant was charged with making an indecent telephone call over the line. *Held:* The defense of entrapment is not available to defendant, since the commission of the offense was of defendant's own conception and consent of the party called does not obviate the offense, G.S. 14-196.1, and therefore the exclusion of evidence tending to establish entrapment was not prejudicial.

4. Criminal Law § 67—

The victim of a lewd telephone conversation may testify upon hearing the defendant speak at police headquarters after his arrest that the voice she had heard over the telephone was that of the defendant, and any lack of assurance or uncertainty on the part of the witness affects the weight and credibility of the testimony but not its admissibility.

5. Same—

The admission in evidence of the tracing of the origin of a telephone call to the residence of defendant by use of a diode device preventing the breaking of the connection by the originator of the call, *held* not error, an employee of the telephone company having testified that he had supervised the installation and checked the device prior to the occasion in question, and there being testimony of witnesses that after the occasion in question the witnesses picked up the telephone and talked to the party called without dialing any number, the reliability of the diode device in this specific instance having been proven.

6. Telephone Companies § 5; Criminal Law § 33—

The use of a diode device to prevent the originator of a telephone call from breaking the connection so that the telephone from which the call originated can be identified is to protect the telephone system from abuse by a threatening or obscene caller, and use of such device in no way violates the prohibition against wiretapping, since it does not involve the interception of any communication and the divulgence of its contents by a third person. 47 U.S.C.A. § 605.

APPEAL by defendant from *McLean, J.*, 4 April 1966 Regular Criminal Session of MECKLENBURG. Docketed and argued as Case No. 254, Fall Term 1966, and docketed as Case No. 264, Spring Term 1967.

Criminal prosecution upon an amended warrant charging that defendant on 5 December 1965 at and in Mecklenburg County and within the city limits of Charlotte did unlawfully, willfully, and maliciously use lewd and profane language and words of vulgarity and indecency over a telephone to Mary Thompson, a female person, a violation of G.S. 14-196.1, heard *de novo* on appeal from a conviction and sentence of imprisonment in the recorder's court of the city of Charlotte.

Plea: Not guilty. Verdict: "Guilty as charged in the warrant."

From a judgment of imprisonment for a period of not less than 18 months nor more than 24 months, defendant appeals.

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

Plumides & Plumides by John G. Plumides, Richard L. Kennedy and Jerry W. Whitley for defendant appellant.

Moore and Van Allen by John T. Allred for Southern Bell Telephone and Telegraph Company, amicus curiæ.

PARKER, C.J. The State's evidence in summary tends to show the following facts: Prior to 5 December 1965 there had been in Charlotte a number of telephone calls from a man or men in response to legitimate ads in the daily papers when it was apparent that a woman would answer. Typical of these ads were an ad, "girl to share an apartment with a girl," or "some woman had a room for rent," or "wearing apparel or something of that nature." The police department of the city of Charlotte, in order to catch the man or men who made such calls, had the Charlotte Observer on Sunday, 5 December 1965, to run the following ad: "EMBA MINK JACKET CAPE STOLE, slightly used. Will sell at a sacrifice. Nice gift. 334-3237." Mrs. Frances S. Sutton, an employee of the Charlotte Observer and the Charlotte News, composed this ad and had it placed in the Charlotte Observer. Telephone No. 334-3237 was installed in an office of the police department in the city of Charlotte.

Prior to 5 December 1965 Southern Bell Telephone and Telegraph Company had installed a diode device in a particular section of its telephone exchange in the city of Charlotte serving telephone No. 334-3237. The basic function of a diode on a telephone line is simply to prevent a disconnection when the originating or calling party hangs up. It does not identify the parties to a conversation or record the actual conversation; it merely enables the calling line to be identified. In essence, it denies the caller a get-away. The nature and operation of the diode was described at the trial by the State's witness T. G. Latham, a Southern Bell employee for the past thirteen years. He testified: "A diode device that we used gives joint or dual control of the call. In other words, what I mean to say there, may I give an example? When a person makes a call, he dials all of his numbers into the central office. When he dials each digit, each digit is handled by a separate piece of equipment. It in turn goes through the central office in a step by step fashion to each piece of equipment and then goes to the terminated equipment or the receiver's line. This is all done automatically and then it rings the receiver's line and they will talk and have a conversation or transmission. All right, the calling party has control over the connection. If we use this diode device, then it gives dual control; not only the calling party can hold the connection but the receiving party can also hold the connection if they leave their receiver off the hook. This is what happened in this case. The receiver left their phone off the hook, called us and requested that we make a trace on this call. . . . Without the diode, only the calling party has control. In other words, when they hang up the connection is dropped. As long as the calling party has their receiver off the hook, then they have control

but when they hang up the connection is dropped. . . . I supervised the installing of this device on this line. I didn't do the installation. I checked it out to see that it was functioning. I did that myself. . . . As to whether I am an expert, it doesn't take much of an expert to install them so I guess I'm an expert. I consider myself an expert on doing this. I am convinced beyond a shadow of a doubt that every time I placed it, it was perfect. No mishaps. It is a very reliable instrument." Mr. Latham also testified: "I received the telephone call from the police station at 9:22 A.M. It took me until 9:27 A.M. to make the trace — five minutes. I reported the results of my tracing to Sgt. Ross."

Mrs. Mary S. Thompson is an employee of the police department of the city of Charlotte, and was so employed on 5 December 1965. She was assigned by the police to answer three telephones that had been installed in the police department of the city of Charlotte. The number of one of these telephones was 334-3237. About 9:21 a.m. on 5 December 1965, the bell on telephone 334-3237 rang and she answered. The person calling her over the telephone asked her if she was the lady that had the ad in the paper about the mink cape for sale, and then he used to her over the telephone such lewd, vulgar, and indecent language that we will not soil the pages of our Reports with such filth. It is manifest that it is such language as is prohibited by G.S. 14-196.1. (Anyone who is interested in reading the language this person used to Mrs. Thompson can find it set out on pages 14, 15, and 16 of the record.) What the person said to her lasted from two and one-half to three minutes, and then this person hung up. She kept the receiver up and held it in her hand until she received a dial tone about 10:49 a.m. She recognized the voice of the person talking to her over the telephone as that of a male person. She did not have a mink cape stole for sale.

T. G. Latham was on duty on the morning of 5 December 1965 for Southern Bell Telephone and Telegraph Company. About 9:30 a.m. he received a call from the police department of the city of Charlotte to trace a call to telephone No. 334-3237. In response to that call, he went to a telephone building at 208 N. Caldwell Street in the city of Charlotte to the receiving equipment for telephone calls to 334-3237 by means of the diode device, and checked that call back on automatic devices to determine where the call originated. He testified: "We traced this call back to the originating line equipment and after we found the originating line equipment which was 85 and 152, we went to our service record cards and pulled the card on 85 and 152 and found that the number 334-6987 was on this 85 and 152 and it was registered, the phone was registered to a Reverend

Maxie Coleman. It was a private line, with no extensions in the house. . . . This phone is located at 1705 North Allen Street in the City of Charlotte."

Robert W. Fleming is employed as the Business Office Manager by Southern Bell Telephone and Telegraph Company in Charlotte, and as such he has control over the telephone listings for the city of Charlotte. Telephone No. 334-6987 in Charlotte is listed in the name of the Reverend Maxie Coleman, and his address is 1705 North Allen Street, Charlotte. It is a private line, with no extensions.

After the telephone call had been traced, police officers of the city of Charlotte went to 1705 North Allen Street in the city of Charlotte. Upon arrival they saw the defendant walking towards a 1957 blue and white Pontiac parked at the curbing in front of the house, get in it, and leave. The officers followed him for about two and one-half blocks, got his license number and had it identified through the police station. They lost him in traffic. They went back to 1705 North Allen Street to observe the house. Later on, the defendant driving the 1957 Pontiac parked again in front of 1705 North Allen Street. Defendant then left this house and went to his car and got in on the driver's side. The officers drove up, identified themselves to the defendant, and asked who lived at 1705 North Allen Street. He stated that he did. After Officers Bruce S. Treadaway and Marshall Haywood went into the house with defendant, Officer Ross arrived with an arrest warrant and told defendant that he was under arrest and advised him as to his rights to counsel, that he did not have to make a statement unless he so desired, and that if he said anything it could be used against him. Officer Treadaway testified that "at that time I picked up the telephone and had conversation with Mrs. Mary Thompson without dialing the phone. I picked up the receiver. I hung the phone back up. Officer Ross picked it back up off the cradle. He had a conversation with someone. He didn't dial the phone." Pertaining to the same matter, Sergeant C. W. Ross testified in substance, except when quoted, as follows: He took the phone from Officer Treadaway and talked to the party on the other end of the line. "I recognized the voice. In my opinion, it was Mrs. Mary Thompson on the other end of the line." The officers took defendant to police headquarters. Defendant stated that his mother and father left about 9:00 or 9:05 a.m. to go to church, and that he was alone in the house from that time until the time the officers first drove up.

During a conversation at police headquarters, Mrs. Mary S. Thompson listened to the defendant talk. Mrs. Thompson testified in substance that she heard the defendant talk at the police station

and the voice of the defendant was the voice of the man who had used lewd, vulgar, and indecent language to her over the telephone that morning. On recross-examination of Mrs. Thompson by Mr. Plumides, the record shows this:

> "Q. That's the only other time you ever heard his voice, other than on the telephone, wasn't it?
>
> "A. When he made the statement, 'No, lady, I've never talked to you before,' the way he used 'lady' in his words, 'are you the "lady" with the cape for sale?'
>
> "That was not altogether the basis of my opinion. That was part of it. I didn't talk to him more than twenty to thirty seconds; that was enough to convince me. I was not helped in my opinion by the fact that he had already been brought to the Police Station by the police officers. He was the only one they had in custody at that time, but that didn't help influence my opinion."

Defendant offered no evidence.

Defendant assigns as error the following:

> "EXCEPTION No. 5. (R. p. 11) Defense counsel attempted to establish on cross examination that a certain advertisement was put in The Charlotte Observer with the intention of enticing male callers. Questions attempting to elicit the purpose for which the ad were *(sic)* placed were objected to and the objections were sustained. To this the defendant excepts and assigns this as his Assignment of Error No. 5."

We have to go beyond this assignment of error on a voyage of discovery through the record to find out the excluded testimony to which the defendant excepts. This assignment of error, like many of defendant's other assignments of error, does not comply with our Rules of Practice in the Supreme Court. *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. On our voyage of discovery it appears from the record that the excluded testimony is as follows:

> "They were written like the ones that had been receiving calls for the legitimate ads, like 'girl to share an apartment with a girl' or some woman had a room for rent or wearing apparel or something of that nature. These were the type of ads that the caller had been hitting, where he knew a woman would answer."

Defendant contends that the exclusion of this evidence prevented him from developing his defense of entrapment. This assignment of error is overruled.

The defense of entrapment, as understood and defined in the criminal law, was not available to defendant under the evidence. This Court said in *S. v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191, with plenary authority to support the statement:

> "A clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception. [Citing authority.]
>
> "It seems to be the general rule in those cases where the doing of a particular act is a crime regardless of the consent of anyone, that entrapment is not available as a defense to a person, who has the intent and design to commit a crime originating in his own mind, and who does in fact commit all the essential elements constituting it, merely because an officer of the law, or another, in his effort to secure evidence against him for a prosecution, affords him an opportunity to commit the criminal act, or purposely places facilities in his way or aids and encourages him in the perpetration of the crime which had its genesis in his own mind."

The rule stated in the *Burnette* case applies here. The police of Charlotte merely set a trap to catch defendant in the execution of a crime which had its genesis in his own mind. The ad in the Charlotte Observer merely created an opportunity for defendant to commit the crime. Defendant used the telephone to call Mrs. Thompson, and he used the lewd, vulgar and indecent language over the telephone to her such as is condemned by G.S. 14-196.1.

Defendant in his brief relies upon *S. v. Nelson,* 232 N.C. 602, 61 S.E. 2d 626 (captioned as *S. v. Nelon* in the Southeastern Reporter). That was a case wherein defendant was charged with an assault with intent to commit rape. In certain crimes consent to the criminal act by the person injured, *e.g.,* rape and assault with intent to commit rape, eliminates an essential element of the offense, and is therefore a good defense. *S. v. Burnette, supra.* Consent is not an essential element of the offense condemned by G.S. 14-196.1. The law as stated in the *Nelson* case is not applicable to the instant case.

Defendant assigns as error that the court erred in permitting Mrs. Mary S. Thompson, after listening to defendant talk in the police station, to testify that in her opinion the voice she heard over the telephone using the lewd, vulgar and indecent language was the voice of defendant. This assignment of error is overruled. Mrs. Thompson heard the defendant talk at police headquarters after he was arrested, and she expressed the opinion that the voice heard by her over the telephone using lewd, vulgar and indecent words was

that of defendant. Any lack of assurance or uncertainty on the part of Mrs. Thompson identifying defendant by voice recognition affects only the weight and credibility, and not the admissibility of her testimony. As a general rule, the weight of voice recognition is a question of fact for the jury. *S. v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871, *cert. den.* 342 U.S. 831, 96 L. Ed. 629; *McGraw v. State*, 34 Ala. App. 43, 36 So. 2d 559, petition for *certiorari* dismissed 251 Ala. 123, 36 So. 2d 560; *Taylor v. State*, 75 Ga. App. 205, 42 S.E. 2d 926; *State v. Clyde*, 388 P. 2d 846 (Hawaii 1964); Stansbury, N. C. Evidence, 2d Ed., § 96, p. 226; Annot. 70 A.L.R. 2d 995, "Identification of accused by his voice."

Defendant has an assignment of error reading as follows:

> "EXCEPTION No. 15. (R. p. 43) A State's witness was permitted to testify about a device installed on one of the telephone lines in question without first having qualified the device as being accurate, or as having been carefully tested for accuracy. To this the defendant excepts and assigns this as his Exception No. 15."

This assignment of error does not comply with our Rules of Practice, because it does not disclose the question sought to be presented without the necessity of going beyond the assignment of error itself. Rules of Practice in the Supreme Court, Rule No. 21; *Lowie & Co. v. Atkins, supra.* Embarking on another voyage of discovery through the record, we find on page 43 of the record this: "Q. What type of device had you [T. G. Latham] installed? MR. PLUMIDES: OBJECTION. COURT: OVERRULED. Exception. DEFENDANT'S EXCEPTION No. 15." On the same voyage of discovery we find Latham's answer on page 44 of the record, which is: "It was a diode device," and then he testified as to the basic function of a diode on a telephone line, as set forth verbatim above. Mr. Latham testified on cross-examination as follows: "I supervised the installing of this device on this line. . . . I checked it out to see that it was functioning. . . . As to whether I'm an expert, it doesn't take much of an expert to install them so I guess I'm an expert. I consider myself an expert on doing this. I am convinced beyond a shadow of a doubt that every time I placed it, it was perfect. No mishaps. It is a very reliable instrument." The testimony of Officer Treadaway when they were in the house at 1705 North Allen Street with defendant and picked up the telephone there in the house is as follows: "At that time I picked up the telephone and had conversation with Mrs. Mary Thompson without dialing the phone. I picked up the receiver. I hung the phone back up. Officer Ross picked it back up off the cradle. He had a conversation with someone. He didn't dial the

phone." Treadaway's testimony shows the diode was functioning properly. The reliability of the diode is measured in terms of its ability to keep the switches open. If the diode had not been performing properly, the switches would have closed, Officer Treadaway could not have had the conversation with Mrs. Thompson without dialing the number of the telephone she was at in the police station, and the manual line tracing procedure would not have been possible. In this case, the identification of the calling line and number was made, and the reliability of the diode speaks for itself. Defendant's assignment of error is overruled.

Defendant's assignment of error No. 18 is as follows:

> "EXCEPTION No. 18 (R. p. 49). The defendant moved to strike certain evidence on the ground that it was illegally obtained as the result of an illegal wiretap, and on the second ground that it was obtained as the result of an entrapment. To the denial of this motion, the defendant excepts, and assigns this as his Assignment of Error No. 18."

Embarking on another voyage of discovery through the record, we find on page 49 of the record this:

> "MR. PLUMIDES: First, I'd like to make a motion to quash any evidence made or given as a result of this line being left open and which directly relates back to the evidence of Mary Thompson, based on my argument if I might at this time."

Defendant contends in his brief "though it has been held that Section 605 of the Federal Communications Act does not apply to States . . . the defendant argues this contention that the evidence obtained with the diode device should be excluded as violating Section 605 of the Federal Communications Act."

The function of a diode device is not to overhear or record or divulge a telephone conversation. Its function is merely to permit a called person to maintain the connection, and thereby enable the successful identification of the calling telephone number. It protects the telephone system from abuse by a threatening or obscene caller. The use of a diode device in no way violates the literal language or the legislative intent of Section 605 of the Federal Communications Act, 47 U.S.C.A., which prohibits wire tapping. The purpose of this statute is to prevent public or private encroachment on the privacy of the contents of a conversation over a telephone or a communications system. *Nardone v. United States,* 302 U.S. 379, 82 L. Ed. 314. The diode device, and those connected with its installation and use, did not induce or advise defendant to make the obscene telephone call, but the diode device and the persons merely

created a condition under which the offense of making obscene telephone calls by a male person to a female person could be committed. This is not an entrapment. *S. v. Burnette, supra.*

In *Rathbun v. United States,* 355 U.S. 107, 2 L. Ed. 2d 134, reh. den. 355 U.S. 925, 2 L. Ed. 2d 355, a majority of the Supreme Court of the United States held as stated in the 1st head note in 2 L. ed. 2d 134:

> "No violation of the provision of § 605 of the Federal Communications Act (47 U.S.C. § 605) that no person not being authorized by the sender shall intercept any communication and divulge the existence or contents of such intercepted communication to any person is involved in the use, with the consent of one party to a telephone conversation, of a regularly used telephone extension to overhear the conversation; hence a conviction of the crime of transmitting an interstate communication threatening the life of another, in violation of federal statute (18 U.S.C. § 875(b)), is not vitiated by the admission in evidence of the contents of a telephone conversation, so overheard, in the course of which the threat in question was made."

In accord: *Seeber v. United States,* 329 F. 2d 572; *Carnes v. United States,* 295 F. 2d 598, *cert. den.* 369 U.S. 861, 8 L. Ed. 2d 19. In the *Carnes* case, the Court held:

> "Evidence obtained by recording or by listening to telephone conversation with consent of one of the parties but without knowledge or consent of the other is admissible. Communications Act of 1934, § 605, 47 U.S.C.A. § 605."

Defendant's assignment of error No. 18 is overruled.

All of defendant's other assignments of error have been carefully examined. None is sufficient to justify disturbing the trial below, and all are overruled. The study of this case and the writing of this opinion have been laborious, for the reason that defendant has almost totally disregarded the Rules of Practice in this Court in his preparation of his assignments of error.

It is a matter of common and general knowledge that the abusive, threatening or obscene telephone call has become an unpleasant and all too often an encountered reality of life in America today. These acts are the more reprehensible, because they are very often directed against female persons. For this reason, the North Carolina General Assembly, along with most other states, has enacted a statute to deal with this menace. G.S. 14-196.1. Until recent years there existed almost no reliable methods by which this statute and similar statutes could be enforced. Until recently, relying upon the character-

istic anonymity of the telephone, the obscene caller could commit his crime in a matter of seconds, break the connection, and relax, secure in the knowledge that he could not be detected. Further, he could safely repeat his crime as often as he wished by the simple precaution of never talking too long to any one person. The basic function of a diode device is to permit the identification of the calling telephone number by preventing the caller from breaking the connection once he has completed the commission of his crime. It has performed a useful purpose. No wonder defendant, like all other persons caught in a trap in the commission of a crime originating in his own mind, viciously assails the trap. See an article published in the July 1966 issue of *Coronet* magazine by Al Bernsohn entitled "New Ways to Nab Sex Offenders."

In the trial below we find

No error.

HENRY LEWIS JACKSON, BY HIS NEXT FRIEND, JAMES ADAM JACKSON, v. FRANK MCBRIDE.

(Filed 24 May, 1967.)

1. Negligence § 24d—

In an action to recover for negligence, plaintiff has the burden of proving each essential element of his cause of action substantially as alleged in his complaint, and may not recover by proving that he sustained injuries by negligent conduct of defendant not alleged if the difference between his allegations and his proof is so substantial as to constitute a material variance.

2. Negligence § 11—

Contributory negligence is negligence on the part of the plaintiff which concurs with the negligence of the defendant as alleged in the complaint, and contributory negligence does not negate negligence as alleged in the complaint but presupposes the existence of such negligence.

3. Negligence § 20—

Contributory negligence must be alleged in the answer.

4. Automobiles § 35—

Plaintiff's allegations were to the effect that he was struck by the car driven by defendant as he was standing on the shoulder of the road on defendant's left side of the highway. Defendant alleged in the answer that plaintiff was lying motionless on the hard surface and that defendant, suddenly confronted with the emergency, was unable to avoid striking plaintiff. *Held:* The answer does not allege contributory negligence, since it does not allege any negligence on the part of plaintiff concurring with

the negligence of defendant as alleged in the complaint, and refusal to submit the issue of contributory negligence was not error.

5. Automobiles § 41—

Plaintiff's evidence to the effect that he was struck by the car driven by defendant as he was standing on the shoulder of the road on defendant's left side of the highway is sufficient to be submitted to the jury on the question of defendant's negligence. Nor does plaintiff's further testimony that he had "flagged" defendant down for a ride and momentarily looked away while defendant's car was angling over toward him compel nonsuit, since it does not compel the conclusion that plaintiff's failure to continue to watch the car contributed to his own injury. Further, in this case, such act was not alleged as contributory negligence in the answer.

6. Automobiles § 46; Negligence § 28—

An instruction to the effect that if plaintiff had satisfied the jury by the greater weight of the evidence that he was struck by the car driven by defendant as he was standing on the shoulder of the road on defendant's left side of the highway to answer the issue of negligence in the affirmative, without any instruction or explanation of the meaning of negligence or proximate cause, does not satisfy the requirements of G.S. 1-180.

APPEAL by defendant from *Brock, S.J.*, at the December 1966 Civil Session of RICHMOND.

The plaintiff was struck and seriously injured by the left rear fender of an automobile owned and driven by the defendant while the plaintiff was either standing on the shoulder of a rural paved road or was lying on the pavement in the defendant's lane of travel at 1 a.m.

The jury found the plaintiff was injured by the negligence of the defendant as alleged in the complaint and awarded damages. From a judgment on the verdict, the defendant appeals, assigning as error the denial of his motion for judgment of nonsuit, the refusal of the court to submit an issue of contributory negligence and certain alleged deficiencies in the charge.

The complaint alleges that at 1 a.m. on 5 September 1964 the plaintiff was standing on the west shoulder of Rural Paved Road No. 1155, that the defendant, driving northward, drove his automobile off the pavement and struck plaintiff. It alleges that the defendant was negligent in that he failed to keep a proper lookout, drove onto the shoulder of the road without keeping his car under proper control, and drove at a high rate of speed.

The answer denied each of the above allegations of the complaint. As a further answer, the defendant alleged that as he drove northward, he saw a dark object lying on the unlighted, black-topped highway directly in his (east) lane of travel, which object turned out to be the plaintiff, and that he was unable to avoid a collision between his left rear fender and the plaintiff. He alleges that the

plaintiff was negligent in that he lay down in the nighttime directly in the travel lane of a dark highway, failed to keep a proper lookout, and failed to remove himself from such position when he saw, or should have seen, an automobile was approaching. He alleges these acts and omissions of the plaintiff were the sole proximate cause of his injuries or were contributory negligence.

The evidence introduced by the plaintiff, interpreted in the light most favorable to him, in addition to that relating to the extent of his injuries, tends to show:

The night was clear and moonless. The highway was straight and level for half a mile on either side of the point of impact. The black-topped pavement was 18 feet wide. Each dirt shoulder was 8 feet wide. The speed limit was 55 miles per hour. The point of impact was at the entrance to a driveway leading to the residence of Lillie Mae Little on the west side of the road. There was no light in the yard and no other residence nearby. The only damage to the automobile was to the left rear fender skirt which was bent slightly.

Neither party was intoxicated. Both had attended a party at the home of their mutual friends. The plaintiff, 19 years old, accompanied by several relatives, left the party at 12:45 a.m. They drove to the home of Lillie Mae Little, arriving there about 12:55 a.m. and parked well up into her yard. Intending to remain just a few minutes, all went into the house. Thereupon, without comment, the plaintiff walked out of the house alone. His relatives soon followed. They did not observe him until the headlights of the defendant's automobile, approaching from the south, disclosed him lying on the pavement of the road in front of the house. They rushed out and flagged down the car. It stopped and did not at that time strike the plaintiff. His relatives then discovered that he had been injured and was bleeding profusely about the head. The blood upon the pavement was not in the center of the road, there being enough room on the east side of the road for a car to pass. His legs, below the knees, were on the west shoulder. The remainder of his body was on the pavement, with his head toward the east.

When the plaintiff left the Little house he walked out to the highway. He saw an automobile approaching from the south 500 feet away. By "the run of the car" he knew it was the defendant's. He was standing on the west shoulder, two feet from the pavement. He decided to stop the car and ask for a ride. He threw up his hand. The car was then about in the center of the road, traveling 20 to 25 miles per hour. It pulled over toward the plaintiff and he looked back toward the house. When he again turned toward the car it was very close. He tried to run but fell and was struck by the left rear

fender, the car being between him and the pavement. He never got on the pavement before he was struck.

The evidence introduced by the defendant, interpreted in the light most favorable to him, tends to show:

He is 30 years old and, with five other men in his car, was driving north, in his right lane, at 45 to 50 miles per hour, the lights being on the high beam. When two car lengths away, he saw something lying in the middle of the road, the head being in the defendant's (east) lane of travel. He applied his brakes and turned to the right. The right portion of his car went off on the east shoulder but he was unable to avoid striking the object lying in the road. He stopped but did not back up because he had no back-up lights on his car. He drove on north until he reached a place where he could turn around. Traveling back in a southerly direction to the point of impact, he saw he had struck a person. He continued on south for a bit, turned around again and was once more approaching the point of impact, headed northward, when he was stopped by the people who had come out of the house.

At no time did he see the plaintiff standing on the west shoulder. When he first saw him, the plaintiff was lying in the road with his head on the defendant's right of the center, dressed in dark clothing. The defendant's companions, two being on the front seat, did not see the plaintiff until after he had been struck and the car returned to the point of impact on its southbound run. They felt the bump. When these observers saw the plaintiff lying in the road, after the impact, his head was east of the center of the pavement and there was blood in the center of the road.

The trial judge refused to submit the issue of contributory negligence, duly tendered by the defendant. On the issue of negligence, he instructed the jury that the burden was upon the plaintiff to satisfy them by the greater weight of the evidence that the plaintiff "was injured by the negligence of the defendant, Frank McBride, *as alleged in the complaint.*" (Emphasis added.) The court also instructed the jury:

> "So, upon this first issue, or first question, if the plaintiff, Henry Jackson, has satisfied you by the greater weight of the evidence that at the time and place in question he was standing some distance on the shoulder from the west edge of the road, that the defendant traveling north along the road ran off of the defendant's left side of the road and hit the plaintiff and injured him, then it would be your duty to answer this first question in the plaintiff's favor, and you would answer it YES. * * * If, on the other hand, the plaintiff has failed to satisfy you by the

greater weight of the evidence that the accident occurred in that manner, approximately, then he would have failed in carrying his burden of proof and you would give the defendant the benefit of that and you would answer the first question No. *Also,* if you are satisfied from all of the evidence in the case that as the defendant drove along this road that the plaintiff was lying in the road and that the defendant struck him while he was lying in the road, then it would be your duty to answer the first issue against the plaintiff, and you would answer it No. *That would be a finding by you that the plaintiff was not injured by the negligence of the defendant, as alleged in the complaint, but by plaintiff's own negligence.*" (Emphasis added.)

Leath, Bynum, Blount & Hinson for defendant appellant.
Webb, Lee & Davis for plaintiff appellee.

LAKE, J. The cause of action alleged in the complaint is for the recovery of damages on account of injuries proximately caused by the negligence of the defendant in driving his automobile at an unlawful speed, without keeping a proper lookout, onto the west or left shoulder of the road where the plaintiff was standing, so that it struck him as he stood there. The first issue submitted to the jury was, "Was the plaintiff, Henry Jackson, injured by the negligence of the defendant, Frank McBride, *as alleged in the complaint?*" This was proper. (Emphasis added.)

To recover in this action, the plaintiff must carry the burden of proving each essential element of the cause of action which he has alleged, substantially as set forth in the complaint. He cannot recover in this action by proving he sustained injuries by other negligent conduct of the defendant if the difference between his allegations and his proof is so substantial as to constitute a material variance. *Moore v. Hales,* 266 N.C. 482, 146 S.E. 2d 385; *Messick v. Turnage,* 240 N.C. 625, 83 S.E. 2d 654; *Deligny v. Furniture Co.,* 170 N.C. 189, 86 S.E. 980; *McCoy v. R. R.,* 142 N.C. 383, 55 S.E. 270. "If the plaintiff is to succeed at all, he must do so on the case set up in his complaint." *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51. In *Talley v. Granite Quarries Co.,* 174 N.C. 445, 93 S.E. 995, Walker, J., speaking for the Court, said:

"When the proof materially departs from the allegation, there can be no recovery without an amendment. * * * When the difference between the allegation of the pleading and the proof is substantial, so that the other party is grossly misled by it, and it really amounts to alleging one cause of action and proving another, it is not a variance merely, but a failure of proof."

Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. It does not negate negligence of the defendant as alleged in the complaint, but presupposes or concedes such negligence by him. Contributory negligence by the plaintiff "can exist only as a co-ordinate or counterpart" of negligence by the defendant as alleged in the complaint. *Martin v. Manufacturing Co.*, 128 N.C. 264, 38 S.E. 876. See also: *Rouse v. Peterson,* 261 N.C. 600, 135 S.E. 2d 549; *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854; *Garrenton v. Maryland,* 243 N.C. 614, 91 S.E. 2d 596; *Darden v. Leemaster,* 238 N.C. 573, 78 S.E. 2d 448; *Ogle v. Gibson,* 214 N.C. 127, 198 S.E. 598; *Ballew v. R. R.,* 186 N.C. 704, 120 S.E. 334; *Davis v. Jeffreys,* 197 N.C. 712, 150 S.E. 488; *Elder v. R. R.,* 194 N.C. 617, 140 S.E. 298; 38 Am. Jur., Negligence, § 177.

In *Darden v. Leemaster, supra,* Parker, J., now C.J., said, "Where there is no plea of contributory negligence, the submission to the jury of an issue of contributory negligence is not proper," and also said, "The allegation in an answer that the death of the intestate was caused by his own negligence and not by any negligence of the defendant is not a sufficient plea" of contributory negligence. For the same reason, evidence by the defendant to the effect that the plaintiff was injured not by the negligence of the defendant, *as alleged in the complaint,* but by the plaintiff's own negligence, *as alleged in the answer,* would not justify the submission to the jury of an issue of contributory negligence.

Of course, if the plaintiff, whether intoxicated or sober, dressed in dark clothing, voluntarily lay down at 1 a.m. on a moonless night across the center line of a black-topped, unlighted rural road and remained motionless until struck by a passing automobile, he was negligent and could not recover damages for injuries thereby sustained in the absence of allegations and proof not present in this case. The learned trial judge plainly so instructed the jury.

It does not necessarily follow that allegation and proof of such conduct is allegation and proof of contributory negligence requiring submission of that issue. It does not if it negates the plaintiff's contention that he was injured by the negligence of the defendant, *as alleged in the complaint.* If so, it relates to the first issue only and does not require or permit the submission of an issue of contributory negligence.

The plaintiff alleged, and all of his evidence is to the effect, that he was standing on the dirt shoulder on the defendant's left side of the road and that the defendant drove off of the pavement, onto the

left shoulder and ran into the plaintiff. The defendant has alleged, and all of his evidence tends to show, that he was driving on his right side of the road and, upon being confronted suddenly with the plaintiff lying in the middle of the pavement, cut to his right but was unable to avoid striking the plaintiff. Thus, the defendant has not alleged or offered evidence of negligence by the plaintiff which, in conjunction with any negligent act or omission of the defendant, *alleged in the complaint,* contributed to the plaintiff's injury. The defendant's pleading and proof, therefore, does not allege or show contributory negligence on the part of the plaintiff. The two parties have alleged and offered evidence to prove two entirely different accidents. If the plaintiff was injured as he alleged and testified, he could not have been guilty of the negligent acts and omissions alleged in the answer. If, on the other hand, the plaintiff was lying on the pavement, as alleged in the answer, he could not have been injured by the negligence of the defendant, *as alleged in the complaint.*

The determinative question for the jury was, which of these alleged accidents actually occurred? They determined that the one alleged and described by the plaintiff is the one which took place. The controversy was fully presented for their decision by the first issue, "Was the plaintiff, Henry Jackson, injured by the negligence of the defendant, Frank McBride, as alleged in the complaint?" The court expressly and clearly instructed the jury to answer this issue "No" if the plaintiff had failed to satisfy them by the greater weight of the evidence that the accident occurred as he alleged and testified. Again, they were instructed to answer this issue "No" if they were satisfied from all of the evidence that the accident occurred as the defendant alleged and testified. There was no occasion for the submission of an issue of contributory negligence and there was no error in the court's refusal to do so.

The motion for judgment of nonsuit was properly overruled. The plaintiff's evidence, taken to be true, as it must be upon such a motion, was sufficient to support a finding that he was injured by the negligence of the defendant, *as alleged in the complaint.* Obviously, a judgment of nonsuit may not be entered on the basis of the defendant's evidence to the contrary. While the plaintiff's own testimony would support a finding that when he knew, or should have known, the defendant's car was angling over toward him, in response to his signal, he turned his head and looked back to the house while remaining in the new path of the car, it does not compel the conclusion that such failure to watch the car contributed to his injury. Furthermore, this is not among the acts *alleged by the answer* as contributory negligence. For both of these reasons, such failure to

watch the approach of the car would not justify a judgment of nonsuit. *Douglas v. Mallison,* 265 N.C. 362, 144 S.E. 2d 138.

G.S. 1-180 requires the trial judge to "declare and explain the law arising on the evidence given in the case." The defendant assigns as error the failure of the court below to do so in that the charge does not contain any definition or explanation of "negligence" or of "proximate cause."

The court properly instructed the jury that the burden of proof was upon the plaintiff on both the issues submitted and correctly defined the terms, "burden of proof" and "greater weight of the evidence." There was no other reference to or statement or explanation of any principle or rule of law applicable to the determination of the first issue, and no definition of or explanation of the terms "negligence" and "proximate cause" except the paragraph quoted in the above statement of facts, the only omission in that quotation being this sentence:

> "If the plaintiff has satisfied you by the greater weight of the evidence that that is what transpired, then I instruct you that would constitute negligence on the part of the defendant, and it would constitute the proximate cause, or one of the proximate causes of the accident, and you would answer the first question YES."

Obviously, this is a peremptory instruction to answer the issue in favor of the plaintiff if the jury should find by the greater weight of the evidence that the defendant drove onto the shoulder to his left, whether to stop and pick up the plaintiff or otherwise, and there struck the plaintiff, whether he saw or should have seen the plaintiff or not. Such an instruction, with no explanation whatever of the meaning of negligence or of proximate cause, does not satisfy the requirement of G.S. 1-180 and for this error there must be a

New trial.

MELVIN C. NUNN, TRADING AS LIBERTY FARM AND GARDEN SUPPLY, v. J. I. SMITH.

(Filed 24 May, 1967.)

1. Trial § 20—

While ordinarily the question of the sufficiency of the evidence to be submitted to the jury must be presented by motion to nonsuit, it is not error for the trial court on its own motion to grant nonsuit when the evidence would justify a directed verdict, G.S. 1-183, since the legal effect is the same.

2. Damages § 10—

Punitive damages may not be awarded merely for the giving of checks returned by the drawee bank marked insufficient funds, since punitive damages may not be allowed for simple fraud alone.

3. Execution § 17—

Execution against the person will lie, G.S. 1-311, only when defendant has been lawfully arrested, or the complaint or affidavit alleges facts which would have justified an order of arrest, G.S. 1-410, and it is further necessary that such facts be judicially determined, since body execution will not lie solely upon plaintiff's allegations.

4. Same— Evidence held insufficient to support execution against the person.

Plaintiff obtained a judgment by default for the amount of two checks issued by defendant and returned by the drawee bank marked insufficient funds. Upon the inquiry plaintiff's evidence was solely that defendant had given him the checks and that plaintiff had given defendant cash and merchandise in the amount thereof, that the checks had thereafter been returned by the drawee bank marked insufficient funds, and that defendant promised to make the checks good but failed to do so. Plaintiff did not introduce the checks in evidence and offered no evidence as to when the checks were presented for payment or evidence that defendant did not have sufficient funds on deposit with the bank to pay the checks at the time of delivery or if presented within a reasonable time. *Held:* The evidence is insufficient to warrant execution against the person of defendant.

APPEAL by plaintiff from *Latham, S.J.,* 25 July 1966 Civil Session of RANDOLPH.

Plaintiff filed action alleging that on 3 July 1964 and on 14 July 1964 defendant executed and delivered to plaintiff checks in the amount of $144.50 and $190.00, respectively; that on both occasions defendant received from plaintiff merchandise and cash in return therefor; and that in due course these checks were presented to the drawee bank and were returned unpaid and marked "insufficient funds." Paragraph IV of plaintiff's complaint is as follows:

> "That the plaintiff is advised, informed, believes and therefore alleges that on both July 3, 1964, and July 14, 1964, the defendant had insufficient funds on deposit on both occasions with which to pay either or both of said checks, and on both said occasions the defendant knew that he had insufficient funds on deposit but represented to the plaintiff that he did have sufficient funds on deposit with which to pay said checks, the defendant knowing at said time that said representation was false, and the defendant on each said occasion making said representation with the intention to commit fraud upon said plaintiff, and on each said occasion the plaintiff relied upon said repre-

sentation by giving the defendant merchandise and cash for said checks."

Plaintiff further alleged that defendant has failed to pay any of the amount due him as a result of these transactions, although plaintiff has made repeated demands for payment. Plaintiff prayed that he recover of defendant the sum of $334.50, with interest, that he recover $500 in punitive damages, and that he have body execution on defendant in the event judgment execution be returned unsatisfied.

On 25 January 1965 plaintiff was awarded actual damages in the amount of $334.50 by judgment of default final signed by the clerk of superior court. It was further ordered that an inquiry into the amount of punitive damages be executed at the next civil term of superior court of Randolph County to determine the amount of such damages, and for the jury to ascertain whether plaintiff is entitled to body execution of the defendant.

At the trial on the inquiry as to punitive damages and body execution, plaintiff offered in evidence the complaint, summons and judgment by default final. The remaining evidence offered by plaintiff was his own testimony, which was as follows:

> "The defendant gave me a check on July 3, 1964, in the amount of $144.50, drawn upon the First-Citizens Bank and Trust Company of Greensboro. I have the check now. He also gave me another check on July 14, 1964, on the same bank, dated the same date, in the amount of $190.00. Upon my receiving these checks, he bought a little merchandise and wanted cash for the rest of the checks. I didn't ask him if these checks were good. We'd done business with him on previous occasions and I assumed that they were good. I gave him merchandise and cash for the checks each time. We ran the checks through the bank. I deposited them in First Union National Bank in Liberty. In due course, they came back 'Insufficient Funds.' After they came back for insufficient funds, I had occasion to talk to the defendant about these checks. I advised him that they had been returned for insufficient funds. He stated, 'I'll make them good.' But he never did. He did not suggest that I run them back through the bank, or that he had sufficient funds on deposit."

At the close of plaintiff's evidence the trial court, *ex mero motu*, awarded judgment of nonsuit. Plaintiff appealed.

Gerald C. Parker for plaintiff.
No counsel contra.

BRANCH, J. Defendant was not present in court or represented by counsel and, of course, motion for nonsuit was not made at the close of plaintiff's evidence. Ordinarily, failure to make the motion amounts to a waiver. G.S. 1-183. However, it is not error for the court to enter a judgment as of nonsuit on its own motion when the evidence would justify a directed verdict, a nonsuit and directed verdict having the same legal effect. *Ferrell v. Insurance Co.*, 208 N.C. 420, 181 S.E. 327. And the court may direct a verdict against the party who has the burden of proof if the evidence offered, when taken as true, fails to make out a case. *Strigas v. Insurance Co.*, 236 N.C. 734, 73 S.E. 2d 788; *Arnold v. Charles Enterprises, Inc.*, 264 N.C. 92, 141 S.E. 2d 14.

Therefore, taking all of plaintiff's evidence as true, we must decide whether the trial court erred in refusing to submit to the jury the issue of punitive damages and the issue of whether plaintiff was entitled to execution against the person of defendant.

The trial judge correctly ruled in not submitting the issue of punitive damages to the jury.

In the case of *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785, plaintiffs, who were aged and uneducated Negroes, instituted action to recover damages for fraudulent misrepresentations as to the amount of land included in a lot purchased by them from defendants. The Court, holding that plaintiffs were not entitled to punitive damages in their action for fraud merely upon a showing of misrepresentations which constituted the cause of action, without more, said:

> ". . . '"Punitive damages" are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct.' . . .
>
> "In some cases, in actions to recover damages for fraud, where punitive damages are asked, it is suggested that a line of demarcation be drawn between aggravated fraud and simple fraud, with punitive damages allowable in the one case and refused in the other. In a note in 165 A.L.R. 616, it is said: 'All that can be said is that to constitute aggravated fraud there must be some additional element of a social behavior which goes beyond the facts necessary to create a case of simple fraud.'"
>
> "We are inclined to the view that the facts in evidence here are not sufficient to warrant the allowance of punitive damages. There was no evidence of insult, indignity, malice, oppression or bad motive other than the same false representations for which they have received the amount demanded."

See also *Horne v. Cloninger,* 256 N.C. 102, 123 S.E. 2d 112; *Lutz Industries, Inc., v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333.

Here, taking all plaintiff's evidence as true, the record is void of evidence of insult, indignity, malice, oppression or bad motive, and the facts upon which plaintiff would recover punitive damages are the same facts on which he bases his cause of action. Therefore, plaintiff cannot prevail.

G.S. 1-410 provides in what cases the defendant may be arrested in civil matters. The statute is divided into five sub-divisions, each specifying one or more classes of cases in which a defendant may be arrested. From an examination of the record, the right to arrest in the instant case is claimed by virtue of sub-division (4) of G.S. 1-410, which is as follows: "When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit."

Article I, § 16, of the Constitution of North Carolina provides: "There shall be no imprisonment for debt in this State, except in cases of fraud."

This constitutional provision against imprisonment for debt has been held to apply to debt in the strict sense of an obligation arising out of contract, and hence would not apply to contracts involving fraud, including fraud in contracting the debt or incurring the obligation. *Melvin v. Melvin,* 72 N.C. 384.

An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under G.S. 1-410, the complaint or affidavit must allege such facts as would have justified an order for such arrest. G.S. 1-311. *Houston v. Walsh,* 79 N.C. 35. Plaintiff's complaint alleges a debt contracted by means of fraud, which is sufficient to support an order of arrest under G.S. 1-410(4).

G.S. 1-311 contemplates three classes whereby execution may be had on the body: (1) Where the cause of arrest does not appear in the complaint, but appears by affidavit. (2) Where the cause of arrest is set forth in the complaint, but is based on facts which are collateral and extrinsic to plaintiff's cause of action. (3) Where the facts showing the cause of arrest as set forth in the complaint are the same or essential to those on which plaintiff bases his cause of action. *Peebles v. Foote,* 83 N.C. 102. In the instant case, it appears that the facts alleged by plaintiff to show his cause of action and recover damages are the same as those on which he bases his cause

of arrest in order that he might have body execution. This is the situation contemplated in sub-division number three (3) above.

The judgment of default final entered by the clerk of superior court determined only that plaintiff was entitled to the amount of actual compensatory damages as represented by the total of the two checks, with interest thereon. The judgment specifically stated that the issue as to body execution was to be tried by jury in the superior court. In *Doyle v. Rush,* 171 N.C. 10, 86 S.E. 165, it is stated: "It was decided in *Ledford v. Emerson,* 143 N.C. 527, that an execution against the person cannot issue simply because of allegations in the complaint, and that the facts alleged entitling the plaintiff to such an execution must be passed upon and must enter into the judgment."

We must conclude that the trial judge entered judgment of nonsuit on the ground that the evidence elicited by plaintiff did not support the allegations contained in the complaint and therefore did not warrant submission to the jury.

The essential elements of actionable fraud are a definite and specific representation, which is materially false, made with knowledge of its falsity or in culpable ignorance of the truth, and with fraudulent intent, which representation is reasonably relied on by the other party to his damage. *Electric Co. v. Morrison,* 194 N.C. 316, 139 S.E. 455; *New Bern v. White,* 251 N.C. 65, 110 S.E. 2d 446.

Here, plaintiff depends solely upon the fact that two checks were issued and returned marked "Insufficient funds" to sustain his allegations of fraud. The act made criminal by G.S. 14-107 is *knowingly* putting worthless commercial paper in circulation. The drawing and delivery of a check to a third person, without more, is a representation that drawer has funds sufficient to insure payment upon presentation. And *if known to be untrue, is a false pretense. State v. Yarboro,* 194 N.C. 498, 140 S.E. 216; *State v. Cruse,* 253 N.C. 456, 117 S.E. 2d 49.

Plaintiff also depends upon the criminal statute 14-106, which provides as follows:

> "Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. *The giving of the aforesaid worthless check, draft, or*

order shall be prima facie evidence of an intent to cheat and defraud." (Emphasis added)

It is stated in 5 Am. Jur. 2d, Arrest, § 56, p. 747:

"The test of the liability of a defendant to arrest under a statute authorizing arrest where the defendant has been guilty of a fraud in contracting a debt or incurring an obligation is the guilt of the defendant. There must have been a fraudulent purpose in contracting or incurring the liability, and this implies personal misconduct, moral or actual, not merely legal or constructive fraud. . . .

"Under a statute permitting arrest for fraud in contracting a debt, a promise to pay *may constitute fraud if coupled with a present intent not to pay.* . . ." (Emphasis ours).

The checks on which plaintiff bottoms his case are not a part of the record. He has offered no evidence as to when he presented the checks for payment. They could have been presented any time from their issuance in July 1964 until December 14, 1964. Plaintiff seems to have studiously avoided introducing the checks or giving evidence as to when the checks were deposited or as to whether defendant had sufficient funds on deposit with the bank to pay the checks at the time of delivery or if presented within a reasonable time. The records of the bank and its personnel were readily available for this purpose.

This Court recognizes that the acceptance of a check implies an undertaking of due diligence in presenting for payment, and if drawer sustains a loss because of lack of such diligence, *i.e.*, presentment within a reasonable time, it will operate as actual payment of the debt for which it is given. *Chevrolet Co. v. Ingle,* 202 N.C. 158, 162 S.E. 219. Since this rule applies in ordinary civil actions, *a fortiori* it would be applicable in the extra-ordinary cases of arrest and execution against the person.

In the case of *Melvin v. Melvin, supra,* an administrator was charged with misapplication of funds with which he was charged, without setting forth in the application how the funds had been misapplied. Holding that the clerk's order of arrest should be vacated, the Court said:

"The judgment of a creditor or distributee fixes him with assets, and if it be proved that he has the money in hand he will be ordered to pay the fund into Court; but suppose he is merely fixed with assets, and there is no telling from the pleading and affidavits whether he has embezzled the funds and put the money

into his own pocket or has lost the assets by negligence in failing to collect notes due to the estate, . . . it would be as hard a measure to treat him as a dishonest man, excluded, because of fraud, from the provision of the Constitution. . . .

". . . We have no proof of the charge, and our decision is, that an administrator, although fixed with assets which should be forthcoming, is not thereby found guilty of fraud so as to exclude him from the privilege of being exempted by the Constitution from being imprisoned for debt, and is not to be treated as a dishonest debtor."

It would be a harsh rule to label defendant dishonest and fraudulent so as to exclude him from the protection of Article I, Sec. 16 of the North Carolina Constitution, where plaintiff has failed to reasonably exclude other possibilities not indicative of fraud. "An inference must be based on some clear and direct evidence, it cannot be based on presumption, some other inference or surmise. . . . 'However confidently one in his own affairs may base his judgment on mere probability as to a proposition of fact and as a basis for the judgment of the court, he must adduce evidence of other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for mere guess and must be such as tends to actual proof.' " *Powell v. Cross,* 263 N.C. 764, 140 S.E. 2d 393.

Plaintiff cannot depend on the terms of G.S. 14-107 to aid his case, since he fails to offer even a scintilla of evidence that defendant knowingly put worthless commercial paper into circulation, nor can he rely on the criminal statute 14-106, since he fails to prove that the checks were worthless when issued. The record does not show a conviction of the crime charged in either G.S. 14-106 or G.S. 14-107, nor would plaintiff's evidence in the record permit such conviction.

Plaintiff's evidence fails to support all of the essential elements of fraud "in contracting the debt or incurring the obligation for which the action is brought."

For reasons stated, the judgment entered by the court below is Affirmed.

STATE v. DALLAS COLE.

(Filed 24 May, 1967.)

1. Criminal Law § 35—

Where a medical expert testifies from his examination of the body of the deceased as to the stab wound in the side of the body, it is competent for the expert to testify that such stab wound could have produced death.

2. Homicide § 20—

The State's evidence tended to show that deceased was stabbed in the stomach and a piece of his liver cut out, that the wound necessitated an emergency operation, that deceased went into a coma Monday night following the stabbing on Sunday, and that deceased remained in a coma with the exception of one day until his death some seven weeks thereafter. *Held:* A person of average intelligence would know of his own experience or knowledge that such a wound is mortal and it was not required that the State show by expert testimony that the wound caused death in order to convict defendant of manslaughter.

3. Criminal Law § 159—

Exceptions not brought forward in the brief are deemed abandoned.

4. Homicide § 22—

In a homicide prosecution resulting in defendant's conviction of voluntary manslaughter, the fact that the court in its instruction correctly defined both voluntary and involuntary manslaughter will not be held for prejudicial error, even though the definition of involuntary manslaughter may not have been required.

5. Same—Evidence held to establish conclusively that death resulted from wound inflicted by defendant.

The State's evidence tended to show that defendant stabbed deceased and inflicted a wound which, as a matter of common knowledge, was mortal in character, that deceased went into a dying coma the day following the injury and never regained consciousness after the second day until he died, some seven weeks thereafter, together with expert testimony that the wound could have caused death. *Held:* In the absence of a request for special instructions, the court was not required to charge that, in order to convict defendant it was necessary for the jury to find beyond a reasonable doubt that the injury inflicted by defendant was the proximate cause of the death of deceased, there being no evidence tending to prove that deceased's death was due to any other cause.

APPEAL by defendant from *Falls, J.*, at 8 August, 1966, Schedule "C" Session of the MECKLENBURG Superior Court.

The deceased Homer Anderson and the defendant Dallas Cole, with their families, lived in the same rooming house in Charlotte. On Friday night, 29 April, 1966, both men were drinking and began fighting. Cole was cut by Anderson but was able to go to his job the next day. The police investigated the fight, but apparently made no charges.

Homer Anderson had a pistol in pawn on Friday but after the trouble with Cole he got it and had it the following day. When the two men returned home after work on Saturday, the trouble was resumed. Anderson had a hammer and a bottle, and during the altercation cut Cole and then ran him to his room. Cole was taken to a hospital where he remained for several hours in receiving treatment.

Following this, the defendant told B. W. Gaddy, a member of the Charlotte police department, that he was not going to prefer charges against Anderson but was going to handle it in his own way. He said he was going to kill the ————.

The State's evidence further tended to show that on Sunday Dallas Cole and the deceased (nicknamed Dub) were scuffling and Dub was trying to get away from Cole. Dallas pushed Anderson back by sticking a knife in his stomach. He had taken this knife from his back pocket, and he also had a butcher knife. Anderson had no weapon at that time.

Later on, Cole was seen chasing Dub toward the railroad tracks. He had two knives and a hammer. They went out of sight of the people at the house, and shortly afterwards Cole returned and told Anderson's wife "If you want to save that so and so, you better get down. He is on his way to the hospital or the undertaker's." He then added, "If that s. o. b. ain't dead, he will be dead." The defendant's knife and hammer had blood on them at that time. When Mrs. Anderson arrived at the place where her husband was she found him bleeding from his right side. He was stabbed in the stomach and a piece plugged out of his liver. He was taken to the hospital by ambulance, lapsed into a coma a day or so later and died while still in the coma on 27 June.

The State offered evidence tending to show that the wound on the body of Anderson could have caused his death.

The defendant testified in his own behalf that he had known Anderson for three or four years, and that they had worked together. He said the deceased had been accusing him of telling people on the job about his drinking habits, and this led to a fight on Friday night, following which the deceased said he was going to get his pistol from the pawn shop and was going to kill him (Cole) when he came back. Sometime later the deceased pointed his pistol at the defendant and told him he was going to kill him, and struck him on the head with the pistol. Still later that night he said the deceased came back and wanted to fight again and cut him up; that he cut him up and busted his lip.

Cole further testified that on Saturday afternoon the deceased cut him a total of four times, stabbed him in the jaw and in the neck; and that he was then taken to Memorial Hospital for treat-

ment. He was released after several hours and returned to his home. On Sunday morning he said that the deceased sat on the steps in the hall and said he was going to raise hell some more; that he was going back to jail "today"; that he cursed and threatened Doretha Cole, the defendant's daughter, and that he, the defendant, then left to avoid further trouble; that, later, Homer Anderson came back up the railroad and jumped at him again with his knife; that the defendant was hemmed up against a fence; that they scuffled; that Homer had a knife and was stabbed in the scuffle. "I don't know exactly how he got stabbed, all I know is I was trying to keep him from killing me . . . he cut me in the hand. I fell one time and he cut my shoe. He (the deceased) used to beat me up all the time; not only me, her too; she had to sleep with us many nights when he would go on a rampage; she couldn't rest over there, shooting and going on." (It is assumed that "she" referred to the deceased's wife).

The defendant said he knew the deceased was cut in the stomach because he could see the blood, and that he told someone to call a doctor.

The defendant was convicted of manslaughter, and from judgment of imprisonment appealed to this Court.

Nivens & Brown by W. B. Nivens Attorneys for defendant appellant.

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

PLESS, J. The defendant assigns a number of errors, one group of which is to testimony regarding the cause of death, the remainder constituting exceptions to the charge. Dr. W. M. Summerville, County Coroner, and an admitted medical expert, testified: "I performed a complete autopsy on the deceased to determine the cause of his death. I cut into the chest and then into the abdomen and removed all organs — for examination . . . there was a long incision extending from the end of the breast bone almost to the pelvis. There was a stab wound or surgical wound . . . There was a stab wound in the right-hand side." At this point, the jury retired, and the doctor was further examined. Upon its return, he was asked: "Do you have an opinion satisfactory to yourself, if the jury should find by the evidence and beyond a reasonable doubt, that Homer Anderson was stabbed in the right side, as to whether or not this was likely to have produced his death? Answer: I do. Question: What is your opinion? Answer: It could have produced his death."

The defendant objected to both questions and answers, and took exception thereto.

While the form of the first question and the answer to the last one is not in preferred form, we have previously held that a statement by a witness that a particular result *could* have occurred upon the hypothetical facts is competent.

In *Schafer v. R. R.*, 266 N.C. 285, 145 S.E. 2d 887, Lake, J., speaking for the Court, said:

> "When an expert is testifying as to his opinion, concerning the cause of an event which he did not observe, the proper form of question is one which states, hypothetically, premises as to which there is evidence already in the record. The question should then call for the opinion of the expert as to whether the facts so supposed could have caused the condition in question, rather than calling for the witness' conclusion as to what actually did cause it. *Service Co. v. Sales Co., supra* (259 N.C. 400, 131 S.E. 2d 9); *Patrick v. Treadwell, supra* (222 N.C. 1, 21 S.E. 2d 818); *Summerlin v. R. R.*, 133 N.C. 550, 45 S.E. 898; Stansbury, North Carolina Evidence, § 137."

In *State v. Minton*, 234 N.C. 716, 68 S.E. 2d 844, Ervin, J., speaking for the Court, said:

> "The State did not undertake to show any causal relation between the wound and the death by a medical expert. For this reason, the question arises whether the cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony. The law is realistic when it fashions rules of evidence for use in the search for truth. The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character. *Waller v. People*, 209 Ill. 284, 70 N.W. 681; *State v. Rounds*, 104 Vt. 442, 160 A. 249. See, also, in this connection: *S. v. Peterson, supra* (225 N.C. 540, 35 S.E. 2d 645); *S. v. McKinnon*, 223 N.C. 160, 25 S.E. 2d 606; *S. v. Johnson, supra* (193 N.C. 701, 138 S.E. 19); *Brundage v. State*, 70 Ga. App. 696, 29 S.E. 2d 316; *James v. State*, 67 Ga. App. 300, 20 S.E. 2d 87; *Brown v. State*, 10 Ga. App. 216, 73 S.E. 33; *Commonwealth v. Sullivan*, 285 Ky. 477, 148 S.W. 2d 343; *People v. Jackzo*, 206 Mich. 183, 172 N.W. 557; *Franklin v. State*, 180 Tenn. 41, 171 S.W. 2d 281; *Mayfield v. State*, 101 Tenn. 673, 49 S.W. 742; *Lemons v. State*, 97 Tenn.

560, 37 S.W. 552; *McMillan v. State,* 73 Tex. Cr. 343, 165 S.W. 576; *State v. Bozovich,* 145 Wash. 227, 259 P. 395."

The evidence in this case brings it within the rule of the *Minton* case. The State's evidence tended to show that when the wife of the deceased went to the railroad track and found him, that he was stabbed in the stomach with a piece of his liver plugged out, and was bleeding from his right side. He was taken to the hospital, operated on that day, and put under oxygen. "He had two operations because they had to bore a hole in his stomach and put a tube in and had to operate in the emergency room that Sunday . . . He was not able to walk — he was paralyzed. He couldn't move no kind of way. He could not raise his hands up — he was paralyzed. He couldn't even move because wherever they laid him he had to lay there . . . Homer went into a coma that Monday night. I (his wife) stayed there until 10:30, when I left Memorial Hospital that night, he was not in a coma. When I got home to go back — Tuesday they call and told me that he had done went back in a coma . . . He went into a coma that Monday night, and he did not come out of that coma."

From the above evidence, it would seem that although the deceased lived for several weeks after receiving his injuries, he was in a dying coma. During that time, and from the nature of the wounds on his body, a "person of average intelligence would know from his own experience or knowledge that the wound was mortal in character."

The defendant has some eighteen exceptions to the charge of the Court but refers to only two of them in his brief. Under our rules, the others are deemed abandoned. *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781. However, they have been considered and are found to be without merit.

One of the exceptions noted in the brief is to that portion of the charge in which the Court defined manslaughter, both voluntary and involuntary. He complains that the Court defined involuntary manslaughter, but the instruction given was a correct one in defining both types of manslaughter, and we do not see that any substantial injustice was done to the defendant, even though the definition of involuntary manslaughter may not have been required. Another exception presented was to a further statement of the law of manslaughter in which the Court properly and fully dealt with anger and sudden passion as elements. A careful consideration of this exception discloses it was a correct and well expressed statement of the law of manslaughter.

The remaining exception discussed in the appellant's brief is

that since the death of the deceased did not occur for some seven weeks following his injuries that the Court committed error in failing to charge the jury on "proximate cause," contending that he should have instructed the jury that before the defendant could be convicted of any degree of homicide, it would have to find beyond a reasonable doubt that the injuries inflicted by the defendant were the proximate cause of the death of his antagonist. However, upon the State's evidence (1) that the defendant told Officer Mobley at the scene that he had stabbed Homer with a butcher knife; (2) the statement by the officer that the deceased was bloody in the lower right abdomen, that he found a stab wound at that time; (3) the statement by the wife of the deceased that he was bleeding from his right side where the stab was, that "he was stabbed and bloody and when they picked him up blood run out. He was stabbed in his stomach and a piece plugged out of his liver . . . The blood was coming from his right side, I looked at it, the cut place was pretty deep"; (4) other evidence relating to the two operations on the deceased; (5) the undisputed testimony that he went into a dying coma the day following the trouble, that he never regained consciousness after the second day, together with (6) Dr. Summerville's opinion — all are sufficient to fully establish the cause of death.

> "Where the cause of death is disputed and there is evidence tending to prove that deceased's death was due to some cause other than the injuries inflicted by accused, the Court may and should instruct the jury fully and clearly on the issue as to the proximate cause of the death. The Court may, and should, particularly if requested, instruct the jury to the effect that they cannot convict, or in other words that they must acquit, unless they are satisfied that decedent died from the injuries inflicted by accused and not from some other cause, such as from improper medical or surgical treatment of the injuries." 41 C.J.S., Homicide, § 363.
>
> Also, "The view has been taken, however, that where, upon the undisputed facts, it clearly and conclusively appears to a moral certainty that the unlawful act complained of was the proximate cause of death, a failure so to charge, especially where there was no request so to charge, is not reversible error. An instruction as to an independent intervening cause is not proper in the absence of evidence to sustain it." 26 Am. Jur., Homicide, § 533.

There being "no evidence tending to prove that deceased's death was due to some cause other than injuries inflicted by the accused,"

an instruction on proximate cause was unnecessary, and especially when there was no request therefor. However, the Court did in several instances require that the jury find that the defendant had killed the deceased as a prerequisite to any verdict of guilty. In one place, as part of the instruction, the Court said, "If you find . . . that he cut and stabbed and killed the deceased . . . that he killed him intentionally, that he killed him with a deadly weapon . . ." In another section of the charge the Court said, "I instruct you that you should ask yourself these questions. Did the defendant cut and stab the deceased? Second: Did he kill him intentionally? Third: Did he kill him with a deadly weapon? If you find from the evidence and beyond a reasonable doubt or if you find from the admission of the defendant that the truth requires an affirmative answer to each of these questions; that is, that each and every one of these should be answered yes, then . . ." In still another portion of the charge, the Court instructed the jury that they should ask themselves the questions just above set forth, and at the conclusion of the charge told the jury that if they found "that the defendant stabbed the deceased . . . that he killed him intentionally, that he killed him in the heat of passion . . ."

The foregoing excerpts from the charge establish that the jury was fully informed that the injuries inflicted by the defendant must have caused the death of Homer Anderson before he could be convicted of any offense. In the trial below, there was

No error.

WILLIAM C. BAREFOOT v. THOMAS OLIVER JOYNER, JR., AND R. H. BOULIGNY, INC.

(Filed 24 May, 1967.)

1. Automobiles § 41i— Evidence of defendant's negligence in entering highway from private driveway held for jury.

Allegations and evidence tending to show that plaintiff was traveling on a four-lane highway with a median some one-half block in width separating the two lanes for eastbound and the two lanes for westbound traffic, that defendant entered the dominant highway from a private driveway to enter a servient highway, and that the collision occurred between the right front and side of plaintiff's car and the left front and side of defendant's car, *held* sufficient for an inference that defendant driver was either traveling in the wrong direction on the dominant highway or that he failed to keep a proper lookout or failed to exercise due

care under the existing conditions, and the issue of negligence was properly submitted to the jury.

2. Negligence § 26—

Nonsuit on the ground of contributory negligence should be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom, and nonsuit on the issue should be denied when opposing inferences are permissible from plaintiff's proof.

3. Automobiles § 42g—

Allegations and evidence tending to show that plaintiff was operating his vehicle in a lawful manner on a dominant highway and that defendant attempted to cross the dominant highway from a private driveway in the path of plaintiff's car, *held* to preclude nonsuit on the ground of contributory negligence, notwithstanding other evidence of plaintiff which would permit an inference that plaintiff failed to keep a proper and careful lookout and did not decrease his speed and keep his vehicle under proper control under the existing conditions.

4. Automobiles § 46; Negligence § 28—

An instruction that the proximate cause of the injury is one that produces the result in continuous sequence and without which it would not have occurred, and one from which injury was reasonably foreseeable under the circumstances, is not erroneous, but it is erroneous to give such instruction without charging upon the element of foreseeability.

5. Appeal and Error § 42—

Conflicting instructions on a material point, one correct and the other incorrect, must be held for prejudicial error when the incorrect instruction is given in the final summation of what the jury must find in order to answer the issue in the affirmative, so that the jury may have followed the incorrect charge in answering the issue.

APPEAL by defendants from *Mallard, J.*, First October 1966 Regular Civil Session of WAKE.

Civil action by plaintiff to recover damages for personal injuries and property damage received when his automobile, driven by him, collided with a Jeep truck driven by defendant Joyner and owned by defendant R. H. Bouligny, Inc.

The accident occurred on 11 December 1964, at approximately 1:09 P.M., in the westbound lane of Western Boulevard (same as U. S. 64) at a point just west of where Hillsboro Road and Buck Jones Road intersect with Western Boulevard and several hundred feet west of where Highway U. S. 1 Business overpasses Western Boulevard. The flow of traffic on Western Boulevard at this point is one-way in a westerly direction (the eastbound lanes being divided from the westbound lanes by a median approximately one-half block in width). Hillsboro Road at this point is two lanes of one-way westbound traffic intersecting with Western Boulevard at

approximately a 57-degree angle on the northern side of Western Boulevard. Traffic in the right lane of Hillsboro is required to yield right-of-way coming into Western Boulevard; the left lane is intended for traffic wishing to cross Western Boulevard into Buck Jones Road, and traffic is controlled by a stop sign. Buck Jones Road intersects with Western Boulevard from its south side, running in a generally north and south direction. The speed limit on that part of Western Boulevard is 55 miles per hour; however, there was a suggested speed sign immediately east of the U. S. 1 overpass indicating 35 miles per hour during school hours.

Plaintiff's evidence tended to show that he was traveling west on Western Boulevard at a speed of about 50 miles per hour as he approached the point of collision; that as he passed under the overpass, he could see some 200 feet ahead and that he did not see any traffic in the road. As he approached the point where Hillsboro Road and Buck Jones Road intersect with Western Boulevard, he looked to his right and left for traffic coming into Western Boulevard from these roads. When he looked back to the front, defendant's vehicle was immediately on him; he did not have time to put on brakes, and was struck on the right front side by the truck operated by defendant Joyner.

Defendant Joyner testified that he had been to General Machine Co., which is located on a lot just west of intersecting Hillsboro Road and across from the intersection of Buck Jones Road, so that the east corner of the building is in line with the west corner of the intersection of Buck Jones Road. He stated he pulled his truck up to a line where the paved portion of the company's lot met Western Boulevard, and stopped. He looked to the left and, seeing no traffic, proceeded across Western Boulevard to get on Buck Jones Road. When he was about two-thirds across Western Boulevard, he collided with plaintiff's automobile. Defendant Joyner stated: "I did that coming to a complete stop and looking to be sure that there was no traffic before I entered the highway. I looked to the left down Western Boulevard and Hillsboro Road coming into an intersection there. I looked east from where I had stopped. I didn't see anything. There were no cars on Western Boulevard to my left or on Hillsboro Street that I could see. Then I proceeded to cross the highway into Buck Jones Road, and I never saw anything. I just felt the collision."

William Gray Arnold testified that he was employed by the Raleigh Police Department on 11 December 1964, and that he investigated the accident. He stated that dirt and debris on the road evidenced the point of the collision, and upon his measurements the

point of collision was thirty-one feet from the north side of Western Boulevard and thirty-seven feet from the west corner of Buck Jones Road. He further testified that damage was done to the left front and side of defendant's car, and to the right front and side of plaintiff's car.

At the close of plaintiff's evidence and again at the close of all the evidence, defendants moved for judgment of nonsuit, which was denied. Issues of negligence, contributory negligence, and damages were submitted to the jury and were answered in favor of plaintiff. Defendants appealed.

Bailey, Dixon & Wooten for plaintiff.
Holding, Harris, Poe & Cheshire for defendants.

BRANCH, J. Defendants contend that plaintiff has not offered sufficient evidence for the case to be submitted to the jury.

In the case of *Lake v. Express, Inc.*, 249 N.C. 410, 106 S.E. 2d 518, Higgins, J., speaking for the Court, said:

> "'If the evidence in the light most favorable to plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion to nonsuit.' *McFalls v. Smith*, 249 N.C. 123, 105 S.E. 2d 297; *Taylor v. Brake*, 245 N.C. 553, 96 S.E. 2d 686; *Scarborough v. Veneer Co.*, 244 N.C. 1, 92 S.E. 2d 435.
>
> "Inconsistencies and conflicts in the evidence, whether witnesses are mistaken or otherwise, truthful or otherwise, are questions of fact to be resolved by the fact finding body — the jury. Only a question of law is presented by demurrer to the evidence or motion to nonsuit. *Bell v. Maxwell*, 246 N.C. 257, 98 S.E. 2d 33; *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19; *Mallette v. Cleaners*, 245 N.C. 652, 97 S.E. 2d 245."

Plaintiff alleged that defendant (1) carelessly and negligently failed to bring his vehicle to a complete stop and remain stopped until he could make the movement into the public highway in safety, in violation of an ordinance of the City of Raleigh, 21-18; (2) that he negligently and carelessly operated a motor vehicle in the wrong direction on a highway of the State of North Carolina; (3) that he failed and neglected to keep said vehicle under reasonable and proper control; (4) that he operated said automobile without keeping a proper and careful lookout; and (5) that he operated said vehicle

at a speed greater than was reasonable and prudent under circumstances and conditions then existing, in violation of G.S. 20-141.

Recognizing the rule that physical facts at the scene of an accident may be sufficiently strong within themselves, or in combination with other evidence, to infer negligence and make the issue one for the jury, *Rouse v. Jones,* 254 N.C. 575, 119 S.E. 2d 628, there is sufficient evidence here to infer that defendant Thomas Oliver Joyner, Jr., while operating said truck as the agent and employee of defendant R. H. Bouligny, Inc., and in the performance of his duties as such agent and employee, was either traveling in the wrong direction on Western Boulevard, or that he failed to keep a proper and careful lookout, or that he failed to keep his automobile under proper control and to operate it carefully under conditions then existing, thus causing the collision and plaintiff's injury and damage. The allegations and the evidence present issues of fact, and the trial court correctly allowed the jury to decide whether plaintiff was damaged and injured by the negligence of defendants as alleged in the complaint.

Considering defendants' contention that their motion for nonsuit should have been allowed, we must decide whether plaintiff was guilty of contributory negligence as a matter of law.

Nonsuit on the ground of contributory negligence should be allowed only when the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom. *Rouse v. Peterson,* 261 N.C. 600, 135 S.E. 2d 549; *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283; *Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170.

From an examination of defendants' pleadings and the evidence offered, it would appear that if plaintiff were guilty of contributory negligence it would be on the basis of excessive speed, or his failure to keep a proper lookout. The statutory speed limit at the place of the accident was 55 miles per hour. There was no *direct* evidence that plaintiff exceeded the statutory speed limit, nor that he drove too fast for existing conditions, nor that he failed to decrease his speed and keep his car under proper control with due regard to existing conditions. However, the plaintiff in testifying did state: "I never remember putting on brakes or anything." Thus, there was evidence from which it might be inferred that plaintiff did not decrease his speed and keep his automobile under control with due regard to existing conditions, or that he failed to keep a proper and careful lookout when he did not see defendant's vehicle as it came across Western Boulevard. Conversely, the evidence would permit

a reasonable inference or conclusion that he was operating his automobile on a dominant highway in a lawful manner, that he kept his automobile under proper control, and that after looking to his left toward Buck Jones Road and to his right toward Hillsboro Road, he had a right to proceed, assuming no vehicular traffic would come across the road from a private driveway in the path of oncoming traffic.

Nonsuit on the issue of contributory negligence should be denied when opposing inferences are permissible from plaintiff's proof. *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743; *Wooten v. Russell,* 255 N.C. 699, 122 S.E. 2d 603.

A factual determination by the jury was required, and the court below ruled correctly in denying defendants' motion for nonsuit.

By Assignments of Error Nos. 5 and 8 defendants contend that the court erred in its charge to the jury, in that erroneous definitions of proximate cause were given.

Defendants' Assignment of Error No. 5 refers, in part, to that portion of the judge's charge on the first issue which is as follows:

> "Proximate cause, the other element of actionable negligence, means the real, the dominant, the efficient cause, *a cause without which the occurrence would not have occurred,* and proximate cause is also a cause from which a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable under the facts as they existed. An act is a proximate cause of an injury and damage when in a natural and continuous sequence unbroken by any new or independent cause it produced the result complained of and without which the injury and the damage would not have occurred. And there can be more than one proximate cause of an injury and damage. I instruct you that the violation of a statute or ordinance enacted for the public safety is negligence, *per se,* unless the statute or ordinance itself provides to the contrary and all that is needed to make an act negligent is the essential element or (of) proximate cause."

In the case of *Nance v. Parks,* 266 N.C. 206, 146 S.E. 2d 24, the Court defined proximate cause:

> "Proximate cause is 'a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.' *Mattingly v. R. R.,* 253 N.C. 746, 750, 117 S.E. 2d 844, 847. Foreseeable injury is a requisite of proxi-

mate cause, which is, in turn, a requisite for actionable negligence. *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796."

Here, the court, in substance, gave the approved definition, and this assignment of error is overruled. However, the defendants contend by their Assignment of Error No. 8 that the definition of proximate cause given by the court in its summation of the charge on the first issue was prejudicial error. That portion of the charge given is as follows:

"I say, members of the jury, that if the plaintiff has proven any of those things and proven by the greater weight of the evidence, and has further proven by the greater weight of the evidence that the negligence of the defendant Thomas Oliver Joyner, Jr., in any one or more of those regards, not only exist, but that such negligence of the defendant Thomas Oliver Joyner, Jr., was one of the proximate causes of the collision between the vehicles, *that is that it was one of the causes without which the collision would never have occurred* resulting in and causing damage to the plaintiff's automobile or injury to plaintiff's person, or both, then it would be your duty to answer this first issue in plaintiff's favor, that is, YES."

In the case of *Ratliff v. Power Co.*, 268 N.C. 605, 151 S.E. 2d 641, this Court considered a charge of the lower court in which the jury was, in part, instructed:

"If you are satisfied from this evidence and by its greater weight, that * * * *or* that the defendant had not complied with the requirements of the statute to obtain a proper permit for the length of the rig that was being driven, the Court charges you that if you are satisfied from this evidence and by its greater weight that such failure to comply with either of those statutes amounted to negligence, that that failure was such a failure as a reasonable and prudent man would not have been guilty of under the same and similar circumstances, and if you are further satisfied from this evidence and by its greater weight that such failure was a proximate cause, *that is a cause without which the collision would not have occurred,* then it would be your duty to answer the first issue Yes."

Holding that this was an incorrect definition of proximate cause, the Court, speaking through Lake, J., said:

"An event which is a 'but for' cause of another event — that is, a cause without which the second event would not have taken

place — is not, necessarily, the proximate cause of the second event. While one event cannot be the proximate cause of another if, had the first event not occurred, the second would have occurred anyway, *Henderson v. Powell,* 221 N.C. 239, 19 S.E. 2d 876, the reverse is not necessarily true. A 'but for' cause may be a remote event from which no injury to anyone could possibly have been foreseen. Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which the plaintiff seeks to recover damages. *Nance v. Parks,* 266 N.C. 206, 146 S.E. 2d 24.

"The learned judge had, in an earlier portion of his charge, correctly defined proximate cause. However, this subsequent instruction, related as it was to a specific and final summation of what the jury must find in order to answer the first issue in the plaintiff's favor, was reasonably calculated to substitute in the mind of the jury the inaccurate definition of proximate cause for the correct definition previously given."

Here, the court had earlier in the charge given a correct instruction in defining proximate cause, but in the final summation of what the jury must find in order to answer the first issue for plaintiff, an inaccurate definition was given. The inaccurate definition was so closely related to the final summation and the explicit instruction to answer the issue "Yes" that reasonably the inaccurate definition would be substituted for the accurate in the mind of the jury.

For reasons stated, defendants are entitled to a

New trial.

WALTER LEE CHANDLER v. MORELAND CHEMICAL COMPANY.

(Filed 24 May, 1967.)

1. Negligence § 24a—

Motion to nonsuit presents the question of law whether the evidence is sufficient to be submitted to the jury, taking the evidence favorable to plaintiff as true and resolving all conflicts in the evidence in plaintiff's favor, and nonsuit is properly denied if there is evidence, so considered, tending to support all essential elements of plaintiff's cause of action.

2. Sales § 16— Evidence of negligence in delivering sulphuric acid in drum with defective bung held for jury.

Plaintiff's allegations and evidence were to the effect that the practice in emptying drums of sulphuric acid prepared by defendant was to re-

lease pressure by the vent or bung on top, then loosening the bung on the side by a one-quarter turn while the drum was standing on end, and then laying the drum down with the bung up and completing the removal of the bung by up to four complete turns, that plaintiff was engaged in opening the drum in this manner but that when he had loosened the bung less than a one-quarter turn, while the drum was on end, the bung came out, causing the acid, under the pressure of the liquid above the bung, to be forced violently through the opening onto plaintiff. The evidence further tended to show that the threads on the bung were worn and that there were two gaskets under the bung cap instead of one, so that the second gasket displaced the threads to such extent that a quarter turn released the contents. *Held:* Nonsuit was correctly denied.

3. Damages § 12—

Where plaintiff introduces evidence that he suffered permanently disfiguring scars from sulphuric acid burns resulting from defendant's negligence, the admission in evidence of the mortuary tables on the issue of damages is not error, and the court correctly charges on the question of permanent injury. G.S. 8-46.

APPEAL by defendant from *Crissman, J.*, January 2, 1967 Civil Session, GUILFORD Superior Court (High Point Division).

The plaintiff, Walter Lee Chandler, employee of Marlowe-Van Loan Corporation, High Point, North Carolina, on September 17, 1963 was severely burned by sulphuric acid escaping from a 55 gallon metal drum which had been filled, sealed and shipped by the defendant from its Charlotte plant to the plaintiff's employer. The allegations of negligence on which the plaintiff relies are contained in paragraph 6(a), (b) and (c) of the complaint:

"(a) Defendant shipped to plaintiff's employer a fifty-five gallon metal drum containing sulphuric acid, which drum had a metal bung-hole cap. The threads on said cap were worn to such a degree that they could not mate with the corresponding threads in the bung-hole of said drum. In addition the threads in said bung-hole itself were worn to such a degree that they could not mate with corresponding threads on a bung-hole cap. Defendant knew, or by the exercise of due care should have known, of the defective and dangerous condition of said drum; nevertheless, defendant failed to take any precautions whatsoever by way of inspecting and repairing said drum or warning the plaintiff of its defective condition, although defendant knew or in the exercise of due care should have known that defective conditions could not be observed by the plaintiff before the bung-hole cap was removed. As a result of said defective and dangerous conditions, when plaintiff unscrewed the cap less than one-quarter of a turn, the bung was completely released from any hold on the barrel, and the weight of the acid above the

bung level caused the cap to explode outwardly, allowing the acid to be forced violently through the opening onto the plaintiff's body.

(b) Defendant placed a bung-hole cap into said drum which cap was held to the drum by less than one-quarter of a turn rather than the eight to ten turns which are deemed safe and necessary on same or similar drums throughout the chemical industry.

(c) Defendant failed to attach said bung-hole cap to said drum in any manner so as to secure the drum and the contents within."

By answer the defendant admitted filling, sealing and shipping to plaintiff's employer, in August, 1963, a number of metal drums approximately 3 feet high and 26 inches in diameter. The drums had a ¾ inch bung on top and a 2 inch bung on the side of the drum, midway between the top and the bottom. The bung on top was intended to be opened "from time to time so as to allow the accumulated gases to escape"; that plaintiff was experienced in the use of sulphuric acid and with the proper manner of releasing pressure, especially in hot weather. The defendant denied all allegations of negligence and conditionally pleaded plaintiff's contributory negligence by the manner in which he opened the drum and such acts on the part of the plaintiff contributed to his injury.

The plaintiff's evidence disclosed that on September 17, 1963 the plaintiff and W. R. Jones, Sr. were preparing to empty a drum of sulphuric acid received from the defendant two weeks prior. When full, the drum weighed about 900 pounds. The acid contained in the drum weighed 750 pounds. Shortly before beginning the removal process, Jones opened the small vent or bung and released the pressure inside the barrel. The drum had a 2 inch hole in the side, midway between the two ends. This hole was threaded. A bung, or cap, also threaded, screws into this hole, sealing the acid inside the barrel. Jones testified he had had experience and had been used to sulphuric acid for 22 years. He testified the usual procedures were being followed in the incident in which the plaintiff was injured. The drum which he had vented and relieved the pressure that morning was standing on end. "We set the wrench at about nine o'clock . . ." and then turned down to seven o'clock just to loosen the cap. A turn from nine o'clock to six o'clock would be a one-quarter turn. After the cap is thus loosened, the practice is to lay the drum down with the bung up, then complete the removal of the cap by completing three and one-half to four complete turns and drain the barrel by rolling it over slowly until the bung is at the bottom and

the acid all drained from the drum. Jones testified that on September 17, after the one-quarter turn, the cap came off and a part of the acid went straight out from the bung and inflicted the burns on the plaintiff. An immediate examination of the drum and the cap revealed the threads on both were worn to the point where the one-quarter turn released the cap. Examination further disclosed that two heavy gaskets, or washers, had been placed under the cap. One of these was defective and broken. Jones testified the custom was to loosen the cap by a one-quarter turn while the drum was standing on end; otherwise, the heavy pressure required to start the cap caused the drum to spin. The witness testified he and the plaintiff followed the usual procedure on the occasion of the plaintiff's injury.

For the defendant Mr. Luper testified that on the day following the injury, he contacted Mr. W. R. Jones, Sr. at the Marlowe-Van Loan plant. Mr. Luper was investigating the injury on behalf of the defendant. He testified he used a recording machine and the recordings were typed and verified. He remembered Mr. Jones as having said that in trying to vent the drums from the top they had trouble . . . and had quit doing it. Plaintiff's counsel asked whether the conversation and recording did not show Mr. Jones as having said, "Well, the bung itself was an unusual bung for an acid drum, and it had two gaskets on it, which (while) that's not rare, but for this type bung it was. It shouldn't have had but just one gasket on it, but this one had two gaskets, and so, therefore, it wasn't very much thread that could have been screwed in the drum, that was the trouble". This quoted statement was admitted without objection.

At the close of the plaintiff's evidence and again at the close of all the evidence, the Court overruled motions for nonsuit. The Court submitted issues which the jury answered, as here indicated:

> "1. Was the plaintiff, Walter Lee Chandler, injured and damaged by the negligence of the defendant, Moreland Chemical Company, as alleged in the complaint? Answer: Yes.
>
> 2. If so, did the plaintiff, Walter Lee Chandler, contribute to his own injury and damage by his own negligence, as alleged in the answer? Answer: No.
>
> 3. What amount of damages, if any, is plaintiff, Walter Lee Chandler, entitled to recover? Answer: $12,000.00."

From the judgment on the verdict, the defendant appealed.

Jordan, Wright, Henson and Nichols and William L. Stocks by William L. Stocks for defendant appellant.

Schoch, Schoch and Schoch by Arch K. Schoch, Jr., Bencini & Wyatt by Frank B. Wyatt for plaintiff appellee.

HIGGINS, J. The defendant insists: (1) the verdict and judgment in this case should be set aside for failure of the Court to grant the motion for judgment of nonsuit at the close of all the evidence; or (2) a new trial should be awarded because of errors in the Court's charge.

The rule by which this Court determines the sufficiency of the evidence to survive a motion for nonsuit in a civil case has been stated by this Court in many cases.

> "The question presented is whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. 'If the evidence in the light most favorable to plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion to nonsuit'. *McFalls v. Smith,* 249 N.C. 123, 105 S.E. 2d 297; *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686; *Scarborough v. Veneer Co.,* 244 N.C. 1, 92 S.E. 2d 435.
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> Inconsistencies and conflicts in the evidence, whether witnesses are mistaken or otherwise, truthful or otherwise, are questions of fact to be resolved by the fact finding body — the jury. Only a question of law is presented by demurrer to the evidence or motion to nonsuit. *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *Mallette v. Cleaners,* 245 N.C. 652, 97 S.E. 2d 245." *Lake v. Express, Inc.,* 249 N.C. 410, 106 S.E. 2d 518.

The latest statement of the rule is by Branch, J., in *Barefoot v. Joyner, et al, ante,* 388, decided this day.

The material evidence on the issue of negligence is contained in the statement of facts. The defendant shipped to the plaintiff's employer a drum containing 750 pounds of sulphuric acid — a potentially dangerous substance. The threads on the bung and the cap or plug were so worn out that the release of the cap could be affected by a quarter turn, whereas ordinarily a release required 3½ or 4 complete turns. Under the sealing cap the defendant had placed two gaskets, one of which was defective. This particular drum was not suited to the use of two gaskets. In following the customary procedure, by using a heavy wrench to begin removal of the plug (by making a quarter turn), then changing the position of the drum before making the customary additional turns ordinarily required, the bung or cap gave way, permitting the acid from the drum to gush

out and burn the plaintiff. The two gaskets were used — only one should have been used on this drum. The second gasket displaced the threads to such an extent that a quarter turn released the contents.

The condition of the drum, the manner in which it was sealed by the defendant, and opened by the plaintiff, raised issues of negligence and contributory negligence. These issues arose on the pleadings and were supported by evidence sufficient to justify their submission and to sustain the answers. "The plaintiff, however, is not required to make out his case by direct proof, but may rely upon circumstances from which a reasonable inference of negligence may be drawn, *Dail v. Taylor,* 151 N.C. 284; *Perry v. Bottling Co.,* 196 N.C. 175, in which event the evidence must be interpreted most favorably for the plaintiff, and if it is of such character that reasonable men may form divergent opinions of its import it is customary to leave the issue to the final award of the jury." *Corum v. Tobacco Co.,* 205 N.C. 213, 171 S.E. 78. By overruling the motion for nonsuit the Court did not commit error.

The defendant's objections to the charge are not sustained. The Court charged fairly upon the issues raised by the pleadings, and supported by the evidence. Over objection, the Court permitted the plaintiff to introduce the mortuary tables. The objection is based upon the alleged lack of evidence showing permanent injury. However, the evidence disclosed that permanently disfiguring scars resulted from the burns. *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753. The mortuary table is statutory, G.S. 8-46, and need not be introduced, but may receive judicial notice when facts are in evidence requiring or permitting its application. The objections to the charge are not sustained.

No error.

FERRIS J. BELMANY v. OMA WALKER OVERTON.

(Filed 24 May, 1967.)

1. Pleadings § 12—

Upon demurrer, the complaint should be liberally construed with a view to substantial justice between the parties and the demurrer must be overruled unless the complaint is fatally defective. G.S. 1-151.

2. Automobiles § 54d—

In an action seeking to hold the owner of a motor vehicle liable for the alleged negligence of the driver, a complaint alleging that the driver at

the time and on the occasion of plaintiff's injury was operating defendant's car as the agent of defendant held sufficient to withstand demurrer, notwithstanding the absence of allegation that the driver was then and there acting within the course and scope of the said agency.

3. Trial § 20—

When defendant offers evidence, only his motion to nonsuit at the close of all of the evidence need be considered in determining the sufficiency of the evidence to be submitted to the jury. G.S. 1-183.

4. Automobiles 54f—

The admission of ownership of the vehicle involved in the collision is sufficient to take the issue of *respondeat superior* to the jury by virtue of G.S. 20-71.1, and the owner's motion for nonsuit on the issue is properly denied.

5. Same—

Plaintiff relied solely on G.S. 20-71.1 to take the issue of agency to the jury. Defendant's evidence tended to show that the driver was on a purely personal mission at the time of the accident in suit. *Held:* Defendant, without request therefor, was entitled to a peremptory instruction related directly to the particular facts shown by defendant's positive evidence to answer the issue in the negative, and a general instruction to so answer the issue if the jury believed the facts to be as defendant's evidence tended to show, without relating such instruction directly to defendant's evidence in the particular case, is insufficient.

6. Appeal and Error § 54—

Where an error is found which relates solely to one issue, the Supreme Court may grant a partial new trial limited to such issue.

APPEAL by defendant from *Crissman, J.*, September 1966 Session of ROCKINGHAM.

Civil action instituted March 7, 1966, to recover damages for personal injuries sustained by plaintiff on March 8, 1963, at about 3:15 p.m., when struck by a Mercury car operated by Druscilla Overton Quisenberry, then nineteen, the married daughter of defendant.

The accident occurred at the intersection of Gilmer, an east-west street, and Scales, a north-south street, in the business section of Reidsville, N. C. The automatic traffic control signal at said intersection was in operation.

Plaintiff walked west along the north side of Gilmer to reach the northeast corner of said intersection. Approaching said intersection, Mrs. Quisenberry was driving north on Scales.

Plaintiff, then about sixty-six, undertook to walk from the northeast to the northwest corner of said intersection. At a point near the center of Scales Street, he was struck by the northbound car operated by Mrs. Quisenberry.

Plaintiff alleged he stopped on said northeast corner and waited

until the light controlling traffic on Scales Street had changed from green to red; that, when the light changed, he started across Scales Street and was struck while attempting to cross; and that Mrs. Quisenberry entered and crossed said intersection when the signal facing northbound traffic on Scales Street was red.

Defendant, in her answer, denied Mrs. Quisenberry was negligent in any of the respects alleged by plaintiff and conditionally pleaded the contributory negligence of plaintiff. She alleged Mrs. Quisenberry entered and crossed said intersection when the signal facing northbound traffic on Scales Street was green; and that plaintiff, "without regard to his own safety, stepped from the northeast corner of said intersection directly into the path of the defendant's automobile, suddenly and without warning, and collided with said automobile and fell to the pavement."

Defendant denied all of plaintiff's allegations to the effect Mrs. Quisenberry was operating the car as "defendant's agent." She admitted she was the owner of the Mercury car and that Mrs. Quisenberry was operating it with her knowledge and consent.

The court submitted, and the jury answered, the following issues: "1. Was Druscilla Overton Quisenberry the agent of the defendant in the operation of the Mercury automobile at the time of the accident on March 8, 1963, as alleged in the Complaint? ANSWER: Yes. 2. Was the plaintiff injured by the negligence of the defendant as alleged in the Complaint? ANSWER: Yes. 3. Did the plaintiff by his own negligence contribute to his injury as alleged in the Answer? ANSWER: No. 4. What amount, if any, is the plaintiff entitled to recover of the defendant? ANSWER: $4500.00." Judgment that plaintiff recover of defendant the sum of forty-five hundred dollars was entered. Defendant excepted and appealed.

J. S. Moore, Jr., for plaintiff appellee.
W. F. McLeod for defendant appellant.

BOBBITT, J. In this Court, defendant demurred to the complaint for failure to state facts sufficient to constitute a cause of action *against her,* her asserted ground of objection being that "there is no allegation that connects the driver of the motor vehicle in question at the time of the collision in question with the said Oma Walker Overton as servant, agent, or employee acting within the scope of her employment."

Except as to the identity of the demurrant, the quoted phraseology is identical with that used in a demurrer to the complaint in *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765. In *Parker v. Underwood, supra,* the demurring defendant, the father-owner, was

not present when the accident occurred. His truck was being operated by his eighteen-year-old son. Plaintiff alleged the son was operating the truck "with the express consent, knowledge and authority" of his father. Judgment of the superior court sustaining the demurrer was affirmed by this Court. The ground of decision was that the complaint contained no allegations to the effect the son was operating the truck as agent of his father.

In *Hartley v. Smith,* 239 N.C. 170, 178, 79 S.E. 2d 767, 773, Barnhill, J. (later C.J.), after discussing the significance of G.S. 20-71.1 as a rule of evidence, stated: "*Non constat* the statute, it is still necessary for the party aggrieved to allege both negligence and agency in his pleading and to prove both at the trial. *Parker v. Underwood, post,* 308."

In subsequent decisions, complaints have been held fatally deficient as to the owner of an automobile where the plaintiff has failed to allege the operator of the car was the agent of the owner. *Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462; *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427; *Cohee v. Sligh,* 259 N.C. 248, 130 S.E. 2d 310; *Beasley v. Williams,* 260 N.C. 561, 133 S.E. 2d 227.

In *Ransdell v. Young,* 243 N.C. 75, 89 S.E. 2d 773, nonsuit entered at the conclusion of the plaintiff's evidence was affirmed. The *plaintiff's* evidence disclosed affirmatively that the operator of the car at the time of the accident was not on any mission for the absentee owner (defendant). In this connection, see *Taylor v. Parks,* 254 N.C. 266, 118 S.E. 2d 779. The *per curiam* opinion in *Ransdell v. Young, supra,* contains this statement: "Moreover, the plaintiff does not allege in her complaint that the defendant's automobile at the time of the accident, was being operated for the benefit of the owner, or that the alleged agent was about her employer's business at the time of and in respect to the very transaction out of which the injury arose. G.S. 20-71.1; *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765."

In *Whiteside v. McCarson,* 250 N.C. 673, 678, 110 S.E. 2d 295, 298, the opinion contains this paragraph: "G.S. 20-71.1 did not change the elements prerequisite to liability under the doctrine *respondeat superior.* To establish liability under this doctrine, the injured plaintiff must allege and prove that the operator was the agent of the owner and that this relationship existed at the time and in respect of the very transaction out of which the injury arose. *Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644. As to the necessity for such *pleading: Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767; *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765; *Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462."

In *Whiteside v. McCarson, supra,* and in *Jyachosky v. Wensil, supra,* no question as to the sufficiency of the plaintiff's pleading was involved. In each of these cases, the complaint alleged the driver was the agent of the defendant owner, acting for his benefit and within the scope of his agency. Hence, the quoted statement from *Whiteside v. McCarson, supra,* was not in any sense the basis of decision therein.

In the present action, the complaint contains numerous references to the way and manner in which "defendant's agent" operated defendant's car. In addition, it contains the allegation that Mrs. Quisenberry, at the time she approached said intersection, "and at all times herein complained of," was operating said car "as agent for the defendant Oma Walker Overton."

"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." G.S. 1-151. The question comes to this: Is the complaint fatally defective on account of plaintiff's failure to supplement his said allegations as to agency by alleging that Mrs. Quisenberry was then and there acting within the course and scope of said agency? While such allegations would be appropriate, we are constrained to hold the allegation to the effect that Mrs. Quisenberry was operating defendant's car at the time and on the occasion of plaintiff's injuries *as the agent* of defendant was sufficient to withstand the demurrer.

It seems clear that all parties, including the presiding judge, understood plaintiff's allegations as in effect allegations that the driver of the car was acting as defendant's agent and within the scope of her agency. Defendant did not object to the submission of the first issue, involving solely the question of agency. Nor does it appear that defendant has at any time challenged the sufficiency of the complaint in any respect until the filing of her demurrer and brief in this Court.

Although plaintiff's meager allegations as to agency are not commended, we are of opinion, and so decide, that they are not so fatally deficient as to warrant the sustaining of the demurrer filed in this Court. Hence, the said demurrer is overruled.

Defendant assigns as error the denial of her motion(s) for judgment of nonsuit. Defendant having offered evidence, the only motion to be considered is that made at the close of all the evidence. G.S. 1-183; *Widenhouse v. Yow,* 258 N.C. 599, 604, 129 S.E. 2d 306, 310.

Defendant makes no contention that plaintiff failed to offer evidence sufficient to establish the alleged actionable negligence of Mrs.

Quisenberry. Nor does defendant contend the undisputed evidence establishes contributory negligence as a matter of law. Even so, we have considered carefully the evidence relevant to the second (negligence) and third (contributory negligence) issues. Suffice to say, the pleadings and evidence required the submission of these issues for jury determination.

The sole ground on which defendant contends her motion(s) for nonsuit should have been granted is that plaintiff failed to allege and to prove that Mrs. Quisenberry was operating defendant's car as defendant's agent and within the scope of her agency. These contentions relate solely to the first issue. Plaintiff's allegations as to agency being sufficient, defendant's admission as to ownership of the Mercury car operated by Mrs. Quisenberry on the occasion plaintiff was injured was sufficient to take the case to the jury for its determination of the ultimate question, namely, whether Mrs. Quisenberry was in fact the agent of defendant and then and there operating defendant's car within the scope of her agency. G.S. 20-71.1; *Whiteside v. McCarson, supra,* and cases cited; *Lynn v. Clark, supra,* and cases cited. The court properly denied defendant's motion(s) for judgment of nonsuit.

Defendant assigns as error the court's failure to give an instruction, related directly to the evidence in this case, that it was the duty of the jury to answer the agency issue, "No," if they found the facts to be as the only positive evidence, namely, the evidence offered by defendant, tended to show.

Plaintiff relied solely on G.S. 20-71.1 to take the case to the jury as to alleged agency. By virtue of this statute, the ultimate issue was for jury determination notwithstanding the only positive evidence tended to show that Mrs. Quisenberry was on a purely personal mission at the time of the collision. "In such case, the owner, without request therefor, is entitled to an instruction, *related directly to the evidence in the particular case,* that it is the jury's duty to answer the agency issue, "No," if they find the facts to be as the positive evidence offered by the owner tends to show. *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295; *Chappell v. Dean,* 258 N.C. 412, 417-418, 128 S.E. 2d 830," *Passmore v. Smith,* 266 N.C. 717, 719, 147 S.E. 2d 238, 240; also, see *Duckworth v. Metcalf,* 268 N.C. 340, 150 S.E. 2d 485; *Torres v. Smith,* 269 N.C. 546, 153 S.E. 2d 129.

Under the decisions cited in the preceding paragraph, defendant, without request therefor, was entitled to an instruction substantially as follows: If the jury find that, on the occasion of the collision, Mrs. Quisenberry was driving the car from her place of employment

in Reidsville to her home in Draper, where she resided with her husband and not with defendant, and that she was making the trip solely for her own personal purposes and not on a mission or errand of any kind for defendant, it would be your duty to answer the first issue, "No." Such an instruction was not given. The trial judge did instruct the jury in general terms that if they believed the facts to be as the evidence for the defendant tended to show it would be their duty to answer the first issue, "No." However, in view of what Justice Devin, referring to G.S. 20-71.1, aptly called the "vigor" of the statute, *Brothers v. Jernigan,* 244 N.C. 441, 94 S.E. 2d 316, we adhere to the rule adopted in *Whiteside v. McCarson, supra,* approved in the subsequent cited cases, to the effect that the required instruction *must be related directly to the evidence in the particular case.* For instructions complying with this rule, see *Jyachosky v. Wensil, supra,* and *Skinner v. Jernigan,* 250 N.C. 657, 110 S.E. 2d 301.

As to all matters embraced by the second, third and fourth issues, defendant has had a trial free from prejudicial error. The jury's verdict as to these issues will stand. However, for the error indicated, the jury's answer to the first issue is set aside and a partial new trial is ordered. Upon such new trial, the sole issue for determination will be whether Mrs. Quisenberry, on the occasion of the collision, was the agent of defendant and then and there acting within the scope of her agency. If the answer is, "No," plaintiff cannot recover from defendant; if the answer is, "Yes," plaintiff will be entitled to judgment for the amount established as damages at the prior trial. See *Whiteside v. McCarson, supra; Chappell v. Dean, supra; Passmore v. Smith, supra.*

Partial new trial.

STATE v. CHARLES BRANTLEY ROSE.

(Filed 24 May, 1967.)

1. Criminal Law § 159—

Exceptions not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Rape § 18—

Evidence in this case held amply sufficient to support the jury's verdict of guilty of assault with intent to commit rape.

3. Criminal Law § 84—

Even in the absence of impeachment of the credibility of prosecutrix as a witness, the State is entitled to introduce, for the purpose of corroboration, evidence of prior consistent statements made by her, and, to corroborate her statement that defendant assaulted her with a pistol, testimony of a witness that defendant had a pistol in his possession very soon after the attempted assault.

4. Criminal Law § 97—

Where, upon defendant's objection to the argument of the solicitor that he would not believe anything defendant said, the court instructs the jury that their beliefs, and not the beliefs or views of the solicitor or of defendant's counsel, were determinative, the argument will not be held for prejudicial error.

5. Criminal Law §§ 93, 97—

Upon the argument of the solicitor to the effect that defendant's brother, who had testified as to the relationship between the prosecutrix and defendant prior to the alleged criminal assault, would be less likely to tell the truth than prosecutrix, the witness jumped up and left the courtroom. The solicitor made a comment susceptible to the interpretation that the incident reflected upon the witness' credibility. The court instructed the jury that it should not consider matters outside the evidence, and the fact that any person either came into or left the courtroom during the argument of counsel should be disregarded. *Held:* The incident is not ground for new trial.

APPEAL by defendant from *Cohoon, J.*, January 1967 Criminal Session of WAYNE.

Criminal prosecution on indictment charging that defendant on November 2, 1966, "unlawfully, willfully and feloniously did commit an assault on one Viola Marriner, feloniously, by force and against her will, to ravish and carnally know Viola Marriner," etc.

Much evidence was offered by the State and by defendant.

The evidence most favorable to the State tends to show: On November 2, 1966, the prosecutrix, age 20, was living with her husband, age 22, in Goldsboro, N. C., near Seymour Johnson Air Force Base. Her husband, an Airman First Class, was stationed at this base. Prosecutrix had met defendant through her association with certain of his relatives. There was no relationship between them other than that of casual acquaintance. About 2:00 p.m. on November 2, 1966, prosecutrix and her little daughter, age fourteen months, were alone in their home. The little girl was on the sofa in the living room. Prosecutrix was waxing the floor in her little girl's bedroom. She did not know anyone had entered the home until, turning around, she saw defendant standing beside her, with a pistol in his hand. Defendant declared his intent to have sexual intercourse with her then and there, demanded that she take her clothes off, threatened to kill her and her little girl if she resisted his advances.

She refused to yield to his demands. They fought in the child's bedroom, later in the larger bedroom, and during the continuing struggle he struck her, choked her and tossed her across the bed onto the floor, until finally she got free from his grasp and fled from the home, reporting what had occurred to the neighbors, the police and a physician at Seymour Johnson Air Force Base.

The evidence most favorable to defendant tends to show: Prosecutrix had visited him at the home of his brother and of his grandmother and elsewhere. Their relationship had developed into one of mutual affection. Often they had been observed hugging and kissing in the home of defendant's brother and of defendant's grandmother. On the afternoon of November 2, 1966, he knocked at the door of the home of prosecutrix. No one answered. He saw the little girl on the sofa and walked in, called to the prosecutrix and she responded by telling him to come back to the child's bedroom. He put his arms around her and she put her arms around him. She told him he ought not to be there; that she thought her husband had a neighbor watching the house to see if he was there. Defendant testified: "We saw a shadow come by and she walked out the front door and I walked out the back."

The jury returned a verdict of guilty as charged. Judgment, imposing a prison sentence of not less than ten nor more than twelve years, was pronounced. Defendant excepted and appealed.

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

Braswell & Strickland for defendant appellant.

BOBBITT, J. Defendant's counsel noted sixty-nine exceptions. Those brought forward in his brief are referred to below. All others are deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

Based on Exceptions Nos. 1, 2, 41 and 54, defendant contends the court erred by failing to grant his motions for judgment as in case of nonsuit. This contention is without merit. There was ample evidence to support the verdict of guilty of assault with intent to commit rape.

Based on Exceptions Nos. 14, 40, 48 and 20, defendant contends the court erred when it allowed the State to introduce evidence of prior consistent statements made by the prosecutrix when she, *according to defendant,* "had not been impeached on the stand." Evidence of this character, to which Exceptions Nos. 14, 40 and 48 relate, was competent as corroborative evidence. *S. v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354, and cases cited; Stansbury, North Carolina Evi-

dence, Second Edition, §§ 51, 52. Exception No. 20 relates to the testimony of a State's witness that defendant, when observed by this witness between 2:00 and 2:30 p.m., had a pistol in his possession. This was competent as tending to corroborate the testimony of the prosecutrix that defendant had a pistol when he entered her home and assaulted her. Moreover, the premise on which defendant bases his contention that the evidence involved in these exceptions was incompetent is without substance. The prosecutrix was the *first* witness for the State. Her testimony was substantially impeached during an extended cross-examination. These exceptions are without merit.

Based on Exceptions Nos. 58 and 59, defendant contends the court erred in instructing the jury as to the distinction between corroborative evidence and substantive evidence. He does not contend the instructions given were incorrect. His contention is that the evidence offered to corroborate the prosecutrix was incompetent and therefore no instruction as to the significance of corroborative evidence should have been given. Theese exceptions are without merit.

Based on Exceptions Nos. 55 and 57, defendant contends the court erred "when it allowed the Solicitor to make remarks to the jury prejudicial to the defendant."

The portion of the record on which Exception No. 55 is based is as follows:

"Solicitor Taylor, during the argument, objects to Mr. Strickland stating to the jury that anybody lied.

"COURT: Yes; that is for the jury.

"ATTORNEY FOR DEFENDANT OBJECTS during the argument of the Solicitor, to the Solicitor saying that he wouldn't believe anything the defendant said.

"THE COURT INSTRUCTED THE JURY as follows: It is what you, the jury, believe the witness to of *(sic)* said and not what the Solicitor or Counsel believes."

In the record, immediately below the quoted excerpt, there appears, without comment or explanation, the following: "EXCEPTION #55."

The excerpt to which Exception No. 55 relates does not disclose precisely what actually occurred. The record does not disclose exactly what defendant's counsel said or exactly what the solicitor said on the occasions referred to or elsewhere in their arguments. The fourth paragraph indicates the judge instructed the jurors in substance that their belief, not the beliefs or views of the solicitor or of defendant's counsel, were determinative. We find nothing to indicate that anything in this incident misled or improperly in-

fluenced the jurors. It is noteworthy that defendant's counsel made no motion that the court give any further instruction or caution to the jurors.

The portion of the record to which Exception No. 57 refers is as follows:

"Attorney for defendant further objects to the argument of Solicitor to the jury.

"MR. TAYLOR: 'During my argument to the jury, I asked the jury this question: Would it be more likely that Mrs. Mariner would fabricate the truth in this case or would it be more likely that Baby Brother Larry would fabricate the truth in this case?' (At which time Larry jumped up and left the courtroom.)

"ATTORNEY FOR DEFENDANT: 'At which time the defendant made a comment.'

"MR. TAYLOR: I said, 'He has answered that question.'

"OBJECTION OVERRULED. DEFENDANT EXCEPTS."

In the record, immediately below this excerpt, there appears, without comment or explanation, the following: "EXCEPTION #57."

The phraseology of this excerpt suggests that it was prepared subsequent to the occurrence of the event referred to therein. It appears therefrom that Solicitor Taylor during his argument asked the jury the quoted rhetorical question. The Mrs. Mariner to whom he referred is the prosecutrix. The "Baby Brother Larry" to whom he referred was defendant's brother, Larry Allen Rose, *one* of the witnesses whose testimony as to the prior relationship between the prosecutrix and defendant was in conflict with the testimony of the prosecutrix. The excerpt indicates "Larry jumped up and left the courtroom" when Solicitor Taylor asked the quoted rhetorical question. Thereafter, according to defendant's attorney, "the *defendant* made a comment." (Our italics.) There is nothing in the record to indicate either the substance or the subject of defendant's comment. After the defendant "made a comment," Solicitor Taylor said, "He has answered that question."

It was permissible for the solicitor *to contend* that Larry Allen Rose would be more likely to "fabricate the truth" than the prosecutrix. It is unclear whether the solicitor's remark, "He has answered that question," refers to the departure of Larry Allen Rose from the courtroom or to the comment made by defendant. When interpreted in the light most unfavorable to the State, the solicitor's remark may be considered *a contention* that the departure of Larry Allen Rose from the courtroom should be considered a circumstance bearing adversely upon his credibility as a witness. Why he left the courtroom is a matter of conjecture. Whether he returned is not disclosed. The jury had observed him during the trial in his role as

witness. Under the circumstances, whatever the exact setting and significance of the solicitor's remark, there is no substantial reason to believe it misled or improperly influenced the jurors.

Ordinarily, an improper argument may be corrected by instructions given during the court's charge to the jury. *S. v. Smith,* 240 N.C. 631, 635, 83 S.E. 2d 656, 658, and cases cited. The court's charge, which followed the solicitor's argument, includes these instructions: "The law makes it your duty to consider all legitimate contentions made by counsel for the defendant or the Solicitor for the State, and to consider any other legitimate contentions that arise out of the evidence, whether called to your attention or not. *You will not consider matters outside of the evidence which have no bearing or which are not legitimate to be drawn from the evidence if so made. The fact that any person either came into or left the courtroom during the argument of counsel you will disregard and attach no significance thereto if such occurred.*" (Our italics.)

"The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge." *S. v. Bryan,* 89 N.C. 531. Ordinarily, this Court "will not review his discretion unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury." *S. v. Baker,* 69 N.C. 147; *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466, and cases cited; *S. v. Smith, supra; S. v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424.

The solicitor's remark was not directed towards defendant or defendant's testimony. The testimony of Larry Allen Rose did not relate to anything that occurred on the occasion of the alleged assault. As indicated above, it related solely to the prior relationship between the prosecutrix and defendant and was in substantial accord with the testimony of other witnesses offered by defendant.

The solicitor's remark was quite different from the remarks of the solicitor in *S. v. Smith, supra,* for which a new trial was awarded, and from the remarks of the solicitor in *S. v. Bowen, supra,* and *S. v. Barefoot, supra,* where the solicitor's remarks were held insufficient ground for a new trial.

Under all the circumstances, we think it quite clear that the jury understood fully that the departure of Larry Allen Rose from the courtroom during the solicitor's argument did not constitute evidence in the case and that the solicitor's remark, "He has answered that question," did not prejudice defendant in the jury's deliberations.

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

No error.

STATE OF NORTH CAROLINA v. FRED ROOSEVELT OXENTINE.

(Filed 24 May, 1967.)

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

The statutes permitting persons within the classifications enumerated to be excused from jury duty upon application for exemption are constitutional and valid. G.S. 9-19, G.S. 90-45, G.S. 90-150, G.S. 127-84.

2. Jury § 2—

Motions to quash the venire or for a special venire from another county are addressed to the sound discretion of the trial court, and the refusal of the motions will not be disturbed in the absence of a showing of abuse of discretion.

3. Criminal Law § 93—

Motion to sequester the State's witnesses is addressed to the sound discretion of the trial court, and the refusal of the motion will not be disturbed in the absence of a showing of abuse of discretion.

4. Homicide § 20—

The State's evidence tending to show that defendant shot and killed the deceased without justification or provocation, as deceased sat in a chair, *held* sufficient to deny defendant's motions for nonsuit.

5. Criminal Law § 71—

The evidence tended to show that while the investigating officer was interrogating a person in the room in which the deceased was lying dead, the officer asked such person who had shot deceased, and she named defendant, whereupon defendant, who was standing at the doorway, stated that he had shot deceased. *Held:* The incriminating statement of the defendant was a voluntary and spontaneous statement made before anyone had been taken into custody and prior to any questioning of defendant, and was competent in evidence.

APPEAL by defendant from *Farthing, J.*, December 1966 Criminal Session, CALDWELL Superior Court.

The defendant was charged in a bill of indictment with murder in the first degree of Edgar J. Wheatley on 15 May 1966. The bill of indictment was returned by the Grand Jury at the August Term, and counsel was appointed to represent him. Upon motion of the defendant, upon his claim that counsel had not had adequate time in which to prepare the case, it was continued and was tried at the December Term. Prior to the trial, his attorney moved to quash the indictment for that the clerk of the superior court had excused from jury service persons who were exempt under the statute and that because of this certain qualified prospective jurors were not used in constituting the Grand Jury which indicted the defendant. The defendant also moved that the State's witnesses be sequestered and further that a special venire of jurors be ordered from another county. Each of the motions was denied.

The solicitor announced that he would not seek a verdict of murder in the first degree, but would seek a verdict of murder in the second degree or manslaughter, as the evidence might justify.

The State offered evidence tending to show that Addie Church went with the deceased, Ed Wheatley, to the house where the defendant Oxentine lived on 15 May 1966. Several other persons were there, and all were drinking beer. Addie Church testified that while they were talking that the defendant left the room and "he came back in the other door and had a .22 rifle in his hands and shot, and I saw blood pouring out of Ed Wheatley. No one had said anything to anybody else in anger. Ed and Eloise had been teasing each other. Ed Wheatley fell over in the floor. Oxentine went out and then came back with the gun . . . Ed was sitting in a chair in the kitchen when the gun was fired. Fred was standing in the door about 15 feet away. Ed was just sitting there." On cross examination, she said, "There were no words said in the house. This man just went in this room and got the gun and shot him down."

Gene Prestwood testified that he was also present. He said that Eloise Coffey came in but didn't sit down. "She stood there for a little while and then left out through the kitchen door. Fred got up and walked to the other room and came back in shooting a .22 rifle. I heard two shots and I saw Ed Wheatley fall over in the floor. I seen a little blood on Ed's chest. Ed was sitting beside me when the shots were fired. He was still in the same chair, and he wasn't arguing with anyone. There was no argument between any of us. Fred was about 7 or 8 feet from Ed when he fired the two shots. Fred then walked back in the front room and unloaded the gun."

L. W. Tripplett, a deputy sheriff, testified that upon his arrival at the scene "Ed Wheatley was dead, laying face down beside the kitchen table . . . I found five beer cans. One can was on the floor, turned over. I touched Ed Wheatley, and I observed a wound on his body, and some blood. When I arrived at the scene, Addie Church was crying, and I asked her what had happened, who had shot him, and she said, 'Fred Oxentine' . . . and Fred was back at the doorway of the other room, and he said, 'Yes, I shot him.'"

At this point the defendant's counsel objected to the statement attributed to the defendant because it was made without the benefit of counsel and that he wasn't warned that anything he said might be used against him. At his request, the jury was excused, and the court heard a statement by the defendant in which he denied saying "Yes, I shot him." He said that Officer Tripplett did not advise him that anything he said could be used against him and that he didn't hear the officer ask Addie Church what happened. The court over-

ruled the defendant's objection, following which the jury returned to the courtroom.

Dr. Paul Moss, the Coroner of Caldwell County, testified that he examined the body of Edgar J. Wheatley, that it "had blood on the front part of his body and there was a small caliber bullet hole in the left chest, just barely above the level of the heart or the level of the border of the heart . . . that Wheatley was dead at the time of his examination and that the cause of his death was a small caliber bullet gunshot wound . . . that death was fairly sudden as the bullet struck some vital organ either the heart or a great blood vessel."

At the conclusion of the State's evidence, the defendant moved for judgment as of nonsuit, which was denied. The defendant offered no evidence and rested and renewed his motion for judgment as of nonsuit, which was also denied.

The jury returned a verdict of Guilty of Manslaughter, and the court ordered the defendant imprisoned for not less than fourteen (14) nor more than eighteen (18) years, from which the defendant appealed.

Paul L. Beck, Court-Appointed Attorney for the defendant appellant.

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

PLESS, J. The defendant's objection to the excusal of jurors by the clerk of superior court was not well founded. The motion itself says that the persons excused were those who made application for exemption and who were entitled to claim such exemption under G.S. 9-19, 90-45, 90-150, and 127-84, and that those excused from service was "pursuant to the North Carolina General Statutes." His claim that the statutes referred to above are unconstitutional is without merit. *State v. Knight,* 269 N.C. 100, 152 S.E. 2d 179.

No other reason is presented for quashing the bill of indictment.

The record contains no evidence or reason upon which the defendant sought to quash the venire, sequester the State's witnesses, or order a special venire from another county.

In his brief, it is said "the defendant is aware that this is within the court's discretion." His view is fully supported by many decisions of our Court, *State v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469; *State v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347, and other cases therein cited. There being nothing in the record to support any

claim that the court abused its discretion, these exceptions are overruled.

The State's evidence tended to show that the defendant shot and killed the deceased for no apparent reason as the latter sat in a chair, and there is nothing in the evidence to indicate any provocation on the part of the deceased. It is amply sufficient to deny the motions for nonsuit.

The defendant further excepts to the admission of the evidence of Officer Tripplett that he asked Addie Church what had happened and who had shot the deceased and she said "Fred Oxentine," and that the defendant, standing at the doorway, said "Yes, I shot him." The defendant contends that since he had not been warned of his right to counsel or that anything he said might be used against him that this is in violation of the rule enunciated in *Miranda v. Arizona*, 384 U.S. 436, 16 L. ed. 2d 694. He quotes from that case, "To summarize, we hold that when an individual *is taken into custody* or *otherwise deprived of his freedom* . . . He must be warned *prior to any questioning* that he has the right to remain silent . . ." The underscored phrases exclude the defendant's statement from the conclusions of the *Miranda* case. At the time of the statement the defendant "had not been taken into custody" or "deprived of his freedom" and he was not being questioned within the intent and meaning of the *Miranda* case. It was a voluntary and spontaneous statement made by the defendant, who interposed it while the officer was seeking information about what had happened and was talking with Addie Church. We do not interpret this important decision to exclude statements made at the scene of an investigation when nobody has been arrested, detained, or charged. The exception is without merit and is overruled.

The court-appointed attorney for the defendant interposed every objection available and obtained as favorable a result for the defendant as he could possibly hope for when he was not convicted of murder in the second degree, but on the lesser offense of manslaughter. The defendant never offered reason, excuse or denial of shooting the deceased.

The lawyers of North Carolina have patriotically and generously accepted the burden imposed upon them in undertaking the defense of persons accused of crime when asked to do so by the Court. Few relish these assignments, but all recognize that, as officers of the Court, and members of an honorable profession, it is their duty — and they do it.

In this case, as in all too many others, a reputable attorney accepts, from a sense of duty, the order of the Court that he represent

the defendant. He has no expectation of receiving more than nominal remuneration for his services, and little chance of success for his client. He is required to make technical motions and exceptions which he knows are without merit and frequently to pursue appeals that he knows to be hopeless. He has much to lose. The record is barren of any possible defense in this case, and yet, the attorney is faced with the likelihood that in almost unlimited post-conviction hearings he will shortly be charged by his ungrateful client with dereliction and inefficiency. To him, and to other members of the Bar who render the best possible service under hopeless conditions, the public and this Court owe appreciation and gratitude. It is hereby expressed and extended.

As to the defendant, who for no reason so far shown, has tried, convicted and executed his fellow man without cause, we can only say that he has had what he would not give — a fair trial.

No error.

STATE v. JERRY WYNN BRITT.

(Filed 24 May, 1967.)

1. Assault and Battery § 4—

A battery always includes an assault, and where there is a battery by the application of force, directly or indirectly, to the person of another, there is an assault and battery.

2. Assault and Battery § 14—

Evidence that the 16 year old prosecutrix resisted the amorous advances of defendant, a 26 year old man, whereupon defendant hit her on her neck and slapped her when she screamed, *held* sufficient to sustain verdict of defendant's guilt of an assault upon a female, he being a male person over 18 years of age, and defendant's contention that the prosecutrix encouraged defendant in his advances prior to resisting him, is no defense, and the principle of a constructive assault, where a person, through fear, is forced to go where she would not otherwise have gone, or leave a place she had a right to be, is inapposite.

3. Criminal Law § 106—

Where the evidence is direct and amply sufficient to support the verdict, there being no circumstantial evidence before the jury, the failure of the court to charge the jury that a reasonable doubt may arise out of the insufficiency of the evidence, will not be held prejudicial, the court having correctly defined reasonable doubt and charged the jury that the burden was on the State, and remained on the State throughout the trial, to prove each essential element of the offense beyond a reasonable doubt.

4. Criminal Law § 121—

The solicitor is entitled to contend in his argument to the jury that the evidence would warrant an indictment for a graver offense and that defendant was fortunate that he was only charged with a lesser offense, and to contend that defendant was so intoxicated that soon after he committed the assault on prosecutrix he passed out, when such contentions arise on the evidence, and it is not error for the court to repeat such contentions of the State in its charge to the jury.

SHARP, J., concurring.

BOBBITT, J., joins in concurring opinion.

APPEAL by defendant from *Clark, S.J.*, October 1966 Regular Criminal Term, BLADEN Superior Court.

The defendant was charged with assault with intent to commit rape on Sue Johnson on 14 August 1966. He was convicted of an assault on a female, received a sentence of not less than twelve (12) months nor more than eighteen (18) months in prison, and appealed.

The evidence for the State tended to show that the defendant and Sue Johnson worked at the same place, had known each other for a month and had had one date prior to 14 August 1966. When she finished her work that afternoon, she went to a movie, and the defendant later came in and asked her to go riding with him, which she did. They stopped at one or two places where they engaged in kissing and then came to a secluded spot where the defendant attempted to take more serious liberties. She said that "he started getting fresh and putting his hands where he didn't belong to, and I would slap at him." The defendant had gotten some liquor and was drinking at this point until he finally consumed the entire bottle. Sue testified that around midnight "he began to get rough again — trying to put his hands where they didn't belong. He tried to unbutton my blouse then," and "he pushed me down on the seat and he would pick at me . . . I would try to get up and he would push me back. When he pushed me back, he pulled up my skirt and I wouldn't pull off my clothes . . . He tore my pants or pulled them aside. . . . I screamed four or five times. He hit me when I screamed, on my neck. The last time he told me to shut up, and slapped me. He didn't hit me with all his strength. He hit — it was hard enough." She further testified that the defendant got on her and attempted to have relations with her but did not succeed. She continued to ask him to take her home, but the car would not start, and they stayed in it until about daybreak, when the defendant left. Upon his failure to return within an hour, Sue left, went to a nearby house and obtained a ride home. Upon seeing her mother, she told her what had happened, and the sheriff's department was noti-

fied. She repeated to the officers what she had told her mother, and later that day was examined by Dr. E. C. Bennett who testified that he found a contusion or bruising of the hymen but that it was not torn, and that she had not been penetrated sufficiently to rupture the hymen.

Sue testified that her skirt was torn, that the lace was torn from her underpants, and that there was blood on her slip and the pants. Her mother corroborated this, and the garments were exhibited at the trial. Mrs. Johnson testified that she had washed the pants by mistake, and they therefore did not show the blood at the time of the trial.

Sue Johnson was sixteen years of age at the time, and the defendant was in his late twenties, being divorced, and the father of two children.

The defendant offered no evidence, and upon judgment pronounced gave notice of appeal.

Nance, Barrington, Collier & Singleton by Carl A. Barrington, Jr., for defendant appellant.

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

PLESS, J. The defendant devotes a substantial portion of his brief to the exceptions taken because the Court denied his motion for judgment as of nonsuit at the close of the plaintiff's evidence and at the end of all the evidence. Whether there was sufficient evidence to sustain a verdict of guilty of an assault with the intent to commit rape is not now relevant, since the defendant was convicted only of a misdemeanor: an assault on a female, he being a male person more than eighteen (18) years of age. The evidence given in the statement of facts shows that the defendant hit the sixteen year old girl on her neck and that he slapped her when she screamed. This, of course, constitutes an assault. The defendant argues that Sue had "placed herself in a position of leading and encouraging the defendant, Jerry Wynn Britt, into amorous advances which she now claims amount to an assault," and further contends that "none of the required elements for a conviction of assault on a female, to wit: that the defendant threatened or menaced the prosecuting witness in such a way as to cause her to go where she would not otherwise have gone or to leave a place where she had a right to be." We know of no such requirement in the law of assault. A battery always includes an assault, and is an assault whereby any force is applied, directly or indirectly, to the person of another. *State v. Sudderth*, 184 N.C. 753, 114 S.E. 828. Probably the most succinct defi-

nition is "an assault is an intentional attempt, by violence, to do injury to the person of another." *State v. Davis,* 23 N.C. 125. This definition has been cited by this Court dozens of times and embodies all the necessary elements of the offense. It is applicable to the evidence in this case.

The defendant also takes exception to the charge in that it omits a statement that a reasonable doubt may arise out of the insufficiency of the evidence. However, the Court said " 'beyond a reasonable doubt' . . . does not mean a vain, imaginary or fanciful doubt, but it means a sane, rational doubt. It means that you, the jury, must be fully satisfied or entirely convinced of the truth of the charge against this defendant." And also, "the burden of proof is on the State and remains on the State from the beginning to the end of the trial. It does not shift at any stage of the trial to the defendant, and the defendant is not required to disprove the State's case; and the State must fail if from the whole of the evidence you, the jury, are not satisfied beyond a reasonable doubt that the defendant is guilty of every element of the offense with which he is charged."

In *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, Denny, J., later C.J., said that a definition of reasonable doubt, "without adding 'or from the lack or insufficiency of the evidence' or some equivalent expression, it is error. But, whether or not such error will be considered sufficiently prejudicial to warrant a new trial will be determined by the evidence involved. Here the State's evidence was direct and amply sufficient to support the verdict. No circumstantial evidence was before the jury, nor could there have been any doubt as to the sufficiency of the State's evidence, if believed, to warrant a conviction."

When a sixteen year old child testifies that a man nearly twice her age, and experienced in the ways of the world, takes her to a secluded part of a country road and there slaps and beats her and holds her down while he gets on top of her and attempts to have sexual relations with her by force, we hold that the above statement from the *Hammonds* case is applicable, that the State's evidence "was direct and amply sufficient to support the verdict," and that the omission was not "sufficiently prejudicial to warrant a new trial."

The defendant further complains that in his charge the Court referred to the State's contentions that "the defendant not only committed the crime of assault with intent to rape, but that he actually committed the capital offense of rape"; and "that he is fortunate that he is only charged with assault with intent to commit rape," and that "he was intoxicated to such an extent that soon after

he committed this assault with intent to rape or actually rape, that he passed out or went to sleep and that the young sixteen year old girl had to stay there in the woods, in the car until daylight the following morning." It is reasonable to assume that the Solicitor in his argument to the jury would have made such contentions, all of which are logical and naturally arise upon the State's evidence, and in repeating them as being some of the State's contentions, the Judge committed no error.

It must be recalled that the defendant was not convicted of rape or attempted rape, which are the subjects criticized by the defendant, but of a misdemeanor, to-wit, assault on a female.

A full consideration of the defendant's exceptions reveals no substantial error that would justify another trial.

No error.

SHARP, J., concurring: I concur fully in the result reached by the majority opinion, but I deem its reference to the case of *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, to be misleading and the quotations therefrom to be inapplicable to the definition of reasonable doubt which the court gave to the jury in this case. There are many acceptable definitions of reasonable doubt. Indeed, this Court has said, "The words 'reasonable doubt' in themselves are about as near self-explanatory as any explanation that can be made of them." *State v. Wilcox,* 132 N.C. 1120, 1137, 44 S.E. 625, 631, quoted with approval in *State v. Phillip,* 261 N.C. 263, 269, 134 S.E. 2d 386, 391.

Here Judge Clark told the jury, "'(B)eyond a reasonable doubt' . . . does not mean a vain, imaginary or fanciful doubt, but it means a sane, rational doubt. It means that you, the jury, must be fully satisfied or entirely convinced of the truth of the charge against this defendant." This definition has been approved many times. *State v. Phillip, supra; State v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895; and see the cases collected in *State v. Hammonds, supra* at 232, 85 S.E. 2d at 138. It is only when reasonable doubt is defined as "a doubt arising out of, or growing out of, the evidence in the case" that it is error for the judge not to add "or from the lack or insufficiency of the evidence," or some equivalent expression. *State v. Braxton, supra.* But whether such failure will "warrant a new trial will be determined by the evidence involved." *State v. Hammonds, supra* at 233, 85 S.E. 2d at 139.

The definition of reasonable doubt employed by the court in this case contains no error of omission.

BOBBITT, J., joins in the concurring opinion.

ELEASE AUTRY FULLWOOD v. JOHN WARREN FULLWOOD, JR.
AND
JOHN WARREN FULLWOOD, JR. v. ELEASE AUTRY FULLWOOD.

(Filed 24 May, 1967.)

1. Divorce and Alimony § 16—

The wife's action for alimony without divorce, G.S. 50-16, does not abate upon the husband's subsequent institution of an action for absolute divorce, and upon determination of the issues in favor of the wife on conflicting evidence in her action for alimony, the award of alimony after investigation and findings of fact with respect to the financial conditions of both parties, will not be disturbed in the absence of error of law.

2. Divorce and Alimony § 13; Abatement and Revival § 18—

After institution by the wife of an action for alimony without divorce the husband instituted an action for absolute divorce on the ground of separation. *Held:* The issues involved and the relief demanded in the respective actions are not the same, and the wife's plea in abatement in the husband's subsequent action for absolute divorce is properly denied.

3. Divorce and Alimony § 16— Decree for divorce may be held in abeyance pending determination of wife's action for alimony.

The wife's action for alimony without divorce and the husband's subsequent action for absolute divorce on the ground of separation were consolidated for trial by the consent of the parties. Judgment for alimony was entered upon the verdict of the jury in that action in favor of the wife. The court refused to enter judgment in the divorce action on the verdict of the jury in favor of the husband in view of the husband's appeal from the order awarding alimony. *Held:* It is not error for the court to have refused to sign the divorce decree until the determination of the appeal in the action for alimony, so as to prevent a defeat of the wife's right to alimony in the event decree of divorce should first be entered.

APPEAL by John Warren Fullwood, Jr. from *Carr, J.*, December, 1966 Regular Civil Session, BRUNSWICK Superior Court.

The pleadings and the evidence disclose that John Warren Fullwood, Jr., then age 25, and Elease Autry, then age 39, were married on November 18, 1955. They separated on May 18, 1965. There were no children born of the marriage which was the first for John Warren Fullwood, Jr. but the second for Elease Autry.

On March 8, 1966, Elease Autry Fulwood instituted an action for alimony without divorce under G.S. 50-16, alleging the husband abandoned her without providing her sufficient support according to his means. On March 19, 1966 Judge Mallard entered an order that the defendant pay $10 per week *pendente lite*. On March 21, 1966 the defendant filed answer, admitting the marriage and the separation as alleged in the complaint, but denying he caused or provoked the separation and alleging it was without fault on his part. By

court leave, he amended his answer by alleging the plaintiff ran him off from the home with this admonition: ". . . 'to get the hell out of this home and to stay out' ".

On May 25, 1966 the plaintiff, John Warren Fullwood, Jr., instituted an action against Elease Autry Fullwood for absolute divorce on the ground of one year's separation. The wife, defendant in the divorce action, filed an answer and plea in abatement on the ground the husband should have set up his cause of action in the alimony proceeding. The husband filed a plea in abatement alleging the divorce action superseded the alimony proceeding. Judge Carr overruled both pleas in abatement and by consent of the parties consolidated the two actions for trial.

In the wife's suit for alimony, the jury returned this verdict:

"1. Were the plaintiff and the defendant married to each other, as alleged in the Complaint? ANSWER: Yes.
2. Has the defendant separated himself from his wife, the plaintiff, and failed to provide her with necessary subsistence according to his means and condition in life, as alleged in the Complaint? ANSWER: Yes.
3. Did the plaintiff offer such indignities to the person of the defendant as to render his condition intolerable and his life burdensome, as alleged in the Answer? ANSWER: No."

After inquiries into the financial circumstances of the parties, the Court entered judgment that the husband pay into Court, for the benefit of the wife, $30 per month. The defendant gave notice of appeal.

In the divorce action the jury returned this verdict:

"1. Were the plaintiff and the defendant lawfully married as alleged in the Complaint? ANSWER: 'Yes.'
2. Has the plaintiff been a *bona fide* resident of the State of North Carolina for more than six (6) months next preceding the bringing of this action? ANSWER: 'Yes.'
3. Have the plaintiff and the defendant lived separate and apart continuously from each other for more than one (1) year next preceding the bringing of this action? ANSWER: 'Yes.' "

The plaintiff husband tendered judgment of absolute divorce which Judge Carr refused to sign. The plaintiff appealed.

Sullivan & Horne by Kirby Sullivan for Husband appellant.

Herring, Walton, Parker & Powell by Ray H. Walton for Wife appellee.

HIGGINS, J. In the alimony action the evidence was in direct conflict. The jury accepted the wife's version and answered the issues in her favor. After the verdict the Court made investigation into the financial conditions of both parties, made findings of fact with respect thereto, and awarded alimony to the wife. G.S. 50-16; *Scott v. Scott,* 259 N.C. 642, 131 S.E. 2d 478; *Beeson v. Beeson,* 246 N.C. 330, 98 S.E. 2d 17. Error of law does not appear in the alimony proceeding.

In the husband's divorce action the wife interposed a plea in abatement on the ground the husband should have proceeded by cross action in the alimony suit rather than by independent action. *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796; *Lockhart v. Lockhart,* 223 N.C. 559, 27 S.E. 2d 444. The Court properly overruled the plea in abatement. By the admission of the parties, they separated on May 18, 1965. The wife instituted the alimony action on March 8, 1966. On March 25, 1966 the husband filed answer. His cause of action for divorce on the ground of one year's separation did not accrue until May 18, 1966. *Lockhart* and other cases have held that when one party sues for divorce either absolute or from bed and board, the other party may, as a cross demand, set up a cause of action for divorce. At the time the defendant filed answer in the alimony proceeding his cause of action for divorce had not accrued. Hence, he was unable to allege a cause of action for divorce. "The ordinary test for determining whether . . . the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Cameron v. Cameron, supra.* The parties are the same. The subject matter is somewhat different. The issues involved, and the relief demanded, are different. The wife's plea in abatement in this action does not meet the test. *Whitehurst v. Hinton,* 230 N.C. 16; 51 S.E. 2d 899.

In the divorce action the jury found the issues in favor of the husband. Judge Carr refused to sign the judgment of divorce for the reason the husband, defendant, in the alimony proceeding, had given notice of his appeal from the order awarding alimony. Should the permanent alimony be vacated, a decree of absolute divorce would confront the wife in a new trial and prevent the award of alimony. In order to prevent a defeat of the alimony proceeding by such maneuver, Judge Carr refused to sign the divorce decree until the appeal is determined. The delay in signing the judgment, under the conditions and for the reasons discussed, was not error. Since we affirm the judgment awarding alimony, the husband still has his

verdict in the divorce action on the basis of which he may move for judgment in the Superior Court.

In the wife's action for alimony: No error.

In the defendant's appeal in his divorce action, there is at present no judgment which may be reviewed on appeal.

LIBBY ISAACS, EXECUTRIX OF THE ESTATE OF BERTRAM ISAACS, DECEASED, V. I. L. CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 24 May, 1967.)

1. Taxation § 25—

The principle that an administrative interpretation of a statute continued over a long period of time should be given consideration by the courts in the construction of the statute, loses its force when, for practical reasons, contest of the administrative interpretation would rarely be feasible.

2. Taxation § 19—

While statutory exemptions from tax liability must be strictly construed against the claim of exemption, such rule does not require that the plain language of the statute be distorted from its natural meaning in order to increase the revenue of the State.

3. Taxation § 27—

The statutory exemption of $5000 for each child under 21 years of age in computing the inheritance taxes payable by a widow to whom the husband has willed substantially all of his property is a personal exemption to her and may not be limited to a deduction from the amount accruing to her under the provisions of her husband's will, but such exemption may be subtracted at her option from whatever interest passes to her by reason of his death, including one-half interest in property held by the entirety and funds payable to her from insurance policies on his life.

4. Same—

The widow's election to claim the $5000 exemption from inheritance taxes for each child deprives the children of the exemption which otherwise would be theirs, and therefore where the wife claims the exemptions, the tax is correctly imposed against the entire funds passing to the children by revocable trusts.

APPEAL by defendant from *McKinnon, J.*, at the 14 November 1966 Civil Session of DURHAM.

The plaintiff sues for a refund of an additional inheritance tax assessed and collected from her by the defendant. The facts are stipulated and were found by the Superior Court to be as so stipulated.

The will of Bertram Isaacs provided, "I give, devise and bequeath unto my beloved wife, Libby Isaacs, *all of my property,* both real and personal, wheresoever situated, *which I may own or to which I may be entitled at the time of my death,* all for her sole and separate use." (Emphasis added.) The will further stated that the testator made no provision for his children, or children born after the date of the will, knowing that his wife would bestow upon them all of the care and attention that they might require.

The testator left surviving him his wife and three children, aged 18, 9 and 8, respectively. In addition to properties which passed to the widow under the will, $40,454.74 was paid to her as beneficiary of certain policies of life insurance issued upon the life of the testator, and a house and lot valued at $40,613.36, owned by the testator and his wife as tenants by the entireties, became her sole property upon his death, subject to a mortgage thereon. There were also three trusts for the benefit of the minor children, which were revocable by the testator during his lifetime, the amounts being $1,098.78, $315.16 and $247.67, respectively.

The plaintiff filed her inheritance tax return, showing thereon all property owned by the testator at the time of his death, the entirety property, the life insurance and the debts owed by the testator. The revocable trusts for the benefit of the children were not shown. The return shows that the debts owed by the testator, including that secured by the mortgage upon the real estate held by the entireties, exceeded the value of the properties passing to the widow under the will.

The plaintiff paid, with the return, an inheritance tax computed by including in the taxable interests passing to the widow: One-half of the value of the real estate held by the testator and his wife as tenants by the entireties; the total value of other properties owned by the testator; and the life insurance, less the statutory exemption of $20,000 of such insurance. From this total there was subtracted the total of one-half the debt secured by the mortgage on the real property owned by the testator and his wife as tenants by the entireties, all other debts owed by the testator and other deductions allowed by the statute. From the remainder there was then deducted the exemption of $10,000 allowed by the statute to the widow, plus an additional exemption of $15,000 claimed by the plaintiff to be allowed the widow under the special circumstances of this case.

The Commissioner of Revenue added to the gross properties to be used in computing the inheritance taxes the values of the three revocable trusts. However, he assessed no tax on account of these trust properties since each of the trusts amounted to less than the exemption of $5,000 allowed by the statute to each minor child. The

Commissioner disallowed the claim of the additional $15,000 exemption to the widow and levied an additional assessment of $333.52 on this account.

The plaintiff paid the additional tax under protest, and all procedural requirements for the maintenance of this action have been met. The sole question presented by this appeal is whether, under the circumstances of this case, the statute confers an additional exemption of $15,000 ($5,000 for each minor child) upon the widow. The court below gave judgment for the plaintiff and the Commissioner of Revenue has appealed.

Attorney General Bruton and Assistant Attorney General Harrell for defendant appellant.

Hofler, Mount & White for appellee.

LAKE, J. G.S. 105-4(b) provides:

> "The persons mentioned in this class [Class A beneficiaries of decedent's estate] shall be entitled to the following exemptions: Widows, ten thousand dollars ($10,000); each child under twenty-one years of age, five thousand dollars ($5,000.00); * * * Provided, that when any person shall die leaving a widow and child or children under twenty-one years of age, and leaving all or substantially all of his property by will to his wife, the wife shall be allowed at her option an additional exemption of five thousand dollars ($5,000.00) for each child under twenty-one years of age; provided further, that whenever the wife elects to claim such additional exemption, the child or children shall not be allowed the exemption of five thousand dollars ($5,000.00) for each child * * * hereinabove provided for."

Since the adoption of this statute, the Commissioner of Revenue has uniformly interpreted it as allowing such additional exemption to the widow only as to that portion of the widow's taxable interest which passes to her under the provisions of the will of the deceased husband. Thus, where, as here, the debts and expenses of administration of the husband's estate exceed the value of the property owned by him at his death, so that the total value of the taxable interests to which the widow succeeds is not greater than the sum of one-half the value of real property owned prior to death by the husband and wife as tenants by the entireties plus the proceeds of life insurance payable to the widow as beneficiary, the additional exemption is not allowed, notwithstanding the language of the will.

The correctness of this administrative interpretation of the statute has not been considered by this Court heretofore. An administrative interpretation of a tax statute which has continued over a long period of time with the silent acquiescence of the Legislature should be given consideration in the construction of the statute. *Yacht Co. v. High, Commissioner of Revenue,* 265 N.C. 653, 658, 144 S.E. 2d 821. This well established principle of statutory construction loses much of its significance, however, where, as here, there are practical reasons which have made it unlikely that the administrative interpretation would be attacked in the courts or before the Legislature. Even in the largest possible estate, the rate of tax on the widow's inheritance does not exceed 12%. Consequently, even in such an estate the effect of the exemption upon the tax to be paid could not be more than $600 per child and, obviously, in the vast majority of cases the amount of tax turning upon the acceptance or rejection of this interpretation of the statute would not be sufficient to make it feasible for the widow to contest the matter in the courts. Under these circumstances, the long continued application of the administrative interpretation is not, of itself, persuasive.

It is also a well established rule that statutory exemptions from tax liability are to be strictly construed against the claim of exemption. *Yacht Co. v. High, Commissioner of Revenue, supra; Sale v. Johnson, Commissioner of Revenue,* 258 N.C. 749, 129 S.E. 2d 465; *Distributors v. Shaw, Commissioner of Revenue,* 247 N.C. 157, 100 S.E. 2d 334; *Rich v. Doughton,* 192 N.C. 604, 135 S.E. 527. This does not mean, however, that the plain language of the statute is to be distorted from its natural meaning in order to increase the revenues of the State.

G.S. 105-4(b) grants the exemption in question to the wife when "any person shall die leaving a widow and child or children under twenty-one years of age, and leaving all or substantially all of *his property* by will to his wife." (Emphasis added.) Here, the deceased left a will devising and bequeathing to his wife "all of my property." The exemption allowed by this statute to the wife is not an exemption of particular property but is a personal exemption to her. It is, like the $10,000 exemption, an amount to be subtracted from whatever interests pass to her by succession so as to be otherwise subject to the inheritance tax.

In determining whether the will bequeaths and devises to the wife all or substantially all of the testator's property, it must be borne in mind that real property held by the testator and his wife, prior to his death, as tenants by the entireties was not "his prop-

erty," but property belonging to the husband and wife as a unitary person, separate and apart from either of them. *Duplin County v. Jones,* 267 N.C. 68, 147 S.E. 2d 603. The death benefits payable under a policy of insurance upon the life of the husband, payable to the wife as the named beneficiary, do not arise until his death. These are, therefore, not "his property." The fact that his death terminated his right, under the policy, to change the beneficiary, or to surrender the policy and receive its cash surrender value, is a sufficient ground for the inclusion by the Legislature of the death benefits as an interest subject to the imposition of an inheritance tax, but that fact does not make the death benefits "his property." Thus, nothing else appearing, they are not subject to the claims of his creditors and do not pass through the hands of his executor or administrator. *Building & Loan Association v. Swaim,* 198 N.C. 14, 150 S.E. 668. Similarly, the right of the testator to revoke during his lifetime a trust, of which his child is the beneficiary, does not make the trust property "his property," although the fact that his right of revocation is cut off by his death does make the trust beneficiary liable for an inheritance tax.

By the plain language of the statute, the wife of the plaintiff testator was entitled to the additional exemption of $15,000 ($5,000 for each child) in this instance. Her election to claim that additional exemption deprived the children of the exemption which otherwise would be theirs by the express terms of the statute. Thus, the Commissioner of Revenue was entitled to levy an additional assessment in the amount of the tax due under the statute on account of the interests passing to the three children under their respective trusts. This has been taken into account in the judgment rendered below in determining the amount recoverable in this action by the plaintiff.

The fact that the testator owed debts which, including one-half of an indebtedness secured by a mortgage upon real property owned by him and his wife as tenants by the entireties, exceeded the value of the properties passing to the wife under the will itself does not deprive her of this additional exemption from the inheritance tax allowed by this statute.

Affirmed.

HAL W. BROADFOOT, ANCILLARY ADMINISTRATOR OF THE ESTATE OF RICHARD D. ECHARD, v. ANNIE SMITH EVERETT, EXECUTRIX OF THE ESTATE OF WILLIAM AUSTIN EVERETT.

(Filed 24 May, 1967.)

1. Courts § 20; Limitation of Actions § 10—

The proviso contained in the 1955 amendment to G.S. 1-21 has the effect of barring in this State a cause of action arising in another state if, at the time of the institution of the action here, the cause is barred in the state in which it arose, unless the action originally accrued in favor of a resident of this State.

2. Same; Death § 3—

While an action for wrongful death must be brought by the personal representative, the personal representative is not the real party in interest, and therefore the fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute the action one accruing to a resident of this State within the meaning of the proviso to G.S. 1-21.

3. Limitation of Actions § 10—

The purpose of tolling a statute of limitations when defendant is not within the state is to prevent a defendant from defeating a claim by absenting himself therefrom, and where, in the state in which the cause of action arose, a nonresident defendant may be served by substituted service upon a state official, the statute is not tolled so as to preclude the nonresident defendant from asserting the benefits of an applicable statute of limitations.

4. Same—

This action for wrongful death was based upon an airplane crash occurring in the State of Pennsylvania, plaintiff's intestate being a resident of Maryland and defendant's intestate being a resident of North Carolina. The action was not brought until more than a year after cause of action arose, and the State of Pennsylvania prescribed a one-year statute of limitations. Under Pennsylvania law, defendant was subject to substituted service of process. *Held:* The cause of action being barred in the state in which it arose, the action is barred in this State.

APPEAL by plaintiff from *Clark, S.J.,* 9 January 1967 Civil Session of CUMBERLAND.

Action for wrongful death under G.S. 28-173, dismissed upon defendant's plea in bar.

The pertinent facts are either admitted by the pleadings or stipulated. Both plaintiff's intestate, Richard D. Echard, and defendant's testate, William Austin Everett, died on 19 September 1964 in the State of Pennsylvania when an aircraft belonging to defendant's testate (and allegedly piloted by him) crashed on Tuscarora Mountain. Echard was a resident of the State of Maryland. His next of kin (his widow and two surviving children) are not now, and never

have been, residents of North Carolina. Plaintiff, a resident of North Carolina, was appointed ancillary administrator for Echard on 23 March 1966 by the Clerk of the Superior Court of Cumberland County. At the time of his death, defendant's testate was a resident of North Carolina. Defendant, also a resident of this State, duly qualified as Everett's executrix on 2 October 1964.

Plaintiff instituted this action in Cumberland County on 26 March 1966 — one year, five months, and twenty-six days after his intestate's death in Pennsylvania. As a second further answer and defense, defendant alleged that more than one year elapsed between the time plaintiff's cause of action accrued on 19 September 1964, and its commencement on 26 March 1966, and, pursuant to the applicable statutes, defendant "specifically pleads said lapse of time in limitation of and in bar of plaintiff's cause of action and right to recover, if any." In reply, plaintiff alleged (1) that since defendant has never been amenable to Pennsylvania process, "no viable cause of action" has ever existed there which is subject to any statute of limitations in that State; and (2) that the cause of action "originally accrued in favor of plaintiff as a resident of North Carolina upon his appointment as administrator of Echard."

The parties agreed that, before trial on the merits, the judge might hear and determine the plea in bar without a jury. Judge Clark sustained the plea in bar. From a judgment dismissing the action, plaintiff appeals.

Broughton & Broughton for plaintiff appellant.

Nance, Barrington, Collier & Singleton; Quillin, Russ, Worth & McLeod for defendant appellee.

SHARP, J. As they relate to the facts of this case and the question presented by this appeal, the Pennsylvania statutes authorizing the action for wrongful death differ from North Carolina's only in that the period prescribed for the institution of the action in Pennsylvania is one year while in North Carolina it is two years. G.S. 28-173, G.S. 1-53; Purdon's Pa. Stat. Ann. tit. 12, §§ 1601-1603 (1953); *Echon v. Pennsylvania R. Co.*, 365 Pa. 529, 76A 2d 175.

Prior to the enactment of the proviso to G.S. 1-21 (N. C. Pub. Laws 1955, ch. 544), plaintiff's right to maintain this action would, under the decision in *Bank v. Appleyard*, 238 N.C. 145, 77 S.E. 2d 783, have been unquestioned. The Court would have applied North Carolina's two-year statute of limitations. The aftermath of the *Appleyard* decision, however, was that the legislature amended G.S. 1-21 so that it now reads:

"Defendant out of State; when action begun or judgment enforced — If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State."

After the 1955 amendment added the above proviso, this Court first construed G.S. 1-21 in the case of *Little v. Stevens,* 267 N.C. 328, 148 S.E. 2d 201 (filed 25 May 1966). We held that the proviso was not a limitation upon the tolling provisions of the statute but was "a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the State of their origin or in this State." *Id.* at 334, 148 S.E. 2d at 205. Therefore, if plaintiff's claim is barred in Pennsylvania, where the cause of action arose, it is also barred here, for G.S. 1-21 now bars all stale foreign claims unless they originally accrued in favor of a resident of North Carolina.

Plaintiff administrator was himself a resident of North Carolina at the time of the death of his foreign intestate, but he was not appointed ancillary administrator until more than a year after the death of his intestate. Although, under both North Carolina and Pennsylvania law, only the administrator was authorized to bring this action, Pa. R. Civ. Proc. 2202 (1967); G.S. 28-173; *Kinlaw v. R. R.,* 269 N.C. 110, 152 S.E. 2d 329, it did not accrue in his favor, for he has no beneficial interest in the recovery. *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761; *White v. Comrs. of Johnston,* 217 N.C. 329, 7 S.E. 2d 825; Purdon's Pa. Stat. Ann. tit. 12, § 1602 (1953). His intestate's widow and two surviving children, not he, are the real parties in interest. *Dixon v. Briley,* 253 N.C. 807, 117 S.E. 2d 747; *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807; *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203; Purdon's Pa. Stat. Ann. tit. 12, § 1602 (1953). The ancillary administrator, appointed in North Carolina for a foreign decedent killed in Pennsylvania, is

not a resident of this State within the meaning of the proviso to G.S. 1-21; the real parties in interest have never been residents of North Carolina. Therefore, the only question presented is whether the cause of action was barred in Pennsylvania at the time it was instituted in North Carolina.

Defendant at all times after her qualification as executrix of Everett on 2 October 1964 (only thirteen days after the death of plaintiff's intestate) was amenable to the process of Pennsylvania's courts. Purdon's Pa. Stat. Ann. tit. 2, §§ 1410-1413 (1963). Under the Pennsylvania law, any nonresident owner or operator of aircraft who operates (or has the same operated) above the lands and waters of the State of Pennsylvania makes the Secretary of that Commonwealth his agent for the service of process in any action instituted against him in the courts of Pennsylvania by reason of any accident in which such aircraft was involved within the State. The applicable statute, *Id.* § 1410, specifically provides that if the nonresident owner or operator has died prior to the commencement of the action, service upon his personal representative may likewise be made upon the Secretary of the Commonwealth of Pennsylvania. If the owner or operator dies after the institution of the action, provision is made for the substitution of his administrator.

When a nonresident defendant is amenable to process, and the institution of plaintiff's action is not delayed by his absence from the state, there is no need to toll the statute of limitations until he enters or returns to the state. The purpose of a tolling statute is to prevent a defendant from defeating a claim by absenting himself from the state. 34 Am. Jur., Limitations of Actions § 221 (1941). Logic dictates, and the majority of jurisdictions hold, that, where statutory provision is made for substituted service of process upon a state official in cases arising out of motor accidents within the state, a nonresident defendant has the benefit of applicable statutes of limitations, which are not tolled or suspended by his absence from the jurisdiction. See, Annot., Statute of Limitations — Nonresident, 17 A.L.R. 2d 502, 516 (1951); 2 A.L.R. 2d Later Case Service 978 (1965), where the cases are collected.

The only two Pennsylvania cases in point which have been called to our attention have followed the majority rule. *Zarlinsky v. Laudenslager*, 73 York 66 (1960) (C. P. of Lehigh County); *Grabowski v. Noltes*, 11 D & C 2d 627 (1957) (C. P. of Allegheny County). So far as we are advised, the Supreme Court of Pennsylvania has not passed upon this question.

As to a cause of action arising in that state, a Pennsylvania law (Act of May 22, 1895, P. L. 112; Purdon's Pa. Stat. Ann. tit. 12, § 40 (1953)), provides that any defendant who becomes a nonresident

after a cause of action has arisen against him shall not have the benefit of any statute of limitations during the period of his residence outside the state.

In *Grabowski v. Noltes, supra,* the court stated the question for decision as follows: "Whether a resident of the State of Pennsylvania, who becomes a nonresident after the accident, who is charged with liability growing out of a motor vehicle accident, is now entitled to the benefit of the two years statute of limitations notwithstanding the Act of 1895 providing for a suspension of the statute of limitations during the period of his nonresidence from the State." The court answered the question YES and allowed defendant's motion for judgment on the pleadings. It reasoned as follows: The Act of 1895 was passed to prevent the running of the statute where a defendant could not be served within the state because of his absence; since the Act of May 14, 1929, P. L. 1721, a resident of Pennsylvania who becomes a nonresident after having been involved in a motor vehicle accident makes the Secretary of the Commonwealth his agent for the service of process; since the defendant could have been served, the public policy against the litigation of stale claims requires the conclusion that the running of the statute of limitations is not suspended.

In *Zarlinsky v. Laudenslager, supra* (a case similar to *Grabowski, supra*), the court said that substituted service upon the Secretary of the Commonwealth was "the ordinary process" whereby the court reached nonresident motorists and "that therefore, at least in motor vehicle accident cases, the statute of limitations is not tolled by the nonresidence of the defendant." *Id.* at 68. The same reasoning which applies the statute of limitations to nonresident motorists also applies it to nonresident aviators.

At the time this action was instituted here, it was barred in Pennsylvania where it arose; it is, therefore, also barred in North Carolina. G.S. 1-21; *Little v. Stevens, supra.* The judgment of the court below is

Affirmed.

ELECTRO LIFT, INC., v. MILLER EQUIPMENT COMPANY.

(Filed 24 May, 1967.)

1. Appeal and Error § 31—

Statement of what the witness would have answered had he been permitted to testify cannot be supplied at a later date by the attorney's information or deduction, or by the witness, when such matter is entered in the record without any supervision of the trial court.

2. Trial § 31—

The correct form of a peremptory instruction in favor of the party upon whom rests the burden of proof is that the jury should answer the issue in the affirmative if they found the facts to be as all of the evidence tended to show, and should answer the issue in the negative if the jury should not so find. A peremptory instruction which does not add that the jury should answer the issue in the negative if they should not so find the facts to be, must be held for prejudicial error in failing to leave it to the jury to decide the issue.

APPEAL by defendant from *Johnston, J.*, September 1966 Term, ROWAN Superior Court.

The plaintiff sued to recover $3550 due it on an alleged contract by the defendant, Miller Equipment Company (Miller). It alleged, and offered evidence tending to show, that in August 1962 the defendant ordered a hoist and trolley of certain specifications at a price of $4950. The defendant, as contractor, obtained this machinery to install in a kiln construction project for Michigan Sewer Pipe Company (Michigan) in Gnadenhutten, Ohio. The hoist and trolley were delivered to defendant in November 1962, and when they were installed, it was found that the trolley was manufactured to operate on an 8-foot radius, while Michigan had expected to use a 4-foot radius. The specifications of the order called for a trolley to be used on an 8-foot radius: "Travel speed 100 ft./min. on I-beam track and to turn approximately 8' radius." When this situation arose, plaintiff authorized the return of the trolley and gave the defendant credit for it, $1400. Michigan kept the hoist and is still using it. When the plaintiff sought payment of the contract balance of $3550 for the hoist, the defendant replied that "When my customer is satisfied, our account with you will be paid." The account is still outstanding.

The defendant attempted to offer evidence tending to show that American Monorail Company of Charlotte was also supplying machinery and accessories to be used with the trolley and hoist, and that shortly after the purchase order was given, defendant had written the plaintiff with regard to the specifications of the hoist in which it was said that the trolley should be designed for use on Monorail's nominal 4-inch track. The defendant's position was that plaintiff should have known from this that it would require a 4-foot rather than an 8-foot radius as originally specified. The defendant further attempted to offer evidence to the effect that the failure of the trolley to operate satisfactorily because the desired radius was not furnished had caused it to sustain substantial loss, and it asserted a counterclaim for the losses amounting to some $33,000. The court excluded most of the evidence of this nature offered by the

defendant upon the theory that the difficulty was with the trolley, that it had been satisfied by the return of it to the plaintiff with full credit given therefor, and at the close of all the evidence gave a charge which included the following instruction:

> "The Court again instructs you that if you believe the evidence in the case, and you find by the greater weight of the evidence the facts to be as all of the evidence in the case tends to show, then it will be your duty to answer this issue in the sum of $3,550.00, with interest on this amount after the first day of January, 1963.
>
> "Take the issue to your room and answer it, and, when you have done so, you will return into open Court immediately."

Upon the verdict, the Court signed judgment for the plaintiff. The defendant appealed.

Graham M. Carlton, Attorney for defendant appellant.

Benjamin D. McCubbins and George L. Burke, Jr., Attorneys for plaintiff appellee.

PLESS, J. The record contains twenty-six exceptions to the exclusion of evidence the defendant sought to introduce. Typical of these exceptions is the following:

> "EXCEPTION #13 (R p 32):
>
> "Q. Mr. Miller, what was the contract price that you had for the construction of the kiln at Gnadenhutten?
>
> "(Witness would have answered: '$368,563.37 was the total contract price.') (Witness' answer included apart from Court's supervision.)"

Each of the other exceptions to the excluded evidence is in that form. It is an invariable rule that where the court sustains an objection that it will not be considered unless the proposed answer is supplied in the record. In *Peek v. Trust Co.*, 242 N.C. 1, 14, 86 S.E. 2d 745, it is said:

> "(T)he record fails to show what the testimony would have been if the witness had been permitted to answer the question. It is elemental that the exclusion of testimony cannot be held prejudicial on appeal unless the appellant shows what the witness would have testified if permitted to do so. *Highway Comm. v. Black*, 239 N.C. 198, 79 S.E. 2d 778; *Goeckel v. Stokely*, 236 N.C. 604, 73 S.E. 2d 618."

The recognized method for supplying an excluded answer is to excuse the jury at the close of the witness' testimony and then have him, in the presence of the court, give the proposed answer. Another custom permits the answer to be supplied at a later time, when this is done by order of the court or by agreement of the parties. From the court's notation, it is apparent that none of these methods were used; and the statement that the witness would have answered, etc., could be based upon the attorney's information or deduction, or, of course, could have been made by the witness. The court was liberal to the defendant in letting the record show what the defendant contended the answer would have been, but we cannot give consideration to parts of the record furnished "apart from the court's supervision," and each of the exceptions based on similar questions and answers is without merit.

Upon the evidence admitted by the court, it appears that the defendant ordered a hoist and trolley of specified requirements at a total price of $4950. Upon delivery, the defendant complained about the trolley. From the record, it appears that the plaintiff was liberal in accepting the return of the trolley and allowing full credit (even including unearned commissions) to the defendant.

The defendant kept the hoist and has used it regularly for some four years. It is entirely within the specifications of the original order. But now that the plaintiff seeks to recover the agreed price for an article that complies with the original contract, the defendant says that it should not pay for it because another article, which it has returned for full credit, did not measure up. The defendant is on debatable grounds as to the latter claim, but there can be no debate that it has kept and used the hoist which it ordered.

The trial court was apparently of the opinion that the plaintiff was entitled to what amounted to a peremptory instruction, but the one given at the conclusion of the charge does not comply with the rules stated in *Shelby v. Lackey,* 236 N.C. 369, 72 S.E. 2d 757, in which Denny, J., later C.J., speaking for the Court, said:

> "A directed instruction in favor of the party having the burden of proof is error. *McCracken v. Clark,* 235 N.C. 186, 69 S.E. 2d 184; *Haywood v. Insurance Co.,* 218 N.C. 736, 12 S.E. 2d 221; *Yarn Mills v. Armstrong,* 191 N.C. 125, 131 S.E. 416; *House v. R. R.,* 131 N.C. 103, 42 S.E. 553; *Manufacturing Co. v. R. R.,* 128 N.C. 280, 38 S.E. 894; *Cox v. R. R.,* 123 N.C. 604, 31 S.E. 848. And when a peremptory instruction is permissible, conditioned upon the jury finding the facts to be as all the testimony tends to show, the court must leave it to the jury to determine the credibility of the testimony. McIntosh's North

Carolina Practice & Procedure, 632; *Bank v. School Committee*, 121 N.C. 107, 28 S.E. 134; *Boutten v. R. R.*, 128 N.C. 337, 38 S.E. 920; *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871."

The rule is well stated in Strong's N. C. Index, Trial, § 31, that the correct form of a peremptory instruction is that the jury should answer the issue in the affirmative if the jury should find from the greater weight of the evidence the facts to be as all the evidence tends to show, and that if the jury does not so find they should answer the issue in the negative. The court must leave it to the jury to decide the issue.

The instruction here fails to offer the alternative that if the jury fails to find the facts as all the evidence in the case tends to show that it then be the duty of the jury to render a verdict in favor of the defendant.

In view of the condition of the record, we do not pass upon the correctness of the judge's opinion that the plaintiff was entitled to a peremptory instruction. If he were, the defendant was entitled to have it in proper form. Whether a peremptory charge is appropriate at a later trial will be determined by the evidence then adduced. The defendant is entitled to a

New trial.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, ADMINISTRATOR C. T. A., D. B. N. OF THE ESTATE OF SUSAN BORDEN UMPHLETT, DE-C'D., v. JOHN N. HACKNEY, EXECUTOR OF THE ESTATE AND LAST WILL AND TESTAMENT OF W. W. UMPHLETT, JR.

(Filed 24 May, 1967.)

1. Appeal and Error § 24—

An exception to the failure of the court to charge sufficiently on an aspect of the law presented by the evidence should set forth, in substance at least, what appellant contends the court should have charged.

2. Automobiles § 21—

The court's charge on the duty of a motorist traveling on a wet and slippery highway with worn and smooth tires to exercise due care under the circumstances and not to travel at a speed in excess of that which was reasonable and prudent under the circumstances, *held* sufficient.

3. Appeal and Error § 1—

The verdict of the jury in a trial free from error of law is conclusive on appeal.

APPEAL by plaintiff from *Cohoon, J.*, September-October Civil Session of WILSON.

Action for wrongful death. This case was before us at the Fall Term 1965 upon plaintiff's demurrer to certain of the defenses alleged in defendant's answer. *Bank v. Hackney,* 266 N.C. 17, 145 S.E. 2d 352.

On Sunday afternoon 26 August 1962, plaintiff's testate, Susan Borden Umphlett, was a passenger in the Ford station wagon owned and operated by her husband, Dr. W. W. Umphlett, Jr., defendant's testate. They, with three of their four children, were proceeding westerly on U. S. Highway No. 64, a two-lane paved highway enroute from their home in Wilson to a 4:00 wedding in Pittsboro. They had been delayed by engine trouble east of Raleigh. At about 3:35 p.m., they were approximately one mile east of the Capitol in Raleigh. At about 4:00 p.m., at a point approximately 14 miles from the Capitol and about 900 feet west of the intersection of Highway No. 64 with North Carolina Highway No. 55, the station wagon left the road and struck an oak tree 18-22 inches in diameter growing about 10 feet south of the pavement at the edge of a graveled "pull-off" or clearing. The tree was deeply scarred and debarked up to a height of 3½-4 feet. After the impact, the station wagon came to rest about 10 feet from the tree, across the lane for eastbound traffic, with its front end about the center line. The vehicle was severely damaged on the right front. The metal was pushed back along the fender toward the right-door post and pushed in from the right side toward the center of the car. All of the occupants of the station wagon were injured. Mrs. Umphlett was dead upon arrival at the hospital at 4:25 p.m.; Dr. Umphlett died at 5:05 p.m. The three children survived.

At the time the station wagon collided with the tree, a heavy rain was falling, and the asphalt pavement was very slick. There was no eyewitness to the actual collision. At the point of collision, the road was straight for about two miles in either direction with a slight uphill grade in each direction from the pull-off. The only marks on the highway were 83 feet of tire marks which began in the lane for westbound travel, angled to the south (Dr. Umphlett's left) across the center line, and ended at the edge of the pavement, about 15-20 feet from the tree. The ground between the pavement and the tree was heavily graveled and without growth of any kind. Prior to the collision, the driver of a tractor-trailer had stopped in the pull-off and had gone to sleep. He slept through the collision.

Mr. and Mrs. Arthur Woodard, witnesses for defendant, arrived at the scene of the collision seconds after it occurred. Their account of what they saw is summarized as follows: As Mr. Woodard, trav-

eling east on Highway No. 64, drove over a rise, he saw a car traveling west and moving rapidly toward him in his lane of travel. At that time, this vehicle was alongside the clearing. Mr. Woodard immediately reduced speed, and the oncoming car "barely got back" into its lane of travel before it passed his automobile. As soon as it went by, the Woodards saw the Umphlett station wagon across their lane of travel. It was in front of them "about the distance between two telephone poles along the highway." One of the Umphlett girls was lying in the road beside the station wagon; Mr. Woodard stopped immediately and directed traffic around her until the ambulance came.

Plaintiff's evidence tends to show that, on 17 July 1962, Dr. Umphlett had caused the tires on his station wagon to be switched. At that time, Mr. E. V. Alford, the owner of the service station where the switch was made, called his attention to the condition of the two back tires, which had "very little tread on them." Alford had remarked that those two tires were "slick as an onion" and had inquired of Dr. Umphlett if he was going to drive "those tires." Dr. Umphlett had replied, "I'm not; just around town." Alford, however, observed that these same tires were on the station wagon at 1:00 p.m. on Sunday, 26 August 1962, when he checked the air pressure in the tires and filled its tank with gasoline.

Plaintiff alleged in his complaint that Mrs. Umphlett's death was proximately caused by the negligence of her husband, defendant's testate, in that "he operated the station wagon on a wet, slippery road with old tires worn smooth and slippery at a speed and in a manner that he knew, or should have known, that he would be unable to control the same." Plaintiff further alleged that Dr. Umphlett was negligent in that he operated the station wagon without keeping a proper lookout and without keeping it under proper control; that he drove at an illegal and excessive rate of speed in violation of G.S. 20-141(a), (b), and (c).

The jury answered No to the first issue, which was phrased as follows: Was the death of plaintiff's testate, Susan Borden Umphlett, proximately caused by the negligence of defendant's testate, W. W. Umphlett, Jr., as alleged in the complaint? From judgment dismissing the action, plaintiff appealed.

Gardner, Connor & Lee for plaintiff appellant.
Battle, Winslow, Scott & Wiley for defendant appellee.

PER CURIAM. Plaintiff's Assignment of Error No. 37 is that the court failed (1) "to charge the jury as to the duty of defendant's

testate as the owner and operator of a motor vehicle in the maintenance of the tires of the vehicle" and (2) "to apply this legal duty to the evidence offered by the plaintiff in this cause." With reference to this duty, his Honor charged the jury as follows:

> "I instruct you that it is the duty of one who operates a motor vehicle upon the highway with worn and slick tires, with knowledge of the same, upon a wet and slippery road, to operate his motor vehicle with due care, regard to the weather, and the conditions of the highway, and to keep his vehicle under control, and decrease his speed in consideration thereof, even though his speed may be lower than the maximum speed limit applicable there, when necessary, in the exercise of due care, to avoid injury, and a failure to do so constitutes negligence."

He further charged that if plaintiff had satisfied the jury by the greater weight of the evidence that Dr. Umphlett "was negligent in driving an automobile with tires which he knew were worn and slick, on a highway which was wet and slippery, at a rate of speed, which, although not ordinarily unlawful, was unlawful under the circumstances shown by the evidence," and that such negligence was one of the proximate causes of the collision which caused the death of plaintiff's testate, Mrs. Umphlett, then it would be the jury's duty to answer this first issue in plaintiff's favor, that is, YES.

Plaintiff's Assignment of Error No. 37 does not comply with the rules of this Court in that it does not set out plaintiff's contention as to what the court should have charged. *State v. Malpass* and *State v. Tyler*, 266 N.C. 753, 147 S.E. 2d 180. Nevertheless, measuring the charge by the allegation of the complaint with reference to the tires, we think it was sufficient.

The court explained to the jury that plaintiff might establish his case by the physical facts at the scene of the collision and "other evidence circumstantial in nature." The evidence, which was singularly without conflict, would have justified the jury in finding that an unknown, westbound motorist passed Dr. Umphlett in the face of the approaching Woodard automobile; that Dr. Umphlett, fearing a collision between those two vehicles, suddenly applied his brakes; that because of the slick condition of his rear tires, the wet road, and his speed — whatever it was —, he was unable to control his vehicle, which skidded across the highway into the tree; that the death of plaintiff's testate was thus proximately caused by the joint and concurring negligence of Dr. Umphlett and the unknown motorist. The jury, however, did not adopt this theory. Whether it adopted some other or merely concluded that plaintiff

had failed to carry his burden of proof, it would be idle to speculate. No doubt the theory of joint and concurring negligence was adequately argued. In any event, the court charged the jury that if it found that defendant's negligence was *one* of the proximate causes of the collision, it would answer the first issue YES.

We have examined this case with the utmost care. In none of the assignments brought forward do we find any error which, in our opinion, could have materially affected the outcome of the trial. If, as plaintiff so stressfully contends, the jury erred, still it is beyond our power to correct an erroneous verdict unless it is made to appear that some error in law contributed to it.

No error.

ANNA BRAKE, PETITIONER, v. ALTON VAN MILLS, RESPONDENT.

(Filed 24 May, 1967.)

1. Habeas Corpus § 3; Parent and Child § 5—

The respective rights of the parents to the custody of their children is not absolute and must give way to the controlling consideration of the welfare of the children, and upon findings supported by evidence that neither parent is a fit and suitable person to have the custody of the children, the court may award their custody to a third person.

2. Same—

While the abilities of the respective claimants to provide material comforts and advantages to the child are relevant in determining the custody of such child, financial means is of minor significance in comparison with the intangible attributes and qualities which characterize a good home.

3. Same—

Upon the mother's petition for the custody of her minor children after the award of their custody to their paternal aunt by the court of another state, a court of this State may deny the petition for insufficient evidence by petitioner that the welfare of the children would be promoted by the change in their custody, and may properly continue the custody in the aunt upon findings supported by evidence that such custody is in the best interest of the children.

APPEAL by petitioner from *Shaw, J.*, out of term, in GUILFORD County, 23 August 1966.

The petitioner is the respondent's former wife and is the mother of his three children, Sharon Anne, Kathy Sue and Alton, Jr., now aged 13, 11 and 7, respectively. She sued for and obtained an absolute divorce from the respondent in the Circuit Court of Santa

Rosa County, Florida, 11 February 1965, that court having previously awarded the custody of the three children to the respondent father "until such other court of competent jurisdiction in the State of North Carolina shall otherwise adjudge." She immediately married Jacob Brake, with whom she now lives in Florida. She brought this action for the custody of the children 3 June 1965, alleging a change of condition. The respondent replied, denying that the petitioner and her present husband are fit and proper persons to have the custody of the children.

The matter was first heard by Latham, S.J., 15 June 1965. He found as a fact that neither parent was at that time a fit or proper person to have the custody of the children and ordered them placed in the custody of their paternal aunt, Mrs. Audrey Zelien, with permission to either party to reopen the matter in six months or thereafter upon showing a change of condition.

Upon motion of the petitioner, the matter was reopened and a series of hearings were had before Shaw, J., who, on 11 January 1966, entered an order continuing the custody of the children in the aunt until the end of that school year, the matter to be then reopened for further hearing.

On the petitioner's motion, the matter was so reopened and further hearings were had. At that hearing, Shaw, J., with the consent of both parties, talked with the three children separately and privately, a transcript of these conferences being supplied to the attorneys for the parties and being included in the present record. Each child expressed a preference to remain in the custody of the aunt. The statement of the elder girl, which is typical of the three being:

> "I like my Aunt Audrey. She is real nice. She is good to us and makes us mind. She requires us to study our lessons on school nights. Sometimes it is a little hard, and she helps us. * * * I would rather live with my Aunt Audrey than to live with my mother."

Each child told the court of cruelty, abuse, beatings and molestation of the girls by their stepfather, Brake, and mistreatment by the petitioner, their mother.

On 23 August 1966, Shaw, J., entered the order, from which this appeal is taken, finding that "the petitioner has not submitted evidence sufficient to enable the court to find that the health, welfare, education and happiness of these children would be materially promoted and served by a change in their care and custody at this time," denying the petition "at this time," inviting counsel to submit for the court's approval a plan for the petitioner mother to ex-

ercise appropriate visitation rights and retaining the cause for further orders.

Affidavits from the teachers of the children in the public schools of the city of Greensboro are to the effect that each is progressing satisfactorily and is happy and well cared for. There is no evidence in the record suggesting that the aunt, Mrs. Zelien, is not a fit and proper person to have their custody or that she has failed in any respect to provide the children with suitable care and affectionate supervision. The father lives nearby and sees the children daily in Mrs. Zelien's home.

In addition to numerous affidavits offered by each party, Judge Shaw heard testimony by the petitioner mother and by Mrs. Zelien, the aunt.

The petitioner appeals *in forma pauperis.*

B. Gordon Gentry and E. Raymond Alexander, Jr., for petitioner.
Cahoon & Swisher for respondent.

PER CURIAM. The petitioner contends that the court below erred in denying her the custody of her children because she had not submitted evidence to show that the health, welfare, education and happiness of her children would be materially promoted by taking them from the custody of their aunt and putting them in the custody of the petitioner, their mother.

We think it obvious that the term "materially promoted," as used in the order of Judge Shaw, means substantially promoted, not financially promoted. We have said many times that the natural right of parents to the custody of their infant children is not lightly to be disturbed, and taking children from a parent's custody cannot be justified by the mere showing that some other person is financially able to offer them greater material comforts and advantages. *Shackleford v. Casey,* 268 N.C. 349, 150 S.E. 2d 513; *Spitzer v. Lewark,* 259 N.C. 50, 129 S.E. 2d 620. See also, Lee, North Carolina Family Law, § 224. The right of the parent is not absolute, however, and, in extraordinary circumstances, the court may find both parents unfit and place the minor child or children in the custody of a third person. *Wilson v. Wilson,* 269 N.C. 676, ... S.E. 2d ..... In all cases involving the custody of a minor child, the welfare of the child is the controlling consideration. *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871; *Kovacs v. Brewer,* 245 N.C. 630, 97 S.E. 2d 96. While the respective abilities of the claimants to provide material comforts and advantages to the child are relevant to this inquiry, this is of

minor significance as compared to the intangible attributes and qualities which characterize a good home.

In October 1964 the Circuit Court of Santa Rosa County, Florida, found the petitioner was not a suitable and fit person to have the custody of these little children. In June 1965 Judge Latham made a similar finding. The evidence before him, which it would serve no useful purpose to recount, amply supported that finding. While affidavits filed before Judge Shaw indicate that the petitioner has gained the respect of her neighbors and associates in Florida, this evidence does not compel a finding that she is now a fit and proper person to have the custody of these children in her home in Florida, and Judge Shaw did not so find.

The testimony of these little children in the privacy of the judge's chambers speaks more eloquently than carefully prepared affidavits. It paints the picture of contented children, safe and secure in a home where they enjoy that happy combination of discipline and affection which promotes the growth of character. There was no error in the refusal of the court below to uproot these children from the home in which they have found these conditions in order that they may be removed from this State and transplanted back into the identical home from which they were removed for their own good by the Florida court.

Affirmed.

STATE v. ROOSEVELT WORTHEY.

(Filed 24 May, 1967.)

1. Burglary and Unlawful Breakings § 4—

The evidence *held* sufficient to overrule nonsuit in this prosecution of defendant for felonious breaking and entering. G.S. 14-54.

2. Criminal Law § 109—

The court must submit the question of defendant's guilt of lesser degrees of the crime charged in the indictment when there is evidence which would support conviction of such lesser degrees.

3. Burglary and Unlawful Breakings § 6—

The evidence tended to show that defendant was apprehended in a building containing personal property and that screens had been torn off two windows of the building. The evidence of defendant's intent to commit a felony was entirely circumstantial and was not conclusive on the point. *Held:* It was error for the court to fail to submit the question of de-

fendant's guilt of the lesser degree of the crime of breaking and entering without intent to commit a felony or other infamous crime.

APPEAL by defendant from *Armstrong, J.*, January 1967 Regular Two Week Criminal Session of GUILFORD.

Defendant was charged in a bill of indictment with the felonious breaking or entering of a building wherein personal property was kept with intent to steal and carry away the same in violation of G.S. 14-54. Defendant pleaded not guilty.

The evidence at the trial tended to show that on the morning of 17 December 1966 Frank Irvin, an employee of Swift & Co., was on the premises of the company and noticed that the screens were torn off two windows of one of the buildings. The building housed a table, lockers, showers, sink and toilet facilities, and was used by employees of the company as a washroom and locker room when the plant was in operation. On the morning of the 17th the plant was not in operation, and only the watchman and the manager were on the premises. Mr. Irvin testified that he went to a window, heard someone inside, and thereupon called for the police. When the police arrived, they called for anyone inside the building to come out, and defendant emerged. A check stub and a paid bill were found on his person. Defendant testified that he went inside to meet an employee of Swift & Co. named "Robert" who was going to give him a ride, and that he used the toilet facilities while inside. There was evidence that none of the employees of Swift & Co. was named "Robert."

The court charged the jury, in part, as follows:

> "I instruct you in this case, that you may return any one of the following two verdicts, namely, first, guilty as charged in this Bill of Indictment, or, secondly, not guilty, depending entirely upon which one of such two verdicts you find to be warranted by the evidence considered in the light of what I tell you the law is.
>
> "Now, members of the jury, this defendant is charged with violating General Statutes of North Carolina section fourteen dash fifty-four, which is entitled: 'Breaking into or entering houses otherwise than burglariously;' and I want you to pay particular attention to the reading of this statute. It reads as follows: 'If any person' — reads in substance as follows — 'If any person with intent to commit a felony or other infamous crime therein, shall break or enter any storehouse, warehouse or other building where any merchandise, chattel, money, valuable security or any other personal property shall be, or even any uninhabited house, he shall be guilty of a felony.'"

The court did not charge that the jury might return a verdict of the misdemeanor of non-felonious breaking or entering.

The jury returned a verdict of guilty as charged in the bill of indictment, and the trial judge imposed a sentence of not less than thirteen nor more than thirty-six months. Defendant appeals.

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

B. Gordon Gentry for defendant.

PER CURIAM. Defendant contends that the trial judge erred in overruling his motion for nonsuit at the close of all the evidence. Considering the evidence in the light most favorable to the State and giving to the State every reasonable inference and intendment to be drawn therefrom, as we must do on motion for nonsuit, we hold there was plenary evidence to repel defendant's motion for nonsuit. *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654.

Defendant further contends that the court committed error in failing to charge that the jury could bring in a verdict of guilty of the misdemeanor of non-felonious breaking or entering and in failing to explain to the jury the full contents of G.S. 14-54. There is merit in this contention.

Upon trial a defendant may be convicted of the crime of which he stands indicted and charged or he may be convicted of a lesser degree of the same crime. G.S. 15-170. Wrongful breaking or entering without intent to commit a felony or other infamous crime is a lesser degree of felonious breaking or entering within G.S. 14-54.

The evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony; the jury might have found defendant guilty of a misdemeanor upon the evidence.

The court's failure to submit for jury consideration and decision whether plaintiff was guilty of a misdemeanor was prejudicial error. Error in this respect was not cured by a verdict convicting defendant of a felony. *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27.

New trial.

LAURA MAE TAPP WRENN v. HILLCREST CONVALESCENT HOME, INCORPORATED.

(Filed 24 May, 1967.)

1. Negligence § 37b—

A proprietor is not an insurer of the safety of his invitees but is under duty to exercise ordinary care to keep his premises in a reasonably safe condition so as not to expose invitees unnecessarily to danger.

2. Same—

The duty of the proprietor to warn his invitee of a dangerous condition of which the proprietor has knowledge, express or implied, does not apply to conditions of which the invitee has equal or superior knowledge.

3. Negligence § 37f—

Evidence tending to show that plaintiff fell to her injury on ice on a walk on the premises under defendant's control, that plaintiff had knowledge of the weather conditions and the existence of the ice, *held* insufficient to be submitted to the jury on the issue of defendant's negligence.

APPEAL by plaintiff from *Carr, J.*, January 1967 Civil Session of DURHAM.

Civil action to recover damages for personal injury suffered when plaintiff slipped and fell on defendant's premises.

Plaintiff's evidence tended to show the following: Plaintiff was a 65-year old licensed practical nurse, and on 28 February 1964 was employed by W. T. Holland, a patient at the defendant nursing home. During the afternoon on that date it began snowing heavily. By 7:30 it had stopped snowing and the ground was beginning to freeze over. Plaintiff was to go on duty for Mr. Holland at 11:00 P.M. She drove to the nursing home, arriving there around 10:45 P.M., and parked her car in a parking lot provided for the nurses at the rear of the Home. She walked across the graveled parking area to a cement sidewalk which led to a back door of the building. After taking about two or three steps on the cement walk, she slipped on the ice which had formed over the sidewalk and fell, doing serious bodily injury to herself.

The evidence was to the effect that the parking area was graveled up to the point where the sidewalk started, and that the sidewalk was level with the parking area. A street light approximately twenty-five feet in height was set at the end of the walkway nearest the parking area and was burning that night. Plaintiff's witness testified that there was no shrubbery or other obstacles which might obstruct one's view of the sidewalk.

Plaintiff testified in part as follows: "(T)hat at 8:30 it was well frozen on the steps of my house. I saw the water on these steps frozen. . . . I got to the hospital at 10:45. I left home around

10:30. I was driving carefully because the weather was bad. The condition of the streets were getting bad. . . . The water on the streets was freezing over at that time. . . . I knew that the water on the streets was freezing when I drove to the parking lot to get out. . . . I had taken just about two and one-half feet-steps on the walkway. I would say this was medium steps because I was trying to be careful. The weather was bad and I was trying to be careful. . . . (I)t was foggy and dark, very foggy. I couldn't see the sidewalk. As I said, it was very dark and foggy, and the sidewalk wasn't clear. I didn't look down at it until I hit it. I thought the sidewalk would be protected. . . . I was bound to have looked down because I was trying to be real careful when I started to walk on the concrete sidewalk. I could see it was icy and getting slick, but I was real careful to see when I fell. . . . I knew I was getting ready to step on the walkway. I stepped on it and saw it at the same time."

Mrs. Bertha Rudd testified that she and her husband drove up shortly afterwards and found plaintiff lying on the sidewalk, and that the gravel in the parking lot was very slick when she stepped out of her car. She further testified: "I presume that she would have been about even with the street light. . . . You could see the condition of the walk and the snow on the walk. You could see it from the street light as far as I was concerned, I mean it was light. Of course, our car lights were there, too."

At the close of plaintiff's evidence, defendant moved for judgment of nonsuit. The motion was granted, and judgment of involuntary nonsuit was entered. Plaintiff appealed.

E. C. Harris and C. Wallace Vickers for plaintiff.
Brooks and Brooks for defendant.

PER CURIAM. Conceding that plaintiff was an invitee on the property of defendant, the defendant was not an insurer of her safety. Its duty was to exercise ordinary care to keep the premises which plaintiff was to use in a reasonably safe condition, so as not to expose her unnecessarily to danger, and to give warning of hidden conditions and dangers of which it had knowledge, express or implied. *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283. However, defendant was under no duty to warn plaintiff, as an invitee, of an obvious condition or of a condition of which the plaintiff had equal or superior knowledge. *Harris v. Department Stores Co.,* 247 N.C. 195, 100 S.E. 2d 323.

There is plenary evidence that plaintiff had full knowledge of the freezing and icy condition of the area. The danger created by this

condition was obvious, and plaintiff's evidence presents no facts from which it can be inferred that defendant had more knowledge than plaintiff of the alleged dangerous or unsafe condition. Thus, considering all of the evidence in the light most favorable to plaintiff, which we must do on motion to nonsuit, *Hudson v. Transit Co.*, 250 N.C. 435, 108 S.E. 2d 900, we hold that the evidence shows no actionable negligence on the part of defendant.

The judgment of the court below is

Affirmed.

STATE v. JAMES CLIFFORD ROBERTS.

(Filed 24 May, 1967.)

1. Rape § 18—

In a prosecution of defendant for a felonious assault of a ten year old child, nonsuit of the case cannot be properly entered if there is sufficient evidence of defendant's guilt of any offense included in the indictment.

2. Indictment and Warrant § 9—

A blank left in the indictment as to the year the offense was committed should be filled in prior to the submission of the indictment to the grand jury.

3. Criminal Law § 16—

Upon poll of the jury, one juror stated he did not assent to the verdict. The court instructed the jury that he was going to ask that the jury again retire and "consider the case until you reach a unanimous verdict." *Held:* The instruction might reasonably be construed by a member of the jury that he should surrender his well-founded convictions conscientiously held or his free will and judgment in deference to the views of the majority, and constitutes prejudicial error.

APPEAL by defendant from *McKinnon, J.*, 31 October 1966 Criminal Session of DURHAM.

Criminal prosecution upon an indictment that charges the defendant, James Clifford Roberts, "on the 26th day of April, A.D. 196...." *(sic)* with feloniously assaulting Donna Forsythe, a female, with intent by force and against her will to ravish and carnally know her.

Defendant, by his court-appointed attorney Alwood B. Warren, entered a plea of not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment in the State's prison for a term of not less than 42 months and not more than 8 years, defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, Assistant Attorney General Henry T. Rosser, and Staff Attorney Kent Lively for the State.

Alwood B. Warren for defendant appellant.

PER CURIAM. Donna Forsythe, ten years old, was examined on the *voir dire* in respect to her competency as a witness. Her testimony clearly showed that she was competent, the judge so found, and the defendant did not except. Donna Forsythe, in the presence of the jury, testified in brief substance, except when quoted, as follows: About 2:30 P.M. on 26 April 1966, she was walking home from school in the city of Durham. She first saw the defendant on the other side of the sidewalk. He was walking. She turned down a dirt road because that was the shortest way to get home. Defendant followed her down the dirt road, placed his arms around her shoulders, and put his hand under her dress. When he put his hand under her dress, she told him to leave her alone. He held her about two minutes, shoved her over into some bushes, and then turned her loose, saying "If that is the way you want to be, I will turn you loose." She started going up the street, and he followed her. She ran home and told her mother.

The State presented evidence; the defendant did not. Defendant assigns as error the denial of his motion for a judgment of compulsory nonsuit made at the close of the State's evidence. The State's evidence leaves us with considerable doubt as to whether the defendant had the intent at any time to have sexual intercourse with this child below the age of consent. *S. v. Lucas,* 267 N.C. 304, 148 S.E. 2d 130. On the record before us it is not necessary to decide if the State's evidence is sufficient to carry the case to the jury on the felony charge in the indictment, for the reason defendant has no assignment of error in the record presenting that precise point for decision. The court properly denied the motion for judgment of compulsory nonsuit, because the State has plenary evidence tending to show that defendant unlawfully and wilfully committed an assault on the female child Donna Forsythe, who was ten years old on 26 April 1966.

The indictment here alleges that the offense was committed "on the 26th day of April, A.D. 196...." We do not approve of such careless pleading.

The jury, after deliberating about one hour and ten minutes after the judge's charge, returned to the courtroom and stated they would like to hear the testimony of Donna Forsythe, while she was on the stand, read. After this request, the court advised the jury that it was going to recess for lunch and that when it returned their re-

quest would be considered by the court. After the court reconvened, the court granted their request. After this testimony was read, the jury retired to deliberate further. After deliberating about one hour and a half, the jury returned into open court with a verdict of "guilty as charged." Counsel for defendant moved that the jury be polled. Upon the polling of the jury by the clerk, one juror stated that he did not assent to the verdict, whereupon the court instructed the jury as follows: "Now, gentlemen, I instructed you previously the verdict of a jury must be unanimous. That is, all twelve of you must agree to a verdict, and until you do it cannot be accepted as a verdict by the court. For that reason, I am going to have to ask that you deliberate and consider the case further. If there are any further questions you have at this time, I will be glad to consider them. If there are not, *I am going to ask that you again retire and consider the case until you reach a unanimous verdict.* You may retire for that purpose." (Emphasis ours.) Defendant excepted.

After this additional charge, the jury retired; and, after deliberating about twenty minutes, announced to the court that they had not yet reached a verdict. Court was recessed for the evening. Upon reconvening the following morning, the jury deliberated about one hour and twenty minutes and returned into open court with a verdict of "Guilty as charged."

The defendant assigns as error this additional charge to the jury quoted above.

Defendant contends that the charge of the judge, to wit, "I am going to ask that you again retire and consider the case until you reach a unanimous verdict", was coercive and intimidating, and compelled an unwilling juror to surrender his unfettered and unbiased judgment and reach a verdict of "guilty as charged." This assignment of error is good. "The trial judges have no right to coerce verdicts or in any manner, either directly or indirectly, intimidate a jury." *Trantham v. Furniture Co.*, 194 N.C. 615, 140 S.E. 300. The learned trial judge inadvertently failed to instruct the jury that no one of them should surrender his conscientious convictions or his free will and judgment in order to agree with a majority of the jurors upon a verdict. The challenged instruction might reasonably be construed by the member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict. *S. v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767, and cases cited. For this error, the defendant is entitled to a

New trial.

BEULAH MILLIGAN BAUCOM v. JAMES DUDLEY BAUCOM, JR.

(Filed 24 May, 1967.)

Divorce and Alimony § 23—

Whether the husband should be required to continue to make payments for support of his employed son and, if so, the amount thereof, must be influenced by whether the son's employment is merely for a few weeks during school vacation or whether the employment is regular and the son is supporting himself, and the court should find the facts and then enter an appropriate order thereon.

APPEAL by defendant from *McKinnon, J.*, September 12, 1966 Civil Session, DURHAM Superior Court.

The plaintiff, Beulah Milligan Baucom, instituted this civil action against her husband, James Dudley Baucom, Jr., for alimony without divorce. She alleged the parties were married on January 10, 1942; they separated on September 15, 1964 because of frequent and brutal assaults, as a result of which she was forced to leave home. She asked for temporary and permanent alimony, custody of the two minor children and for counsel fees.

The defendant, by answer, admitted the marriage and separation but denied all allegations of mistreatment. As a further defense, he alleged the separation resulted because of the plaintiff's infidelity. Judge Latham, by order dated April 13, 1964, required the defendant to pay into court for the support of the two children the sum of $20 per week and to pay $150 to plaintiff's counsel. Judge Latham required the defendant to surrender the home and furnishings and the Ford automobile to the plaintiff. The order required the defendant to pay installments due on the home and to pay insurance and taxes thereon. On December 8, 1964 Judge May increased the allowance for the benefit of the children to $35 per week and ordered the defendant to pay $150 counsel fees for that hearing. On September 14, 1965 the jury found the defendant was not guilty of misconduct and that the separation was not his fault. Apparently following this finding, a decree of divorce was entered on defendant's application, based on allegations constituting a cross action in his further answer. Judge Hobgood, on June 23, 1966, denied the plaintiff's motion that the defendant be held in contempt for failure to make the required payments, but found the defendant had failed to pay counsel fees as required and increased the allowance to the children to $35 per week. After service of another contempt citation, the defendant conveyed to the plaintiff all his interest in the home, paid up all installments due, including attorney's fees. Judge McKinnon, on October 4, 1966, found that Michael Tyson Baucom, son of the parties, then age 17, was employed and had a gross in-

come of $46.38 and a net income of $39.05 per week. Nevertheless, Judge McKinnon ordered the defendant to pay $43 per week for the support of the two children. The defendant excepted to the order and appealed.

Weatherspoon and Pulley by W. Paul Pulley, Jr., for defendant appellant.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant, Jr., for plaintiff appellee.

PER CURIAM. It seems all matters in controversy have been settled except the question whether the defendant should be required to contribute to the support of Michael Tyson Baucom. Judge McKinnon found he is 17 years old and employed at the income above disclosed. The record does not show whether the employment is regular or for a few weeks during school vacation. If the employment is regular and the boy is supporting himself, the Court, on defendant's motion, may make any appropriate change in the order.

Affirmed.

STATE OF NORTH CAROLINA v. JOHN WILLIAM FETTERS.

(Filed 24 May, 1967.)

Indictment and Warrant § 12—

Where fatal defect in the warrant is corrected prior to delivery to the officer for service, defendant has no ground for objection.

APPEAL by defendant John William Fetters from *Bailey, J.*, November 9, 1966 Criminal Session, CUMBERLAND Superior Court.

In this criminal prosecution the defendant was tried in Recorder's Court of Cumberland County upon a warrant charging the unlawful operation of a motor vehicle upon the highways of North Carolina while his driver's license had been suspended or revoked. The Court returned a verdict of guilty and imposed this judgment: "The defendant is sentenced to serve 6 months in jail to be assigned to work under the supervision of the North Carolina Prison Dept. Sentence to be suspended upon condition def. not operate a motor vehicle on public highway of North Carolina until properly authorized to do so by the North Carolina Motor Vehicle Dept." The defendant appealed to the Superior Court.

In the Superior Court the defendant entered plea of not guilty to the charge contained in the warrant. The jury returned a verdict of guilty. Judge Bailey imposed a prison sentence of 15 months. The defendant excepted and appealed.

T. W. Bruton, Attorney General; William W. Melvin, Assistant Attorney General; T. Buie Costen, Staff Attorney, for the State.

Edward J. David for defendant appellant.

PER CURIAM. In the Superior Court the defendant contended the warrant as originally issued was fatally defective in that it charged the defendant operated his motor vehicle upon the public highway *"after"* his license was suspended; that subsequent to the issue and service of the warrant the word *"after"* was stricken and the word *"while"* was substituted. The photostatic copy of the warrant shows the substitution. However, Judge Bailey conducted an investigation and found the substitution was made by the issuing officer before delivery for service. Hence, the charge of invalidity is not sustained. In the trial, we find

No error.

CHARLES A. JONES, PLAINTIFF, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT.

(Filed 20 June, 1967.)

1. Insurance § 53.2—

The Motor Vehicle Financial Responsibility Act is a remedial statute and must be liberally construed to effectuate its purpose to provide compensation for innocent victims injured by financially irresponsible motorists.

2. Same—

Policy violations which would constitute a valid and complete defense in regard to coverage in excess of, or not required by, the Motor Vehicle Financial Responsibility Act, do not constitute a defense in regard to compulsory coverage required by the statute, and as to compulsory coverage no violation of policy provisions by the insured after the infliction of damages for which insured is legally responsible can exonerate insurer. G.S. 20-279.21(f)(1).

3. Insurance § 60—

Failure of insured under an assigned risk policy to give notice of suit to insurer does not avoid liability of insurer to the party injured by the negligence of insured.

4. Insurance § 64—

Provision of an assigned risk policy that no action should lie against insurer until insured's liability had been established by agreement signed by all the parties or by final judgment after trial, cannot preclude action against insurer after judgment properly obtained against insured through approved legal procedure, as by default, although insurer's liability may not be predicated on a judgment obtained against insured by consent or through collusion.

5. Constitutional Law § 24— Requirement that insurer doing business in this State issue proportionate share of assigned risk policies is constitutional.

An insurer who has been required to issue an assigned risk policy in accordance with statutory provisions for the apportionment of assigned risk policies among insurers doing business in this State, G.S. 20-279.34, is not denied due process in violation of the Fourteenth Amendment of the Federal Constitution or in violation of Article I, §§ 1 and 17 of the State Constitution, in being required to pay the injured third party the amount of damages established by a judgment by default obtained against its insured in an assigned risk policy, G.S. 20-279.21(f)(1), even though insurer had no notice of the accident or the action against its insured, nothing else appearing and there being no question of collusion between insured and the injured third party.

PARKER, C.J., concurs in the result.

PLESS, J., dissents.

APPEAL by defendant from *Hasty, Special Judge,* May 16, 1966 Schedule C Civil Session of MECKLENBURG.

Defendant's appeal is from a judgment which, after recitals, including a recital that the parties had waived jury trial, provides:

"And the Court after having considered the evidence and stipulations of counsel, and the contentions of the parties relative thereto, finds the following facts:

"1. That the plaintiff is an individual and a citizen and resident of Mecklenburg County, North Carolina, and the defendant is a corporation duly organized and existing and has an office and place of business in the City of Charlotte, County of Mecklenburg, State of North Carolina, and the defendant is an insurance company engaged in the business of writing policies of insurance, including automobile liability insurance and is licensed to do business in the State of North Carolina.

"2. That the plaintiff and defendant are properly before the Court and the Court has jurisdiction over the parties and subject matter.

"3. That the defendant issued and delivered for valuable consideration to Harold Leon Brown, a policy of liability insurance which was an assigned risk policy; that the defendant's policy num-

ber was 801-231-B20-33, insuring a 1955 Chevrolet automobile of said Harold Leon Brown; that said policy was a motor vehicle liability insurance policy as defined in G.S. 20-279.21 and was issued under the assigned risk plan as provided for in G.S. 20-279.34; that said policy issued to Harold Leon Brown covered Harold Leon Brown's 1955 Chevrolet automobile with limits of $5,000.00, $10,000.00, and $5,000.00 and was in full force and effect on October 21, 1964.

"4. The North Carolina Automobile Assigned Risk Plan itself is a set of rules and regulations which were agreed upon by the insurance companies and approved by the Commissioner of Insurance pursuant to G.S. 20-279.34, under which the North Carolina Automobile Rate Administrative Office and Manager of the North Carolina Automobile Assigned Risk Plan assign applications for liability insurance according to a quota system, submitted by people who have been denied liability insurance in the voluntary market, to companies licensed to write such insurance in North Carolina in such a manner that each insuror will receive the same proportion of 'private passenger non fleet automobile assigned risk premiums' that its respective 'voluntary private passenger net direct written car years' bears to the statewide total of the voluntary passenger direct written car years of all insurors in the State and so that each insuror will receive the same proportion of all other assigned risk premiums that its respective net direct 'all other automobile liability premiums' bear to the total of such 'all other' premiums of all insurors in the State.

"5. For persons who purchase their automobile liability insurance through the Assigned Risk Plan, the rates are exactly the same for the same coverage limits and for the same individuals under the same circumstances whether the insurance is written through the Plan or voluntarily in the regular market.

"6. That said policy of insurance to said Harold Leon Brown contained, *inter alia,* the agreements as follows:

> 'To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness, or disease, including death, resulting therefrom sustained by any person — arising out of the ownership, maintenance or use of the automobile.'

"And to pay on behalf of said insured all sums which the insured shall become legally obligated to pay as damages because of property damage sustained by any person arising out of the ownership, maintenance or use of said Chevrolet automobile by said Brown, the insured of defendant insurance corporation.

"7. The policy of insurance issued by the defendant to Brown

also contained the following condition with respect to notice of accident:

> 'Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable . . . If claim is made or suit is brought against the insured he shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.'

"8. That Charles A. Jones instituted suit against Harold Leon Brown in Mecklenburg Superior Court on or about the 4th day of November, 1964, alleging that due to and as a direct and proximate result of the negligence of Harold Leon Brown, and the resulting collision, the plaintiff sustained personal injuries and damages to his automobile; that said complaint and summons were duly served on the defendant, Harold Leon Brown, by the Sheriff of Mecklenburg County on the 5th day of November, 1964. That Harold Leon Brown did not report the accident to his insurance carrier, the defendant, State Farm Mutual Automobile Insurance Company, and did not notify said insurance company that suit had been instituted against him; that Harold Leon Brown did not file Form SR-1 and SR-21 with the Department of Motor Vehicles of North Carolina.

"9. Plaintiff duly filed with the Department of Motor Vehicles of North Carolina the form commonly called the 'blue form' or officially designated as 'Driver's Report of Motor Vehicle Traffic Accident,' Form SR-1 and SR-21.

"10. That in the month of February, 1965, a Judgment by Default and Inquiry was duly entered against said Brown and in favor of said Jones; thereafter in due course, the Jury awarded damages against Harold Leon Brown and in favor of the plaintiff in the amount of $5,000.00 for personal injuries and $300.00 for property damages.

"11. Thereafter, plaintiff's attorney advised the defendant, State Farm Mutual Automobile Insurance Company, at its offices in Charlotte, North Carolina, that plaintiff had obtained final Judgment against said Harold Leon Brown and made due demand for payment of same; that execution on said Judgment obtained on the 15th day of February, 1965, was returned unsatisfied by the Sheriff of

Mecklenburg County, North Carolina, and still remains unsatisfied.

"12. That the legal liability of Harold Leon Brown for damages because of the personal injuries and property damages arising out of the use of the insured automobile has been finally determined by the aforesaid Judgment and the defendant has not paid or tendered payment of any part of the said Judgment against the insured.

"13. That at the calendar call of the 26th Judicial District on Friday, February 12, 1965, the case of *Charles A. Jones vs. Harold Leon Brown,* S.D. No. 53-745, was called by said calendar committee and placed on the trial calendar for the week beginning February 15, 1965, and the said trial calendar was published on the bulletin board in the office of the Clerk of Mecklenburg Superior Court in the County Court House at Charlotte, North Carolina, and on the bulletin board in the Law Building in Charlotte, North Carolina, said bulletin boards being in a conspicuous place in each of said buildings.

"14. That had any one communicated with the Personal Responsibility Section, Attention Mr. Donald N. Freeman, Supervisor, of the Department of Motor Vehicles of North Carolina, prior to February 15, 1965, the date of the Judgment against Harold Leon Brown in the case of S.D. No 53-745, making inquiry as to the name and address of the liability insurance carrier of Harold Leon Brown as of October 21, 1964, said person, firm or corporation would have been advised that according to the records of said Safety Responsibility Section of the Department of Motor Vehicles there was no 'automobile liability insurance in effect at the time of the accident,' to wit, October 21, 1964, covering said Harold Leon Brown and his said 1955 Chevrolet automobile and such person, firm, or corporation would have been advised to communicate with Miss Alma Cates, Financial Security Section of said Department of Motor Vehicles, with regard to any FS-1 filing on behalf of said Harold Leon Brown; that said Miss Alma Cates, if present in Court, would testify in her official capacity as an employee of the Financial Responsibility Section of said Department, that had any person, firm, or corporation communicated with or contacted her at any time between October 21, 1964, and February 15, 1965, inquiring as to the name and address of the insurance company furnishing coverage for Harold Leon Brown and his said 1955 Chevrolet automobile, she would have replied that according to the records of the Department of Motor Vehicles of North Carolina, there was no insurance coverage by any liability insurance company of Harold Leon Brown and his said 1955 Chevrolet automobile for the reason that the FS-1 made

a part of the Complaint, was not prepared or filed with the Department of Motor Vehicles of North Carolina until February 22, 1965.

"15. Information pertaining to a person's liability insurance through the North Carolina Automobile Assigned Risk Plan is available only to the named insured, the insured's producer of record, and the insurance company involved and the North Carolina Department of Motor Vehicles and that this is due to the fact that the records of the Assigned Risk Plan are not public records.

"16. The specific vehicle described in the said policy issued by defendant insurance company under the Assigned Risk Plan was the vehicle involved in the collision with plaintiff's automobile.

"17. That the defendant sells and writes a large volume of automobile liability insurance in North Carolina, among which is its legally required share of assigned risk automobile liability policies under G.S. 20-279.34; that the assigned risk portion of defendant's business in North Carolina, when considered separate and apart from all other automobile liability insurance business it does in North Carolina, has not been profitable and defendant has lost money thereon which makes this type of business undesirable.

"18. Defendant in its first pleading filed in this cause and thereafter has maintained the position that to require it to pay the Judgment entered against Brown without notice and opportunity to defend the suit commenced against him by Jones, taken in connection with the fact that it was required to accept Brown as an insured under G.S. 20-279.34, would be to deprive the defendant of its property without due process of law and otherwise than by the law of the land in contravention of the Constitution of the United States of America and of the State of North Carolina.

"19. The parties have stipulated that the only question to be decided in this case is the constitutionality of G.S. Secs. 20-279.21(f) and 20-279.34 as applied to the facts set forth in this case.

"Upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

"1. The liability of the defendant insurance carrier under said insurance policy became absolute when the loss or damage to plaintiff occurred, to wit, October 21, 1964, the time of the collision of plaintiff's Pontiac automobile and Brown's Chevrolet automobile.

"2. Subsequent violations of the terms of the insurance policy by the insured, Harold Leon Brown, cannot and did not operate to defeat or avoid the said policy so as to bar recovery by plaintiff within the limits provided by the Act; that Harold Leon Brown, the insured's, failure to comply with the said insurance policy provisions

and to notify the defendant, State Farm Mutual Automobile Insurance Company, of the accident and the law suit did not defeat plaintiff's right to recover from said defendant the amount of the Judgment by which Harold Leon Brown's legal obligation to plaintiff was finally determined.

"3. That G.S. 20-279.21 and G.S. 20-279.34 and the regulations of the Commissioner of Insurance issued pursuant thereto do not within the meaning of the Fourteenth Amendment to the Constitution of the United States and Sections 1 and 17 of Article I of the Constitution of North Carolina, deprive the defendant, State Farm Mutual Automobile Insurance Company, of its property without due process of law, nor are such statutes and regulations unreasonable, arbitrary, capricious, nor do they work a penalty or forfeiture against the defendant, which constitutes an unreasonable burden upon the exercise of the lawful business of the defendant.

"IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the plaintiff have and recover of the defendant the sum of $5,300.00 plus interest from February 15, 1964, the costs of the Court in the action entitled *'Charles A. Jones vs. Harold Leon Brown'* and the costs of this action, to be taxed by the Clerk."

Defendant excepted (1) to the court's failure to make additional findings of fact as requested by defendant, and (2) to each of the court's conclusions of law, and (3) to the signing and entry of the judgment.

Elbert E. Foster and Nick J. Miller for plaintiff appellee.

Carpenter, Webb & Golding for defendant appellant.

Attorney General Bruton and Assistant Attorney General Harrell for the State as amici curiæ.

BOBBITT, J. The Vehicle Financial Responsibility Act of 1957, G.S. Chapter 20, Article 13, requires *every* owner of a motor vehicle, as a prerequisite to the registration thereof, to show "proof of financial responsibility" in the manner prescribed by the Motor Vehicle Safety and Financial Responsibility Act of 1953, G.S. Chapter 20, Article 9A. G.S. 20-314.

The manifest purpose of the 1957 Act was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle; and, in respect of a "motor vehicle liability policy," to provide such protection notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claims. *Swain v. Insurance Co.*, 253 N.C. 120, 126, 116 S.E. 2d 482, 487. "The primary pur-

pose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists." *Insurance Co. v. Roberts,* 261 N.C. 285, 290, 134 S.E. 2d 654, 659. The 1957 Act is a remedial statute and will be liberally construed "to carry out its beneficent purpose of providing compensation to those who have been injured by automobiles." 7 Am. Jur. 2d, Automobile Insurance § 6; *Moore v. Insurance Co., post,* 532, 155 S.E. 2d 128.

When sued by plaintiff, Brown did not turn over to defendant either the summons or the complaint; nor did he notify defendant that he had been sued. With reference to accidents occurring prior to the effective date of the 1957 Act, such policy violations would constitute a valid and complete defense. *Muncie v. Insurance Co.,* 253 N.C. 74, 116 S.E. 2d 474, and cases cited; *Clemmons v. Insurance Co.,* 267 N.C. 495, 148 S.E. 2d 640. The law as stated in *Muncie* and in *Clemmons* is presently applicable to coverage "in excess of or in addition to the coverage specified for a motor vehicle liability policy" as defined in G.S. 20-279.21. In this connection, see G.S. 20-279.21(g). However, as to the *compulsory coverage* provided by a "motor vehicle liability policy," as defined in G.S. 20-279.21, issued as "proof of financial responsibility" as defined in G.S. 20-279.1, the statute provides explicitly that "no violation of said policy shall defeat or void said policy." G.S. 20-279.21(f)(1). The policy here under consideration provides such compulsory coverage and no more.

If defendant had voluntarily issued its "motor vehicle liability policy" to Brown, *Swain v. Insurance Co., supra,* and *Lane v. Insurance Co.,* 258 N.C. 318, 128 S.E. 2d 398, would control decision and require affirmance. Also, see *Royal Indemnity Co. v. Olmstead,* 193 F. 2d 451, 31 A.L.R. 2d 635, and Annotation, 31 A.L.R. 2d 645 *et seq.* The factual situations in *Swain* and in the present action are alike in all essentials except that in *Swain* the policy was issued voluntarily and here the policy was issued as an assigned risk policy. Relevant to the constitutional questions raised in *Swain,* this Court said: "When defendant voluntarily issued its policy to Owens, it did so with full knowledge that the provisions of G.S. 20-279.21 (f)(1) became a part thereof as fully as if written therein; and, having voluntarily assumed the risk, it may not challenge the constitutionality of the statutory provisions." In *Lane,* although the policy was referred to as an assigned risk policy, the constitutional question with reference thereto which the defendant attempted to raise *for the first time* in this Court was not decided or discussed. *Lane* was decided on authority of *Swain.*

The question for decision is whether G.S. 20-279.21(f)(1) when

applied to an assigned risk policy issued in compliance with the plan set forth in G.S. 20-279.34 and regulations pursuant thereto "deprives the defendant of its property without due process of law and otherwise than by the law of the land in contravention of the Fourteenth Amendment to the Constitution of the United States of America and Sections 1 and 17 of Article I of the Constitution of North Carolina."

All briefs refer to this question as one of first impression.

The pleadings herein raise no issues as to Brown's actionable negligence or as to the extent of plaintiff's injuries. The question presented is whether plaintiff is entitled to recover from this defendant the amount of the judgment plaintiff obtained against Brown. Defendant contends that the judgment of the court below, which requires that it pay the amount of plaintiff's judgment against Brown notwithstanding it had no notice of or opportunity to defend said action, constitutes a denial of his constitutional right to procedural due process.

We consider first whether plaintiff could have instituted and maintained an action against defendant otherwise than on the judgment he obtained against Brown.

In the Annotation, "Joinder of insurer and insured under policy of compulsory indemnity or liability insurance in action by injured third person," in 20 A.L.R. 2d 1097, at p. 1102, the author states: "In the absence of particular statutory or policy provisions which in some instances have induced the courts to depart therefrom, the prevailing rule is that the insurer under a *compulsory* insurance policy may be joined as a defendant with the insured in an action by an injured third person, on the theory that, under the statutes requiring and controlling *compulsory* insurance, a direct or joint right is created in favor of the injured person against both the insured and the insurer." (Our italics.)

With reference to required coverage provided for the protection of the public by carriers operating under the authority of licenses granted by the North Carolina Utilities Commission, G.S. 62-274 provides that no "insurance company or surety executing any insurance policy, bond, or other security for the protection of the public, as provided in § 62-268, or as provided in § 62-112, (shall) be joined with the assured carrier in any action or suit for damages, debt, or claim thereby secured . . ." In connection with such carriers, attention is directed to *Harrison v. Transit Co.*, 192 N.C. 545, 135 S.E. 460, and *Williams v. Motor Lines*, 195 N.C. 682, 143 S.E. 256. In *Harrison*, based on a 1925 statute, it was held that a judgment against the carrier was not a prerequisite to a suit on the

policy or bond, and that it was proper for plaintiff to join the insured carrier and its insurer in the same action. In *Williams*, in accordance with the express provisions of the 1927 Act referred to therein, which repealed the 1925 Act on which *Harrison* was based, it was held that the insurer could not be joined in an action against the insured.

In *Watson v. Employers Liability Assur. Corp.*, 348 U.S. 66, 99 L. Ed. 74, 75 S. Ct. 166, the Louisiana statute there under consideration gave an injured person a right of direct action against the insurer *before* final determination of the insured's obligation to pay, and expressly recognized, as to injury occurring in Louisiana, such right of direct action irrespective of whether the policy sued upon was written or delivered in Louisiana, and notwithstanding it contained a clause forbidding such direct action. The statute also required that a foreign insurance company consent to such direct action in order to obtain a certificate to do business in the state. It was held that this statute did not violate the due process clause of the Fourteenth Amendment in respect of an injury occurring in Louisiana even though the particular policy was negotiated, issued and delivered in another state.

We find no North Carolina statute other than G.S. 62-274, quoted above, authorizing or prohibiting a suit against a liability insurer alone or jointly with its insured by a person allegedly injured by the negligence of the insured. Whether, in the absence of a controlling statutory or policy provision plaintiff could have sued defendant alone or jointly with Brown in an action to determine Brown's liability, if any, to plaintiff, is not presented.

The policy issued by defendant to Brown contains the following provisions: "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. 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."

Under the insuring agreements of the policy, defendant became obligated "(t)o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages" because of personal injuries or property damage caused by accident and aris-

ing out of the ownership, maintenance or use of the insured automobile.

As provided in G.S. 20-279.21(f)(1), this liability became absolute when plaintiff's injury and damage occurred notwithstanding Brown's subsequent violations of his obligations to defendant under the policy provisions. Brown's liability to plaintiff was established by a judgment obtained in accordance with approved legal procedure. As between plaintiff and Brown, all requirements of due process were met. The provision in the "no action" clause with reference to judgment "after actual trial" is valid only when construed as a defense to a judgment obtained against an insured by consent or through collusion. Although invalid in the respects and to the extent indicated, we are of opinion, and so decide, that the "no action" clause precludes an injured person from instituting and maintaining an action against the insurer otherwise than on a judgment properly obtained against the insured through approved legal procedure.

Defendant elected to incorporate the quoted provision in the policy it issued to Brown. By reason thereof, plaintiff had no right to institute and maintain an action against defendant unless and until Brown's liability to plaintiff had been determined *by judgment.*

As required by the policy provisions, plaintiff sued and obtained judgment against Brown in accordance with approved legal procedure. Unless and until set aside, this judgment constituted a final adjudication and determination of Brown's legal liability to plaintiff. In this connection, see *Sanders v. Chavis,* 243 N.C. 380, 90 S.E. 2d 749; also, *Sanders v. Travelers Indemnity Company,* 144 F. Supp. 742 (M.D.N.C.). The record discloses no ground on which defendant can defeat Brown's obligation to plaintiff.

We see no reason why defendant cannot, if it so desires, delete its "no action" clause from assigned risk or other policies providing coverage within the compulsory limits. Too, we refrain from discussing possibilities with reference to the adoption of new statutory or policy provisions that would assure notice to defendant of the pendency of an action against its insured before a judgment that would bind defendant could be entered. These are matters to be considered by defendant and its counsel in the light of all relevant factors.

Plaintiff, in compliance with the provisions of the policy issued by defendant to Brown, pursued the only remedy available to him, that is, an action against Brown in which he obtained judgment establishing Brown's legal liability to him. Defendant is obligated to discharge Brown's liability as established by said judgment. The

fact that defendant had no knowledge or notice of plaintiff's action against Brown before judgment had been entered does not constitute a denial of procedural due process.

There remains for consideration whether the judgment of the court below denies to defendant its constitutional right to substantive due process. G.S. 20-279.21(f)(1), as interpreted and applied by this Court, deprives it of defenses otherwise available under its (standard) policy provisions. Defendant contends the requirement that it be so bound by a policy issued on a risk it did not voluntarily accept constitutes a denial of substantive due process.

The Assigned Risk Plan authorized by G.S. 20-279.34 is "for the equitable apportionment" among insurance carriers licensed to write motor vehicle insurance in this State or "those applicants for motor vehicle liability policies who are required to file proof of financial responsibility under this article (9A) but who are unable to secure such insurance through ordinary methods." All insurance carriers, as a prerequisite to engaging and writing such insurance in this State, must subscribe to, and participate in, the plans and procedures constituting the assigned risk plan.

In *California Auto. Asso. v. Maloney*, 341 U.S. 105, 95 L. Ed. 788, 71 S. Ct. 601, it was held that the provisions of a compulsory assigned risk law of California did not violate the due process clause of the Fourteenth Amendment. The basic factual situation is well summarized by the reporter (L. Ed.) as follows: "The right of an insurance association to do business in California was revoked for its failure to comply with a statute which made it mandatory on all automobile liability insurers to subscribe to a plan for the equitable apportionment among such insurers of applicants who are in good faith entitled to but are unable to procure such insurance through ordinary methods." The plaintiff having failed to subscribe to such plan, the Insurance Commissioner had suspended its license to transact automobile liability insurance business in California. The plaintiff's unsuccessful action was for "a writ of mandate" to compel the Insurance Commissioner to restore its right to do business without subscribing to said California act.

Clearly, the fact that defendant is required to issue assigned risk policies as a condition of transacting liability insurance business in North Carolina does not constitute a denial of due process in violation of State and Federal constitutional provisions.

The gist of defendant's contentions is stated in an assignment of error as follows: "A statutory scheme which compels the issue of a policy under the Assigned Risk Plan without providing reasonable means for notice to the insurer and opportunity to defend a suit

against the Assigned Risk insured concurrently permits arbitrary, unreasonable, and unnecessary windfall to the personal injury claimant and an unreasonable, arbitrary, capricious, forfeiture and loss to the insurer. Permitting an accident victim to recover 'damages' through default proceedings in excess of legitimate compensation for injury actually incurred bears no real and substantial relationship to a valid statutory policy intended to assure the accident victim of just compensation for his injuries."

Defendant assigns as error the court's failure to make requested findings of fact. The requested findings involve primarily evidential facts tending to support the court's Finding of Fact No. 17, namely, "that the assigned risk portion of defendant's business in North Carolina, when considered separate and apart from all other automobile liability insurance business it does in North Carolina, has not been profitable and defendant has lost money thereon which makes this type of business undesirable."

As stated by Mr. Justice Douglas in *California Auto. Asso. v. Maloney, supra:* "(T)he state requires in the public interest each member of a business to assume a pro rata share of a burden which modern conditions have made incident to the business." Defendant's status is the same as that of all companies licensed to write motor vehicle liability insurance in this State. It assumes its pro rata part and no more of whatever additional burden is placed on it by the Assigned Risk Plan. If liability insurance carriers are required to conduct their business and issue policies at rates that are confiscatory and are thereby deprived of substantive due process, the remedy is by a general direct attack upon such rates on these grounds, not by way of defense in an action involving one policy issued in ordinary course in compliance with the regulations of the Assigned Risk Plan.

G.S. 20-279.34 provides that the Commissioner of Insurance "is authorized but not required to establish rates for assigned risk liability policies which are higher than approved manual rates." Defendant asserts that "(i)n those states other than North Carolina in which the defendant operates under an Assigned Risk Plan, there is some differential or surcharge to the insured affording to the company a greater premium for this class of business." Pertinent to this contention, the court's Finding of Fact No. 5 is as follows: "For persons who purchase their automobile liability insurance through the Assigned Risk Plan, the rates are exactly the same for the same coverage limits and for the same individuals *under the same circumstances* whether the insurance is written through the Plan or voluntarily in the regular market." (Our italics.) The meaning is clarified by the following testimony of defendant's witness, the as-

sistant manager of the North Carolina Automobile Assigned Risk Plan: "It is the Commissioner of Insurance who makes the determination that applicants for assigned risk insurance would pay the same rates as those people with the same driving record who buy automobile insurance on the open market." There is no evidence as to policies, if any, issued voluntarily to persons whose driving record ordinarily would necessitate that they obtain liability insurance under the Assigned Risk Plan. If the rates established for assigned risk liability policies under the Assigned Risk Plan are confiscatory and therefore deny substantive due process, the remedy is by general direct attack upon such rates on these grounds, not by way of defense in an action involving one policy issued in regular course in compliance with the regulations of the Assigned Risk Plan.

It may be advisable to provide by statute or by policy provision that a liability insurer be given an opportunity, notwithstanding policy violations by its insured, to contest, in an action against it, alone or jointly with its insured, issues as to its insured's liability and the extent of damage to the injured party. Presumably, defendant prefers that no action be instituted against it except on a judgment, obtained in a prior action to which it was not a party, which finally adjudicates and determines the liability of its insured.

Defendant refers to a possible windfall to plaintiff. These facts are noted: Plaintiff's counsel did not act in haste to obtain judgment by default and inquiry or final judgment. Moreover, the record furnishes no basis for a finding that Brown was not legally liable to plaintiff or that the jury awarded excessive damages. Nor is there any suggestion of collusion between plaintiff and Brown.

It is noted again that this action relates solely to *compulsory coverage* provided by a "motor vehicle liability policy" issued as "proof of financial responsibility." It is noted also that the policy issued by defendant to Brown contained the provision authorized by G.S. 20-279.21(h), to wit: "Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article."

For the reasons stated, we are of opinion, and so decide, that the judgment of the court below should be and is affirmed.

Affirmed.

PARKER, C.J., concurs in the result.

PLESS, J., dissents.

STATE OF NORTH CAROLINA v. WARNER FOWLER, ALIAS JOHNNY RINGO GRAHAM.

(Filed 20 June, 1967.)

1. Criminal Law § 139—

The Supreme Court will review the record on appeal from a death sentence with minute care to the end that it may affirmatively appear that all proper safeguards have been vouchsafed the defendant.

2. Criminal Law § 84; Homicide § 17—

A State's witness testified to the effect that, as a police officer was attempting to lock defendant in a cell, defendant threw the officer down, took his gun, forced the officer into a cell and shot the officer without saying anything. Another witness, for the purpose of corroboration, was permitted to testify to prior consistent statements of the first witness, but testified further that the first witness stated that defendant, before firing the shot, said that he "was sorry but he had to do this." *Held:* The further testimony did not corroborate the first witness and was therefore incompetent for this purpose, and was highly prejudicial as tending to establish premeditation and deliberation.

3. Criminal Law § 139—

In this homicide prosecution, a witness, in testifying to prior consistent statements of the witness for the purpose of corroboration, added incriminating statements which were not in corroboration of the witness but were in contradiction. The trial judge repeated the incompetent testimony in his charge. *Held:* Defendant having been convicted of a capital offense, the Supreme Court will take cognizance of the error *ex mero motu*, notwithstanding the absence of motion by defendant's counsel to strike the incompetent testimony.

APPEAL by defendant from *Copeland, S.J.*, January, 1966 Criminal Session, WAYNE Superior Court.

The Wayne County Grand Jury returned a true bill of indictment charging Warner Fowler (alias Johnny Ringo Graham) with the first degree murder of W. B. Braswell. The offense occurred on November 13, 1965.

At the January, 1966 Session of Wayne Superior Court, the defendant was tried upon the indictment. The jury returned a verdict of guilty of murder in the first degree with the recommendation that punishment shall be imprisonment for life in the State's prison. On appeal, this Court awarded a new trial.

The new trial resulted in a verdict of guilty of murder in the first degree. The jury failed to make any recommendation. The Court imposed a sentence of death. The defendant, by this appeal, seeks a new trial. The grounds for the appeal will be discussed in the opinion.

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

John H. Kerr, III, for defendant appellant.

HIGGINS, J. Each case which comes here is important to the parties involved and receives a careful review of the legal questions presented for decision. However, it is the uniform practice of this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State.

In this case the evidence disclosed that on the morning of November 13, 1965 the defendant and his girlfriend, Ruby Rivers (both under the influence of liquor) were engaged in a fight on the streets of Fremont. As police officer W. B. Braswell appeared, Ruby ran and hid in an automobile in the rear of a grocery store. Officer Braswell arrested both participants and took them to the city jail. No one seems to have been in the jail at the time the officer entered with his prisoners. He locked Ruby in cell No. 1, opened the door to cell No. 2 and ordered the defendant to enter. The defendant refused. Ruby Rivers, a witness for the State, testified:

> ". . . (I) saw the defendant throw Mr. Braswell down. Mr. Braswell fell in the hallway. Johnny was trying to take the gun out of the holster and Mr. Braswell was trying to hold the gun in the holster. The defendant got the gun and the key ring. The defendant told Mr. Braswell to get to his feet and go into the cell. Mr. Braswell went into the cell. After that I couldn't see Mr. Braswell because I couldn't see around the cell because I was locked up. I could see the defendant because he was still standing in front of the cell. I couldn't see Mr. Braswell. I saw the defendant when he shot Mr. Braswell. He fired the gun once. I saw the defendant holding the gun before he fired it. He was pointing the gun towards the cell, the number two cell. . . .
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> * * *
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> Right after the defendant took the gun away from Mr. Braswell and before the shooting, Mr. Braswell said, 'You've got the gun, now take it and go.' The defendant didn't say anything then. . . ."

After Ruby Rivers had completed her testimony the State called James Sasser, a police officer, for the purpose of corroborating the story told by Ruby Rivers. The defendant objected. The Court over-

ruled the objection. Witness Sasser, for the purpose of corroboration, testified:

> ". . . (S)he said that at that point Mr. Braswell pleaded with him and said, 'You have my gun, please go on, just leave,' the words she used. SHE SAID THAT JOHNNY RINGO HAD MOVED AWAY FROM MR. BRASWELL SOME DISTANCE WITH THE GUN POINTING TOWARDS HIM AND AT THAT POINT HE TOLD HIM HE WAS SORRY BUT HE HAD TO DO THIS, . . .
>
> * * *
>
> COURT: Hold that for a minute, right there. Go ahead."

Officer Sasser testified, quoting Ruby Rivers, that before firing the fatal shot the defendant "told him he was sorry but he had to do this."

The Court charged ". . . that Ruby Rivers told Deputy Sheriff Sasser . . . that Johnny Ringo snatched it (pistol) out of the holster . . . backed up three or four feet . . . had the gun in his hand . . . and said 'I am sorry, I got to do this,' . . . shoved him into the cell . . . held the gun out in front and fired it at that time." The foregoing is the subject of the defendant's Exception No. 78, Assignment of Error Group 5.

A comparison of the testimony of Deputy Sheriff Sasser, quoting Ruby Rivers, and the summary of that evidence in the Court's charge, makes it rather obvious the Court's interruption of Sasser's testimony was to enable it to make a note of what the officer said. If the Court stopped the proceedings for the purpose of making a memorandum of the testimony for use in the charge, the interruption served to emphasize the importance of the testimony. *State v. Moore,* 262 N.C. 431, 137 S.E. 2d 812. The statement "I am sorry, I got to do this" signifies deliberation and a pre-fixed purpose to kill. The trouble is the quotation did not corroborate Ruby Rivers. In fact, it flatly contradicted her evidence. She testified, "Right after the defendant took the gun away from Mr. Braswell and before the shooting, Mr. Braswell said 'You've got the gun. Now take it and go.' The defendant did not say anything." A careful check of the record before us fails to disclose that Ruby Rivers, at any time, testified the defendant said "I am sorry, I got to do this," or anything of like import.

Both Ruby Rivers and officer Sasser testified for the State in the former trial. We have examined the record filed here on the former appeal. Neither Ruby Rivers nor officer Sasser testified the defendant made the statement quoted in the preceding paragraph or anything similar thereto. The statement came into the case for the first

time through the testimony of officer Sasser, which purported to be for corroboration only. We do not suggest for one moment that Ruby Rivers did not make the statement officer Sasser attributed to her, but we do say the statement was not in corroboration of anything Ruby Rivers had testified to and hence was not properly admissible in evidence. A review of the record of the former appeal and the record before us now discloses the only essential difference in the State's evidence in the trials is the addition of the "corroborative evidence" of officer Sasser in the latter. This "corroborative evidence" may account for the difference in the judgments — life imprisonment in the first trial — death in the second.

We are confronted with the question whether the Court, on its own motion, should have withdrawn from the jury the damaging statement Sasser attributed to Ruby Rivers. When Sasser was called by the Solicitor for the purpose of corroborating her testimony, the defendant objected. At the time the Court properly overruled the objection, assuming, of course, that what the officer said would tend to corroborate her testimony. When, however, it became apparent the statement was in contradiction, and not in corroboration, defendant's counsel should have moved to strike. This he did not do. Should not the Court have so acted on its motion and instructed the jury to disregard the testimony?

In passing on the question, we must remember the Court had quoted to the jury the corroborating evidence and had instructed the jurors to consider it if they found it to be corroborative. This Court, in *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921 (a capital case) said:

> "In this enlightened age the humanity of the law is such that no man shall suffer death as a penalty for crime, except upon conviction in a trial free from substantial error and in which the constitutional and statutory safeguards for the protection of his rights have been scrupulously observed. Therefore, in all capital cases reaching this Court, it is the settled policy to examine the record for the ascertainment of reversible error. *S. v. Watson,* 208 N.C. 70, 179 S.E. 455; *S. v. Stovall,* 214 N.C. 695, 200 S.E. 426; *S. v. Moore,* 216 N.C. 543, 5 S.E. 2d 719; *S. v. Williams,* 216 N.C. 740, 6 S.E. 2d 492; *S. v. Page,* 217 N.C. 288, 7 S.E. 2d 559; *S. v. Morrow,* 220 N.C. 441, 17 S.E. 2d 507; *S. v. Brooks,* 224 N.C. 627, 31 S.E. 2d 754; *S. v. West,* 229 N.C. 416, 50 S.E. 2d 3; *S. v. Garner,* 230 N.C. 66, 51 S.E. 2d 895. If, upon such an examination, error is found, it then becomes the duty of the Court upon its own motion to recognize and act

upon the error so found. *S. v. Sermons,* 212 N.C. 767, 194 S.E. 469. This rule obtains whether the prisoner be prince or pauper."

* * *

". . . (W)hile an inaccurate statement of facts contained in the evidence should be called to the attention of the court during or at the conclusion of the charge in order that the error might be corrected, a statement of a material fact not shown in the evidence constitutes reversible error. *S. v. Love,* 187 N.C. 32, 121 S.E. 20."

And, in *State v. Knight,* 248 N.C. 384, 103 S.E. 2d 452, this Court said:

". . . (W)hile the error is not assigned by the defendant, nevertheless, since we are here dealing with a capital case, we take cognizance of the error *ex mero motu.*"

The jury got this picture from the evidence of Ruby Rivers, the only eye witness. As the officer, with his prisoners, entered the jail, he locked Ruby in cell No. 1 and ordered the defendant to enter cell No. 2. The defendant refused. A scuffle ensued over the officer's revolver, which the defendant forcibly took from him. The defendant forced the officer into the cell, the officer saying, "You've got the gun, now take it and go", the defendant fired the fatal shot without saying anything. Officer Sasser had Ruby quoting the defendant as saying, immediately before the fatal shot, "I am sorry, I got to do this." The latter describes a fixed and premeditated purpose to kill. Not only did the Court charge the jury to consider Sasser's statement if the jury found it corroborated the witness, but stopped the officer in the recital and then directed him to continue his evidence. If Sasser's evidence needed emphasis, the Court's action served heavily to underscore it. A couple of exceptions inserted in the record at the right place and assignments of error based thereon would have made the task of ordering a new trial very simple, but in the light of the practice in the cases cited and in *State v. Herring,* 226 N.C. 213, 37 S.E. 2d 319, we seem to be required to overlook the formality in a capital case and pick up any errors that appear in the record, whether excepted to and assigned or not. In view of these decisions, we, not without reluctance, hold that the defendant should have a new trial where the rules of evidence are scrupulously observed. The present counsel of record did not participate in the trial. He was appointed to prepare and argue the appeal. The brief and the argument have been helpful to the Court.

New trial.

GRANT *v.* BANKS.

GEORGE R. GRANT, EXECUTOR OF REBECCA KENNEDY, DECEASED, PETITIONER, v. SARAH KENNEDY BANKS, WYLANTA McKAY BUCKNER, DAVID E. BUCKNER, JR., JOHN HERBERT BUCKNER, RUTH BRISTOW, JOHN SAMUEL BANKS, REBECCA DIXON BUNDY, ELIZABETH W. LUNDY, HAZEL WIDDIFIELD WELLS, MARGARET W. RITTER, JEANETTE PALESE, SAM WIDDIFIELD, JR., INEZ W. BLAKELEY, FRANCES W. MATTHEWS, WILLIAM WIDDIFIELD, N. DOUGLAS MATTHEWS, DOROTHY LOUISE MATTHEWS LANGLEY, CHARLES THOMAS MATTHEWS, MINOR; JANET AYERS, MINOR; REBECCA AYERS, MINOR; TRUSTEES OF THE METHODIST HOME FOR CHILDREN, INC., AND HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF FAYETTEVILLE, A CORPORATION, RESPONDENTS.

(Filed 20 June, 1967.)

1. Wills § 66—

Where, subsequent to the execution of a will devising described real estate to a named beneficiary, testatrix becomes incompetent and remains incompetent until her death, and during her incompetency her trustee sells the real estate under order of court for the support of testatrix, the doctrine of ademption does not apply, and the devisee is entitled to the funds traceable to the proceeds of sale to the extent that such funds are not needed to meet debts of the estate or cost of administration. G.S. 33-32.

2. Insane Persons § 4—

The trustee appointed for an incompetent is merely the custodian, manager or conservator of the incompetent's estate, and the legal title to the property remains in the incompetent, and upon sale of the property under order of court the doctrine of equitable conversion will be applied to funds remaining after the death of the incompetent.

3. Appeal and Error § 49—

The judge's findings of fact upon waiver of trial by jury are conclusive when supported by competent evidence.

APPEAL by Respondents William Widdifield, Jeannette Palese, Frances W. Matthews, Sarah Kennedy Banks, Sam Widdifield, Jr., and Inez W. Blakeley from *Clark, S.J.*, June 1965 Regular Civil Session of CUMBERLAND.

Petition brought under the North Carolina Uniform Declaratory Judgment Act, G.S. 1-253 *et seq.*, for construction of a will and for instructions in the administration of the estate of Rebecca Kennedy, deceased.

Deceased executed a will dated 13 November 1951. At that time she owned miscellaneous personal property, including three savings accounts, and two separate tracts of real property, one being her homeplace and the other a lot on which was situate a leased store building. The provisions of Mrs. Kennedy's will are substantially as follows. Items First and Second provide for the disposition of various personal property and certain specific cash legacies. Item Fourth

provides for the prompt sale of her homeplace and bequeathes certain cash legacies. It further provides that after payment of the debts of the estate and cost of administration the residue in the hands of the executor is to be distributed among the children of testatrix's brothers, Sam Widdifield and William Widdifield, or to the children of any deceased child. George R. Grant, petitioner herein, was appointed executor of the estate by Item Fifth. Item Third of the will is as follows:

> "Subject to the right of my estate to the possession, control, rents and profits for two years after the date of my death, I give and devise my storehouse and lot, located on the North side of Hay Street, in the City of Fayetteville, N. C., and known as the J. L. Kennedy store, to the Methodist Orphanage, owned and operated by the North Carolina Conference of the Methodist Church, and now located at Raleigh, North Carolina, in fee simple and absolute, except for the rights of my estate for two years as above set out, said property to be turned over and delivered to said Methodist Orphanage by my executor, hereinafter named, at the expiration of two years after the date of my death. This bequest is made at the suggestion of my beloved husband, J. L. Kennedy, deceased, and I urgently request that said store property not be sold for a period of twenty-five years after my death."

On 6 March 1957, testatrix was struck and seriously injured by a motor vehicle. By judgment rendered 29 May 1957 she was adjudged mentally incompetent and George R. Grant was appointed trustee of her estate. She remained incompetent until her death.

From the date of the accident until her death on 16 November 1964 Mrs. Kennedy required constant medical, nursing and custodial care, first in a hospital and then for the remainder of her life in a nursing home. This care proved extremely costly and caused an appreciable drain on the assets of the estate, requiring the trustee to consume the funds in the three savings accounts mentioned above. Prior to their depletion, however, the trustee filed petition on 20 July 1957 requesting authority from the court to sell the homeplace. In support of this petition, the trustee offered evidence, *inter alia*, that the sale of the house and lot would be in the best interest of the estate, and that it was very unlikely Mrs. Kennedy would ever be able to return home. The petition was granted on 30 July 1957, and her homeplace was sold for a price of $17,500.

On 3 July 1962, the trustee petitioned the court for authority to borrow $10,000 for the continued support of Mrs. Kennedy, using the store building and lot as security. In support of his petition, the

trustee showed the court that the nursing and medical expenses required for the support of Mrs. Kennedy were averaging $12,000 a year, and that the only income to the estate was from the rental of the store, which amounted to $5,440 a year. The petition was allowed by order dated 3 July 1962.

On 24 May 1963, the trustee petitioned the court that he be permitted to sell at public auction the lot and store building situated thereon in order to provide assets for the maintenance of Mrs. Kennedy. "That in support of his petition he sets forth that the incompetent, Rebecca Kennedy, was then 92 years of age and required 24 hour's nursing and other medical care and that her health was deteriorating rapidly. He reiterated the statement of her continuing expenses approximately $12,000 per year and averred that all other assets and cash reserves had been exhausted and that he, as Trustee, had only enough cash to pay said incompetent's expenses 'for another six months or so.' In the petition he further averred that the existing lease on the property expired June 30, 1963, and that it would not be possible to rent or lease the store building to another tenant without the most extensive and expensive repairs and remodeling." Pursuant to order dated 12 September 1963, the property was sold at public sale for the sum of $90,000. The sale was duly approved by the court and the purchase price collected by the trustee.

Mrs. Kennedy died 16 November 1964. Her will was duly probated and George R. Grant appointed executor. There was in the estate at the time six savings accounts and a savings bond, in the names of various respondents, personal property of a negligible value, and cash assets in the amount of between $40,000 and $50,000. Appellees contend that the cash assets were the residue of funds derived from the sale of the lot and store building. The executor filed petition in this case on 17 February 1965, averring, *inter alia,* that taxes, etc., had not been paid and requesting instructions as to the disposition of the assets of the estate, with specific reference to whether the provisions of Items First and Second were to be executed. It was further averred that expenses of the estate, including taxes and funeral expenses, had not been paid.

It appears all parties have been duly served with summons and are properly before the court. N. Douglas Matthews is in the U. S. Navy, but is represented by counsel, and his interests will not be prejudiced by the trial of this case now, during his military service. He and the minors were represented by guardian *ad litem.* Home Federal Savings & Loan Association of Fayetteville was made a party solely in its capacity as a stakeholder. Hearing was held on

stipulated facts, and on 21 December 1966 the trial court entered judgment. The facts found are substantially as set out above, except the trial judge specifically found that the cash assets in the hands of the executor are traceable to and a part of the proceeds of sale of the store building. The judgment instructed the executor as follows: (1) To allow the disposition of personal property included in Item First according to the provisions of that Item; (2) to deliver the savings accounts and bond to the persons in whose name they were issued; (3) that the provisions of Item Third for the operation of the store for two years after testatrix's death has no force and effect and is not to be observed; (4) that the cash in hand from the sale of the store building be first used to pay the debts and costs of administration of the estate, and that no personal property need be sold for this purpose; and (5) that there was no ademption resulting from the sale of the store building, and after making the payments as above ordered, including attorney's fees, the executor should turn over the remaining amount to the Methodist Home for Children, Inc. From the judgment entered, respondents William Widdifield, Jeannette Palese, Frances W. Matthews, Sarah Kennedy Banks, Sam Widdifield, Jr., and Inez W. Blakeley appealed.

Tally, Tally & Lewis for plaintiff Executor, petitioner.

John B. Regan, Nance, Barrington, Collier & Singleton for appellant respondents.

BRANCH, J. The first and principal question presented by this appeal is whether there was an ademption of the specific devise of the store building described in Item Third of the last will and testament of Rebecca Kennedy when the property was sold under court order by the trustee during the lifetime of the testatrix, but during her mental and physical incompetency, which incompetency continued until her death.

The principle of ademption is a well recognized legal principle in the law of wills, but its application or even definition often presents difficulty.

> ". . . It is, for example, sometimes said that ademption is the extinction or satisfaction of a legacy by some act of the testator equivalent to its revocation or clearly indicative of an intention to revoke, but ademption of a testamentary gift may occur by destruction or extinction of its subject matter without the agency of the testator, as by the death of a slave or of an animal disposed of by will, and some courts take the view that

ademption is not a matter of the testatorial intention at all." 57 Am. Jur., Wills, § 1580, p. 1081.

The doctrine of ademption by extinguishment does not apply to general or demonstrative legacies or devises, since neither class of gift depends upon the existence of any *particular* property in testator's estate. 57 Am. Jur., § 1582, p. 1082; *Moore v. Langston,* 251 N.C. 439, 111 S.E. 2d 627.

The history of this Court's decisions reflects the difficulties of application of this principle and reveals conflict upon the matter of whether ademption by extinguishment or alienation depends upon the intention of the testator or simply operates as a matter of law, depending entirely on whether the specific property given by the testator remains *in specie* in the estate at the time of testator's death.

In *Anthony v. Smith,* 45 N.C. 188, testator executed a will, bequeathing to his debtor the bond which constituted the debt. Thereafter, the testator caused the debtor to renew the bond for the convenience of other creditors, adding the amount of accrued interest to the principal on the renewed note. After testator's death, the debtor brought action against the executor to recover the renewed bond, contending this was the same bond bequeathed to him. On appeal from the sustaining of a demurrer, this Court overruled the demurrer, holding that no ademption resulted from the renewing of the note. The Court stated:

> "(W)hen the thing bequeathed is annihilated and gone at the death of the testator, or so completely changed at that time that it cannot be identified, then the legacy must fail; but if it remains *substantially* the same as it was at the time when the will was made, then the legacy is not adeemed: . . . The bequest of the defendant's testator to his brother the plaintiff, was in effect the whole debt, including the interest, which the plaintiff owed him. It does not merely describe the note by which the debt was secured, but it proceeds to declare: 'and I do hereby release him and his heirs from all obligation to me as appears by said note, and all interest accruing on said note.' Could any language have been used to express more clearly and fully that the testator intended to forgive his brother the debt which he owed him?"

In *Nooe v. Vannoy,* 59 N.C. 185, testator executed a will which provided in part: "I further give to my children, by a former marriage, the proceeds of the sale of my town property. . . ." Thereafter, testator sold the property and reinvested the proceeds in the

bonds or notes of other persons. After his death, plaintiffs brought action to have the legacy declared adeemed. Defendants contended that the proceeds from the sale were traceable and no ademption resulted. The Court, noting the general rule regarding ademption, and that the bequest was to testator's children, stated:

> "As the *proceeds of the sale* is given, it follows that if such a part thereof as is specified, can be traced out and identified, at the time of the death of the testator, the legacy will take effect, and there will be no ademption, or, only a partial one. . . . 'the last class of cases to be noticed as not falling within the general rule of ademption, is where the terms of the bequest are so comprehensive as to include, within their compass, the funds specifically bequeathed, although it has undergone considerable alteration.'"

In *Chambers v. Kerns,* 59 N.C. 280, testator executed a will, devising certain land to one Kerns. Thereafter, testator sold the land to others, giving bond to make title upon payment of the purchase price. Title was not given until after testator's death. On suit to determine distribution of the proceeds from the sale, this Court held an ademption had occurred from the testator's contract to sell and bond to make title. The Court stated:

> "(T)he effect of a contract of sale is to make the vendee the owner of the land, the title being retained by the vendor as a security of the purchase money.
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> "There are well-settled principles of law, and if by their application the intention of the testator is disappointed, the Court can say it is not the fault of the law, but the neglect of the testator in not adding a codicil to set out his intention, made necessary by the alteration, in the condition of his estate, . . ."

See also *Gillis v. Harris,* 59 N.C. 267.

In *Starbuck v. Starbuck,* 93 N.C. 183, testator executed a will, Item Fourth of which provided: "I will and devise that such portion of the purchase money of my old home plantation which I sold to my son Clarkson as may still be owing me at my death, and any of this money then on hand, shall be equally divided between my said children, (naming them)." Thereafter, by codicil, additional parties were added to Item Fourth. Prior to his death, testator collected the total amount of the purchase price and deposited it in a bank. He thereafter withdrew the money and bought United States bonds. He later sold the bonds and used the proceeds to purchase stock in Wachovia Bank, which stock he owned at his death. On suit insti-

tuted by the executor for instructions, this Court held the legacy provided in Item Fourth had adeemed, and stated:

> "Specific legacies are said to be adeemed, when in the lifetime of the testator, the particular thing bequeathed is lost, destroyed, or disposed of, or it is changed in substance or form, so that it does not remain at the time the will goes into effect in specie, to pass to the legatees. If the subject matter of such legacies ceases to belong to the testator, or is so changed as that it cannot be identified as the same subject matter, during his lifetime, then they are adeemed — gone — and never become operative. This is so, because the thing given is gone, and nothing remains in that respect upon which the will can operate. . . .
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> . . . . .
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> "There is nothing in the will of the testator that can be construed as indicating any intention on his part that it should take effect at any time before his death. It therefore took effect just as if it had been executed immediately before he died."

However, in *Rue v. Connell,* 148 N.C. 302, 62 S.E. 306, the Court refused to find an ademption, stating:

> "There must be an alteration in the character of the subject-matter of a specific legacy made or authorized by the testator himself after making his will, or it will not operate as an ademption. If the change on the form of the property is brought about by the act of another, it will not effect an ademption of the legacy if the property in its new form is in the possession of the testator at his death."

In the *Rue* case testator executed a will which provided, in part: "To my wife, Addie May Connell, during her widowhood, I give, grant and bequeath all and every right, title and interest in and to my Tusculum plantation. . . ." During administration of his estate after death, one Alston brought suit to recover title to this particular property. Alston was successful in his suit, but by the judgment entered was required to pay into testator's estate a certain amount of money representing testator's interest in the property. On suit brought by the devisee of the property, the Court held the devise had not adeemed, and the devisee was entitled to the property in the form of the proceeds.

In *King v. Sellers,* 194 N.C. 533, 140 S.E. 91, Samuel Blossom executed a will which included a devise "to my daughter, Mary King, a mortgage of $4,000 executed by H. H. Hall, trustee, to

Samuel Blossom. . . ." Thereafter, the mortgage, with interest, was paid, and the money deposited in a bank. During the lifetime of testator, $3,500 of this money was loaned to one Peschau upon a note secured by deed of trust upon real estate. After testator's death, Mary King brought suit, claiming the Peschau mortgage under the above quoted Item of testator's will. On appeal, the Court held no ademption had occurred, and awarded the Peschau mortgage to plaintiff, stating:

> "Ademption, in law, denotes the destruction, revocation or cancellation of a legacy in accordance with the *intention of the testator* and results either from express revocation or is implied from acts done by the testator in his lifetime, evincing an intention to revoke or cancel the legacy. (Emphasis ours)
>
> ". . . In applying the test it is well to bear in mind the wise utterance of Pearson, C.J., in *Nooe v. Vannoy*, 59 N.C. 185: 'But it is unusual for a father to adeem, in this manner, legacies given to children and exclude them from his contemplated bounty, when there has been no change of circumstances; and for this reason the Court is slow to adopt the conclusion that it is an ademption and will seek, anxiously, for some mode of explanation.'"

In *Tyer v. Meadows*, 215 N.C. 733, 3 S.E. 2d 264, testator bequeathed two policies of insurance upon his life to his daughter by his first marriage. The will recited that the daughter had been named beneficiary in the policies. Subsequent to the execution of the will, testator changed the beneficiary in the policies to his estate and borrowed money on the policies. The daughter brought suit to recover the proceeds from the policies in the hands of the executrix. On appeal, the Court, looking to testator's intent as evidenced by his will, held that the change in beneficiary to testator's estate did not result in an ademption of the legacy to plaintiff, except for that amount borrowed by testator during his lifetime which was not repaid, and ordered the proceeds from the policies paid to plaintiff.

In *Green v. Green*, 231 N.C. 707, 58 S.E. 2d 722, testator executed a will which contained bequests of certain mortgage notes. Prior to his death, testator foreclosed on many of these notes and bought the property at sale. After testator's death, plaintiffs brought action to have the legacies declared adeemed in order that the property bought by testator would pass intestate to his heirs at law. Sustaining plaintiffs' contention that the specific legacies adeemed, the Court stated:

"The principle of ademption is firmly imbedded in the law of wills, and is recognized in this jurisdiction as applicable to specific legacies as a rule of law rather than of particular intent on the part of the testator. . . . It applies to defeat a bequest where the subject of a specific legacy has been withdrawn, disposed of, or has ceased to exist during the lifetime of the testator."

The cases where the Court has looked to the intent of the testator were not overruled, but were distinguished by *Green v. Green, supra,* on the ground that "those cases and others of similar import illustrate the modification of the rule when the language of the devise is sufficiently comprehensive to prevent the application of the principle of ademption."

Our research reveals that the North Carolina cases on ademption are based on acts of the testator or events happening during the lifetime of the testator while he retained testamentary capacity. Thus, the question presented for decision is apparently one of first impression in this jurisdiction.

The question of ademption by extinction or alienation by act of a trustee or guardian where the ward remains mentally incompetent until death, has been considered by many other jurisdictions, and a sharp conflict as to the rule in such cases exists among various courts.

The English rule holding that where the testator has become mentally incompetent and his guardian or trustee has dealt with his or her property so that it does not remain in specie in the estate of the testator at the time of his death, the bequest or devise is adeemed, is recognized, among others, by New York, Pennsylvania and Vermont. *Hoke v. Herman,* 21 Pa. 301; *In re Barrows' Estate,* 103 Vt. 501, 156 Atl. 408; *Holmes v. Goodworth,* 7 L.J. Ch. 128 (1829 Eng.).

One of the leading cases applying the English rule is *In re Ireland,* 257 N.Y. 155, 177 N.E. 405. There testator owned common and preferred stock in a corporation at the time his son was appointed committee of his estate and person because of testator's incompetency. The committee sold all of the preferred stock and used a part of the proceeds for the care of testator until his death. Holding that a specific bequest of the preferred stock was adeemed, and that the incompetency of the testator — such that testator could exercise no intention in the matter — was immaterial, the Court stated:

"The rule as it existed at common law, and still exists, admits of no such exception. The property constituting the specific legacy had been sold; it had ceased to exist. The exact

thing which was given by the will could not physically be passed on to the legatee. From the very nature of the case and of the gift the legacy became extinct. In the absence of statute there is no power in the courts to change a specific into a general legacy or turn over the balance of the proceeds derived from the sale of the specific property to the legatee in place of the particular thing intended to be given. Out of the moneys received from the sale of the preferred shares by the committee there was left a balance over and above expenditures for the incompetent of $1,848.40, which was turned over to the executor as part of the estate. To give this to Lena M. Whitmore in place of the preferred shares might seem equitable, but it is not in accordance with the directions or will of the testator. He gave her the preferred shares of stock, not the proceeds thereof, and according to all the decisions, when the specific thing given ceases to exist the legacy falls; it cannot be made up out of other property in the estate."

The Scottish rule, or the rule of necessity, holds that a conversion of the subject matter of a specific legacy by the guardian or trustee of an insane testator does not adeem the legacy unless it can be shown not only that it was a proper and necessary act on the part of the trustee or guardian, but that it would have been a necessary and unavoidable act on the part of the testator if *sui juris*. *Macfarlane v. Macfarlane*, 47 Scot. L.R. 266, 1 Scots. L. T. 40. Closely allied to the Scottish rule is the view taken by Illinois, Missouri, New Jersey, and other jurisdictions, that the relationship between the trustee or guardian and the incompetent testator is a trust relation, the estate is a trust fund for support of himself and his family, and the original character of the estate may be interfered with only to the extent necessary to provide support for them and pay debts thus incurred, including cost of administration.

In the case of *Lewis v. Hill*, 387 Ill. 542, 56 N.E. 2d 619, real estate was specifically devised by an incompetent testatrix and thereafter was sold by her conservator under order of court for the purpose of providing funds for incompetent's support, and the testatrix died a short time later, leaving unexpended funds from the sale in the hands of the executor which were not needed to meet any debts or costs of administration. The Court held that no ademption of the devise resulted, and that the devisee was entitled to receive the remaining fund, which under the circumstances must be regarded as a substitute for the land from which it was derived, and which would pass under the will to the person to whom the land had been devised. The Court considered that the conveyance made by the

conservator was in no sense to be regarded as a conveyance by the incompetent, and that the conversion of the real estate into personalty was for the particular purpose ordered by the court. See also *National Board of C. W. B. M. v. Fry,* 293 Mo. 399, 239 S.W. 519; *Re Cooper,* 95 N.J. Eq. 210, 123 Atl. 45.

Reaching results similar to the trust fund theory, other jurisdictions such as Michigan and Virginia rely on the theory of equitable conversion. In the case of *Bryson v. Turnbull,* 194 Va. 528, testatrix became mentally incompetent and remained under guardianship until her death. During the guardianship the guardian received proceeds from the sale of timber, from a condemnation suit filed by the United States Government, and from a partition proceeding, all under order of court. The Virginia court referred to a number of statutes demonstrating that it was the legislative intent that the character of an incompetent's land not be changed except to the extent required, and that the proceeds received be impressed with the character of the land. While the Virginia case does not deal strictly with the subject of ademption, it applies the doctrine of equitable conversion and considers the guardian of an incompetent merely a custodian and conservator of the estate, without power to change the descent or distribution of incompetent's property.

Looking to our own statutes, we find that G.S. 33-32 provides:

> "Whenever, in consequence of any sale under § 33-31, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all sales by guardians whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper."

In construing G.S. 33-32, this Court in *Brown v. Cowper,* 247 N.C. 1, 100 S.E. 2d 305, speaking through Parker, J. (now C.J.), stated:

> "The general rule is that, where the real estate of a lunatic is sold under a statute, or by order of court, the proceeds of sale remain realty for the purpose of devolution on his death intestate while still a lunatic. Anno. 90 A.L.R., p. 909 *et seq.,*

where the cases are assembled; Anno. Ann. Cas. 1915A, p. 158 *et seq.;* 18 C.J.S., Conversion, p. 75; 19 Am. Jur., Equitable Conversions, Sec. 23; Tiffany on Real Property, 3rd Ed., Sec. 306; Story's Equity Jurisprudence, 14th Ed., Sec. 1101, Pomeroy's Equity Jurisprudence, 5th Ed., Sec. 1167. See *Black v. Justice,* 86 N.C. 504, marginal p. 512; *Bryson v. Turnbull,* 194 Va. 528, 74 S.E. 2d 180; *McCoy v. Ferguson,* 249 Ky. 334, 60 S.W. 2d 931, 90 A.L.R. 891. The equitable doctrine is that upon the involuntary sale by a guardian, under a judicial decree, of the land of an insane person, incapable by reason of his insanity of intelligent assent and of dealing with his real estate, the proceeds of sale should be impressed with the character of the land sold, and should pass as such at his death if the disability of insanity has not been removed. The object of the rule is to prevent, as far as possible, any alteration by the guardian of a lunatic of the respective rights of the heirs of such lunatic in his real property should he die still a lunatic. See 89 Am. St. Rep., note pp. 313-314."

Although this case applies to an intestate, we see no reason why, upon the statute and the principles enunciated above, this rule should not apply to an incompetent testator.

American Law on Property, Vol. 3, Sec. 14.13, p. 608, states:

"There is one type of situation wherein most of the decisions adhere to the intention theory — that in which the testator becomes insane and the specifically devised property is sold in his lifetime by his guardian or committee. These decisions award the remaining proceeds of the specific property to the devisee. A sympathetic argument can be made for this result, because the insane testator has no opportunity to make a substitute devise by a later will."

Also, in Wiggins: Wills and Administration of Estates in North Carolina, § 143, p. 463, we find the following:

"A majority of courts do not apply the principle of ademption by extinction when the testator becomes incompetent and the subject matter of a specific bequest or devise is sold by a guardian. The general rule is adopted by statute in New York. The rule is based upon the theory that an incompetent testator does not have an opportunity to make a new will after the guardian disposes of the property, and the law presumes that the testator would have desired that the legacy remain in effect."

In the instant case we hold the sale of the property of Rebecca Kennedy by the trustee under order of court did not by operation of law cause an ademption of the specific devise of the lot and store building as set out in Item Third of her will. To the extent that the proceeds of such property remain in and are traceable into the estate at her death, without having been applied to the support or expenses of the said Rebecca Kennedy, and are not needed to meet debts or costs of the administration, the proceeds will be regarded as retaining the character of realty so that the specific devise in Item Third will not be adeemed.

G.S. 33-1 in part provides:

> "Provided, further, where any adult person is declared incompetent in connection with his commitment to a mental hospital or is found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said persons. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians."

Trustee and ward is a trust relation in which the trustee acts for the ward, whom the law regards as incapable of managing his own affairs. The legal title to the property is in the ward, the trustee being merely the custodian, manager, or conservator of the ward's estate. *Owen v. Hines*, 227 N.C. 236, 41 S.E. 2d 739. In his limited capacity as custodian or conservator, the trustee has no power to change the will of his ward by merely commingling assets in his hands. To so hold would reach the preposterous result of allowing a guardian or trustee to rewrite and alter the provisions of a will so as to destroy the testamentary intent of the testator by merely commingling funds.

Jury trial having been waived, the judge's finding of fact that the funds in the estate "were traceable to a part of the proceeds of the sale of said Hay Street store building," being supported by competent evidence, is as conclusive as the verdict of a jury. *Trust Co. v. Bank*, 255 N.C. 205, 120 S.E. 2d 830.

Affirmed.

FRED J. BOWEN v. IOWA NATIONAL MUTUAL INSURANCE COMPANY.

(Filed 20 June, 1967.)

1. Judgments § 47—

Payment of the amount of the judgment to the clerk of the Superior Court satisfies the judgment, since the clerk is the statutory agent of the owner of the judgment and not of the party making the payment. G.S. 1-239.

2. Torts § 2—

The actual tort-feasor and the party sought to be held liable for the tort solely under the doctrine of *respondeat superior* are not joint tort-feasors in the technical sense, since the employer's liability is derivative only and not predicated on any wrongful act on his part.

3. Torts § 1; Master and Servant § 32; Judgments § 29—

Even though separate judgments against the employer and the employee may be obtained by the injured party for a tort committed by the employee in the course of his employment, there may be only one satisfaction for the injury, and payment of one judgment extinguishes the other.

4. Same; Automobiles § 52—

The driver of one vehicle involved in a collision obtained judgment against the other driver. In another action instituted in another county, the first driver and his employer obtained judgment in a smaller amount against the owner of the second vehicle under the doctrine of *respondeat superior*, and this judgment was satisfied by payment into court of the amount of the recovery. *Held:* The payment by the employer of the second judgment extinguished the liability of its employee under the first judgment, particularly when the first driver rejected a settlement of the first judgment and elected to pursue his action against the employer.

APPEAL by plaintiff from *Gambill, J.*, May 1966 Session of FORSYTH. Docketed and argued as Case No. 441, Fall Term 1966, and docketed as Case No. 441, Spring Term 1967.

Civil action by plaintiff, a judgment creditor of Johnny C. Shipp, to recover on an automobile liability insurance policy issued by defendant covering A & B Trucking Company, Inc., and its employees.

The parties waived a trial by jury, and the case was heard upon an agreed statement of facts. We summarize so much of the agreed statement of facts as is necessary for a decision, the numbering of the paragraphs being ours:

(1) On 21 June 1961 a collision occurred between a tractor-trailer owned by P. H. Hanes Knitting Company, hereafter called Knitting Co., and driven by plaintiff Fred J. Bowen, and a 1958 Ford truck owned by A & B Trucking Co., Inc., hereafter called Trucking Co., and driven at the time by Johnny C. Shipp, who was driving said truck as an agent of Trucking Co. within the scope of his employment.

(2) At the time of said collision the defendant, Iowa National Mutual Insurance Company, hereafter called Iowa, had in force and effect an automobile liability insurance policy covering Trucking Co. and Shipp. A true copy of said policy of insurance is attached to the answer filed by Iowa and made a part thereof.

(3) On 1 September 1961 Bowen instituted a civil action for personal injuries against Shipp in Forsyth County Superior Court, and process was duly served upon Shipp. Shipp failed to notify Trucking Co. or Iowa of said action, and failed to file answer or otherwise plead within the time allowed by law, and a judgment by default and inquiry was entered against him. This case was tried before a judge and jury on 12 December 1961, and the jury answered the issues of negligence and contributory negligence in favor of Bowen, and awarded him damages in the amount of $15,000. Judgment was entered upon the verdict. Neither Shipp, Trucking Co., nor Iowa had actual notice of or was present at said trial. No appeal was taken from the judgment.

(4) On 2 February 1962 Shipp filed a motion in the Superior Court of Forsyth County to set aside the judgment on the grounds of mistake, inadvertence, and excusable neglect, and also filed an amended motion to the same effect on 4 April 1962. On 18 May 1964 Bowen filed a motion in the Superior Court to dismiss the motions of Shipp. On 20 May 1964 an order dismissing the motions of Shipp was entered as appears of record, and no appeal was taken therefrom. On 2 February 1966 Shipp filed a new motion to vacate said judgment on the ground that it is void because entered on an unverified complaint. This motion was denied by order entered on 10 June 1966, and no appeal was taken therefrom.

(5) On 4 June 1964 the present action was instituted by the plaintiff Bowen against the defendant Iowa to recover of defendant the sum of $15,000 with interest from 12 December 1961, the amount of the judgment entered in the Superior Court of Forsyth County on 12 December 1961 in favor of Bowen against Shipp.

(6) On 3 August 1961 Trucking Co. instituted a civil action against Bowen and Knitting Co. in the Superior Court of Cabarrus County for recovery of property damages arising out of the aforesaid collision between its trailer-truck and the 1958 Ford truck owned by Trucking Co. This was the same collision which was the subject of the civil action instituted by Bowen against Shipp in the Superior Court of Forsyth County on 1 September 1961. On 31 August 1961 Bowen filed an answer and counterclaim for $25,000 against Trucking Co. in this action for personal injuries allegedly sustained in said accident, and alleged negligence on the part of Shipp as the proximate cause of his injuries, and alleged that Truck-

ing Co. was liable for the negligence of Shipp on the doctrine of *respondeat superior.* This Cabarrus County action was tried at the February 1963 Civil Session of Cabarrus, and a jury answered the issues in favor of Bowen and Knitting Co. on their counterclaims, and awarded Bowen damages in the amount of $2,464 for personal injuries, and awarded Knitting Co. the sum of $5,072.87 for its counterclaim for property damage to its tractor-trailer. Judgment was entered on the verdict. True copies of the pleadings and judgment in this action are attached to the answer filed by Iowa.

(7) On 29 April 1963 Iowa, defendant in the present action, paid into the office of the clerk of the Superior Court of Cabarrus County, by virtue of its liability insurance policy issued to Trucking Co., the amount of said judgment. On 31 May 1963 the clerk of the Superior Court of Cabarrus County disbursed to Pierce, Wardlow, Knox and Caudle, the attorneys of record for Bowen and Knitting Co., the amount of said judgment and costs in payment and satisfaction of the judgment entered in the Cabarrus County action in favor of Bowen and Knitting Co. A true copy of the certificate of satisfaction of judgment in this action, signed by the assistant clerk of the Superior Court of Cabarrus County, is attached thereto.

(8) Iowa carried a standard automobile liability insurance policy covering Shipp and his employer, Trucking Co., which was in effect at the time of the aforesaid collision with limits of liability of $50,000 for each person injured, $100,000 for each accident, and $25,000 property damage liability for each accident. Among other things, said policy provided as follows:

> "(b) (2) pay all expenses incurred by the Company, all costs taxed, against insured in any such suit and all interest accruing after entry of judgment until the Company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon. . . ."

(9) By letter dated 7 June 1962, prior to the trial of the Cabarrus County action, and prior to the institution of the present action, Iowa through its attorney tendered for a ten-day period to Fred S. Hutchins, Sr., as attorney for Bowen, the amount of $5,000 in settlement of the Forsyth County judgment in favor of Bowen against Shipp. This tender was not accepted by Bowen.

Plaintiff and defendant agreed that the following two paragraphs state facts, but defendant contends that they are irrelevant and immaterial, which facts are summarized as follows:

(10) Liberty Mutual Insurance Company, hereafter called Liberty, also carried (1) a standard automobile liability policy on the

truck of Knitting Co. involved in said wreck, and (2) also a Workmen's Compensation policy covering the employees of Knitting Co. as provided by law. Liberty retained attorneys to defend the action brought by Trucking Co. in Cabarrus County against Knitting Co. and Bowen.

(11) After the judgments in favor of Knitting Co. and Bowen, in the Cabarrus County action, were paid into the Superior Court of Cabarrus County, but before said amounts were disbursed by the clerk, Lloyd C. Caudle, a member of the firm of Pierce, Wardlow, Knox and Caudle, the attorneys of record for Bowen and Knitting Co., being on notice of a subrogation interest of Liberty for compensation and medical expenses paid on behalf of Bowen, filed a petition with the North Carolina Industrial Commission stating that Bowen had obtained a judgment in his favor in the Cabarrus County action and setting forth the subrogation claim of Liberty, and sought an order of disbursement. An order was entered by the North Carolina Industrial Commission directing that the recovery by Bowen in the Cabarrus County action be distributed by paying to Liberty $2,440 in satisfaction of its subrogation rights under the provisions of G.S. 97-10.2(f) (1)c, and by paying the sum of $23.39 to Bowen. Subsequent to said order and before any funds were disbursed, Liberty filed an amended petition alleging a subrogation right in the amount of $2,818.61 instead of $2,440.61. An amended order was thereupon entered by the North Carolina Industrial Commission ordering that the full amount of $2,464 be paid to Liberty by virtue of its subrogation right; and further ordering that attorney's fees in that case were to be paid by Liberty out of the recovery, not to exceed one-third thereof. Thereafter, the sum of $2,464 was disbursed to Attorney Caudle in satisfaction of the judgment in favor of Bowen on his counterclaim against Trucking Co., and Attorney Caudle paid said amount to Liberty. Bowen did not receive any portion of said amount.

(12) Bowen did not sign the said answer and counterclaim in the Cabarrus County suit, and did not sign the petition to the North Carolina Industrial Commission for distribution of said recovery, but he was present at and testified in the Cabarrus County action. He did not know until later that the judgment had been paid and that the Industrial Commission had awarded said recovery to Liberty. No appeal was taken from the Cabarrus County judgment, and no exception was taken by Bowen to the acceptance of payment of said judgment and to the distribution of the proceeds pursuant to an order of the Industrial Commission.

The agreed statement of facts sets forth that the parties make the following contentions:

I. Bowen contends that the defendant owes him at least $5,000 plus interest on $15,000 since 12 December 1961 until paid, plus costs.

II. Defendant contends: (a) That the satisfaction of plaintiff's Cabarrus judgment by the defendant constitutes a bar to the present action; and plaintiff is thereby estopped from asserting any further claims against the defendant for injuries arising out of the accident in question; (b) that if the Cabarrus judgment is not a bar to the present action, that the maximum amount which the plaintiff can recover is the difference between $5,000 and the amount paid in satisfaction of the Cabarrus judgment; and (c) that in any event plaintiff is not entitled to a recovery of interest on the Forsyth judgment.

Based upon the agreed statement of facts, the court made the following conclusions of law: (1) The Forsyth County action brought by Bowen against Shipp was grounded on the same alleged acts of negligence on the part of Shipp as those contained in the counterclaim of Bowen in the Cabarrus County action; and the Forsyth County action sought recovery for the same injuries as those alleged in the Cabarrus County action; that the liability of Trucking Co. in the Cabarrus County action was based solely on its responsibility for the negligence of its agent Shipp, under the doctrine of *respondeat superior*. (2) The plaintiff is estopped from recovering in the present action by virtue of the prosecution of his counterclaim by him in the Cabarrus County action, the reduction of that claim to judgment, the payment of that judgment by defendant, and the acceptance of satisfaction of that judgment by the plaintiff, which judgment and satisfaction of judgment constitutes a bar to recovery by the plaintiff in the present action. (3) The court is of the opinion that plaintiff is not entitled to recover more "by entering the back door unannounced than he did by entering the front door after being properly introduced." (4) The plaintiff is entitled to recover nothing of the defendant in this cause.

Based upon the agreed statement of facts and his conclusions of law, the trial judge ordered and decreed that plaintiff recover nothing of defendant; that plaintiff's action be dismissed; and that the costs of the action be taxed against the plaintiff.

From this judgment, plaintiff appeals.

Deal, Hutchins and Minor by Roy L. Deal and Fred S. Hutchins for plaintiff appellant.

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

PARKER, C.J. The payment of the judgment in the Cabarrus County action in favor of Bowen and Knitting Co. against Trucking Co. was authorized by G.S. 1-239, and discharges the judgment. 3 Strong's N. C. Index, Judgments, § 47, p. 68. "The effect of the statute (C.S. 617, now G.S. 1-239) is to make the clerk the statutory agent of the owner of the judgment, and not of the party making the payment." *Dalton v. Strickland,* 208 N.C. 27, 179 S.E. 20.

Bowen in the present action seeks to reach and apply to the payment of the judgment in the Forsyth County action in which Shipp, the agent of Trucking Co., was the defendant, the obligation of Iowa under its policy of automobile liability insurance, when Iowa has paid and discharged, by virtue of its obligation under this insurance policy, the judgment in the Cabarrus County action, in which Bowen recovered damages on his counterclaim for personal injuries against Shipp's principal, Trucking Co., a cause of action arising out of the same collision in which he recovered damages, which are unpaid, against the principal's agent Shipp.

The question here presented is whether the payment or satisfaction of plaintiff's Cabarrus County judgment against Trucking Co., the principal, on his counterclaim in the sum of $2,464 for personal injuries received by Bowen in the collision on 21 June 1961, entered at the February 1963 Civil Session of Cabarrus County, and paid by Iowa on 29 April 1963 operates as a satisfaction and a bar to Bowen's present action against Iowa to enforce payment of his judgment entered in his case in Forsyth County on 12 December 1961 for $15,000 for personal injuries against Shipp, the agent of Trucking Co., received in the same collision.

In the Cabarrus County action and in the Forsyth County action, there was a single tort: the negligence of Shipp as agent in operating the Ford truck of Trucking Co., his principal. The liability of Trucking Co. was based not on any personal fault, for there was none on the present record, but on the agency relationship which existed between Trucking Co. and its negligent agent Shipp. Trucking Co.'s liability was derivative and dependent entirely on the doctrine of *respondeat superior.* Because of this liability of the principal, it has been sometimes broadly assumed that the master was guilty of a tort in a personal sense. This is contrary to fact. In the case of joint tort-feasors, although there is a single damage done, there are several wrongdoers. The act inflicting injury may be single, but back of that, and essential to liability, lies some wrong done by

each tort-feasor contributing in some way to the wrong complained of. It is said in *White v. Keller,* 242 N.C. 97, 86 S.E. 2d 795: "Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury." See *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126; 86 C.J.S., Torts, § 34, "Joint and Several Liability." Although the principal is responsible for the tort of his agent under the doctrine of *respondeat superior,* there was nothing in the present situation fairly comparable to that of joint tort-feasors. *McNamara v. Chapman,* 81 N.H. 169, 123 A. 229, 31 A.L.R. 188. See also *Brown v. Louisburg,* 126 N.C. 701, 36 S.E. 166. Cases where there is some personal fault of the principal or master, of course, stand differently.

It is the general rule that, although judgments may be recovered against all persons participating in a single wrong, there can be only one full satisfaction or indemnity. *McNair v. Goodwin,* 262 N.C. 1, 136 S.E. 2d 218. This principle applies where actions are brought against both principal and agent for the same tort. *Leonard v. Blake,* 298 Mass. 393, 10 N.E. 2d 469.

Pinnix v. Griffin, 219 N.C. 35, 12 S.E. 2d 667, was a civil action to recover damages for wrongful death. Griffin was an employee of Gate City Life Insurance Company. There was a judgment of nonsuit as to the corporate defendant entered at the conclusion of the evidence for plaintiff, and verdict and judgment against Griffin was $1,000. Plaintiff excepted to the judgment of nonsuit as to the corporate defendant, and appealed. In the Supreme Court the judgment of nonsuit as to the corporate defendant was reversed. When the case came on again for trial, the jury found by its answers to issues submitted to them that plaintiff's intestate's death was caused by the negligence of Griffin as alleged in the complaint, and that Griffin at the time was acting as a servant of the corporate defendant within the scope of his employment; that plaintiff's intestate by his own negligence did not contribute to his death, and awarded damages against the corporate defendant in the sum of $5,000. There was a judgment on the verdict, and the corporate defendant excepted and appealed. The second appeal is reported in 221 N.C. 348, 20 S.E. 2d 366. The Court held, in part, that where a judgment for a negligent injury is recovered against the servant, the verdict on the issue of damages is the limit of any recovery against the master when he is sought to be held liable solely upon the principle of *respondeat superior.* The Court, in its opinion, said in part: "The plaintiff can have but one satisfaction — payment of the damages caused by the wrongful act of Griffin. [Citing authority.] She cannot recover twice for the same wrong or, in other words, she cannot have two compensations for the same complete tort, but

must abide the first recovery as her full satisfaction for the wrong. [Citing authority.] Nor may she now reopen and recanvass the question, or assert that the act of Griffin inflicted greater damage than she recovered in the former trial. With that verdict she was then content. As to her, it is *res judicata.* [Citing authority.] Neither will she be permitted to allege that the former recovery was upon a wrong basis or in an inadequate amount; for if there was any error to her prejudice in the trial of that case she should then have excepted and had it corrected by an appeal. It is now too late to raise the question, as the judgment forecloses and estops her as to all issues determined on that hearing."

It is said in *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492:

> "However, where the doctrine of *respondeat superior* is or may be invoked, the injured party may sue the agent or servant alone, and if a judgment is obtained against the agent or servant, and such judgment is not satisfied, the injured party may bring an action against the principal or master. In such case, however, the recovery against the principal or master may not exceed the amount of the recovery against the agent or servant. [Citing authority.] On the other hand, if the agent or servant satisfies the judgment against him or obtains a verdict in his favor, no action will lie against the principal or master."

In *Brown v. Louisburg, supra,* the facts were these: A property owner in the town of Louisburg caused an excavation in the sidewalk in front of his building into which the plaintiff fell and was injured. Plaintiff brought an action against the property owner and the town of Louisburg to recover damages for personal injuries sustained by him in falling into this excavation. While the action was pending, plaintiff agreed in writing through his attorneys, for the consideration of $75, to enter a nonsuit and to release the property owner from any and all claims of plaintiff against him, by reason of the facts set forth in the complaint, and from any and all claims of every description which the plaintiff may have against the property owner. It was verbally agreed at the time of the execution of the agreement that the payment of the $75 was not made or accepted in full satisfaction of the injuries received, but simply to discharge the property owner. When the action came on for trial, the town claimed that it also was entitled to the benefit of the release. His Honor held otherwise. The town excepted. The jury rendered a verdict for $400 less $75 against the town. Judgment was entered upon the verdict, and the town appealed. The Court in its opinion said in part:

"The defendants were not, however, joint tort feasors. To make persons joint tort feasors they must actively participate in the act which causes the injury. . . .

"The real question in the case is this: Upon which of the defendants is the ultimate liability resting as between themselves. The plaintiff can, of course, sue either one, but which one of the defendants is liable to the other for the damages which the plaintiff would be entitled to recover for the injury which he has sustained on account of their negligence? We think that Ponton would be liable to the town, and that any recovery which might be made against the town could be ultimately recovered back from Ponton. [Citing authority.]

". . . His Honor should have instructed the jury that upon the evidence the plaintiff could not recover."

This case has been repeatedly cited and approved in our Reports. See Shepard's Citations.

Leonard v. Blake, supra, held, as succinctly and correctly summarized in headnote six in the North Eastern Reporter:

"A plaintiff, suing a mother and her daughter in separate actions for death caused by negligent operation of mother's automobile by daughter, could prosecute both actions to final judgment, but there could be satisfaction for damages in one action only."

In *McNamara v. Chapman, supra,* the Court held that a judgment against a solvent master for tort on the servant is a bar to a suit by the same plaintiff against the same servant for the same cause of action, although it has not been satisfied.

The case of *Marange v. Marshall,* Court of Civil Appeals of Texas, Corpus Christi, rendered 31 March 1966, and reported in 402 S.W. 2d 236, is apposite. A rehearing in this case was denied 28 April 1966. The facts stipulated by the parties show that in this case John P. Marange and wife Pauline brought suit for damages against John Marshall for personal injuries sustained by Mrs. Marange, when a car in which she was riding with her husband as driver was in a collision with a pick-up truck driven by Marshall. Marshall was operating the pick-up truck in the usual course of his employment as an employee of Lew Williams Chevrolet, Inc. Prior to the filing of this suit, the Maranges as plaintiffs had instituted an action under the doctrine of *respondeat superior* against Marshall's employer, Lew Williams Chevrolet, Inc., based on the same accident. This first suit had gone to trial before a jury, and as a result of the verdict, judgment was rendered for the plaintiffs for the dam-

ages found. Defendants appealed. The judgment was affirmed. *Marange v. Lew Williams Chevrolet, Inc.,* 371 S.W. 2d 900. The full amount of the judgment was paid into the registry of the court and was also tendered in cash to the plaintiffs, but was refused by them. The suit against the employer's servant followed. The trial court sustained employee's motion for summary judgment, and an appeal was taken. The Court of Civil Appeals held that the doctrine of *res judicata* barred suit by injured parties against employee for injuries sustained in collision where prior judgment in injured parties' favor against employer had resulted in a tender of judgment by employer. Relationship of employer and employee was not in dispute and the former action was purely derivative and entirely dependent upon the doctrine of *respondeat superior.* The judgment of the trial judge was affirmed. The Court, in its opinion, said in part:

> "In a well and carefully prepared opinion with facts almost identical to the case at bar, the New Hampshire Supreme Court in the case of *McNamara v. Chapman, supra,* firmly and in thoughtful and well-reasoned language, rejects a similar position taken by the appellants here. The court in *McNamara* held, that the second action filed against the employee alone could not be maintained, by reason of the prior judgment. This decision as a leading case is reported in 123 A. 229, 31 A.L.R. 188, and has been cited with approval at least in ten states."

In *Stone v. Coach Co.,* 238 N.C. 662, 78 S.E. 2d 605, the driver of a bus sued the owner and operator of a truck for personal injuries sustained when the bus collided with a truck. A consent judgment was entered under which the bus driver recovered a stipulated sum. Thereafter, the truck driver instituted suit against the bus company to recover damages to his truck occasioned in the same collision. The court held that the bus company could be held liable solely under the doctrine of *respondeat superior,* and, therefore, the judgment releasing the bus driver from further liability is a bar to recovery by the truck owner against the bus company.

The Court held in *Ingram v. Insurance Co.,* 258 N.C. 632, 129 S.E. 2d 222, where one of two tort-feasors is liable to the injured party for the active negligence of the other solely under the doctrine of *respondeat superior,* the tort-feasor whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to indemnity against the primary wrongdoer.

This is stated in the agreed statement of facts:

> "By a letter dated June 7, 1962, prior to the trial of the Cabarrus County action and prior to the institution of the

present action, Iowa National Mutual Insurance Company, through its attorney, Ralph M. Stockton, Jr., tendered for a ten-day period to Fred S. Hutchins, Sr., as attorney for Fred J. Bowen, the amount of $5,000.00 in settlement of the Forsyth County judgment in favor of Fred J. Bowen against Johnny C. Shipp. A true copy of said letter is attached hereto and incorporated herein and fully set out in this paragraph. Said tender was not accepted by Fred J. Bowen."

By rejecting this offer Bowen elected to pursue his counterclaim for personal injuries in the Cabarrus County action and to obtain satisfaction for his injuries in that action. The judgment in the Cabarrus County action, in which Bowen received $2,464 as damages for his personal injuries received in the same collision which was the basis for his Forsyth County action resulting in a judgment in his favor against Shipp, has been paid in full by Iowa into the office of the clerk of the Superior Court of Cabarrus County. The clerk of the Superior Court of Cabarrus County disbursed to the attorneys of record for Bowen the amount of said judgment and costs in payment and satisfaction of the judgment entered in this action in favor of Bowen and Knitting Co. Bowen did not appeal. Although separate judgments may be rendered against the agent and his principal arising out of the same cause of action, there can be but one satisfaction of the judgments arising on the same cause of action, and this rule has been applied even where the judgments differed in amount when the two judgments are for compensatory damages. This is true because Bowen's cause of action is indivisible, and the satisfaction of the judgment by the principal operates to extinguish his judgment in the Forsyth County action against the agent, particularly when Bowen rejected the offer of the payment of $5,000 as aforesaid and elected to pursue his cause of action against the principal and enforce the judgment obtained against him. *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 A. 385, 90 A.L.R. 1260; *Thomas' Adm'r. v. Maysville St. Ry. & Transfer Co.*, 136 Ky. 446, 124 S.W. 398; *Irwin v. Jetter Brewing Co.*, 101 Neb. 409, 163 N.W. 470; *Sarine v. Maher*, 187 Misc. 199, 63 N.Y.S. 2d 241; *Larson v. Anderson*, 108 Wash. 157, 182 P. 957, 6 A.L.R. 621; 30A Am. Jur., Judgments, § 1007; 2 Freeman on Judgments, 5th Ed., by Tuttle, § 1126; 49 C.J.S., Judgments, § 575; Restatement, Torts, § 886, Comment, a.

Although it is not necessary for us in reaching a decision in this case to approve all the trial court's conclusions of law, we approve this conclusion, that the acceptance of satisfaction of the Cabarrus County judgment by Bowen constitutes a bar to recovery by him in

the present action against Iowa, and that conclusion supports the judgment that plaintiff recover nothing from the defendant Iowa.

The judgment of the lower court is

Affirmed.

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

(Filed 20 June, 1967.)

1. Divorce and Alimony § 11—

The court, in its charge to the jury upon the nagging of the wife as constituting such indignities to the person of the husband as to warrant a divorce *a mensa et thoro*, quoting a picturesque philippic on nagging, capped by a quotation from Proverbs as to the difficulty of living with a brawling woman. *Held:* The excerpt from the charge must certainly have been considered by the jury as a description of the wife's behavior, and constitutes prejudicial error as an expression of opinion on the facts by the court.

2. Trial § 35—

G.S. 1-180 proscribes the trial court from expressing or indicating an opinion on the facts, either directly or indirectly.

3. Divorce and Alimony § 23—

Determination of the right to custody of minor children of the marriage is the province of the trial court and not the jury, and the court must decide the question upon the evidence before it, and while the verdict of the jury in the divorce action may be considered by the court with all other relevant factors in determining the question of custody in accordance with the best interest of the children, the verdict of the jury is not controlling, and it is error for the court to so consider it.

4. Same; Appeal and Error § 55—

The court awarded the custody of the children of the marriage in accordance with the prior order entered in the cause under the mistaken belief that he had to do so in view of the verdict of the jury in the divorce action. *Held:* A new trial having been awarded in the divorce action, the order of custody will not be altered prior to trial unless for good cause shown earlier consideration should become necessary, but after retrial the court must consider the question of custody *de novo*.

5. Divorce and Alimony § 18—

The purpose of allowance of fees to the attorneys for the wife is to place her on substantially even terms with the husband in the litigation, and under the facts of this case the amount allowed to the wife's attorneys *is held* not to disclose abuse of discretion in view of the affluence of the husband and the wife's lack of funds, the amount of legal work required of the wife's attorneys, and other relevant circumstances.

APPEAL by both plaintiff and defendant from *May, S.J.*, May 1966 Civil Session of ROWAN. This appeal was docketed in the Supreme Court as Case No. 617 and was argued at the Fall Term 1966.

Plaintiff instituted this action against his wife on 29 March 1965 for a divorce from bed and board and the exclusive custody of the two minor children then born of the marriage. Plaintiff alleged that he was entitled to a divorce *a mensa et thoro* upon each of the five grounds enumerated in G.S. 50-7. Defendant, after denying that plaintiff had any grounds for divorce, filed a cross action under G.S. 50-16 for alimony without divorce. She also asked for custody of the children with visitation rights granted the father.

Plaintiff and defendant, who had known each other seven years, were married in New York City on 19 April 1958, and thereafter lived together in Salisbury, North Carolina. On the morning of 20 February 1965, plaintiff left the home and never returned. At that time, the parties had only two children, Bradford G. Stanback, born 1 April 1959, and Lawrence C. Stanback, born 27 August 1960, but defendant was pregnant with their third child. On 29 March 1965, during defendant's absence, plaintiff came to the home and took the two children away. The third child, Clarence F. Stanback, was born 29 June 1965.

On 22 April 1965, upon motion in the cause, Judge Hal Hammer Walker on a finding that defendant, for a long time, had consumed excessive amounts of alcohol, awarded plaintiff exclusive custody of the children pending the hearing on the merits. Sixteen days later, on 8 May 1965, defendant filed a motion to reconsider the question of custody. On 19 June 1965, less than two months after the date of Judge Walker's order, Judge Allen H. Gwyn concluded another custody hearing and, upon a finding of changed condition, *i.e.*, that defendant no longer used alcoholic beverages, he divided the custody of the children equally between the parents. Plaintiff appealed. This Court, being of the opinion that sufficient time had not elapsed between the two orders to support a finding of changed conditions, reversed Judge Gwyn's order. See *Stanback v. Stanback*. 266 N.C. 72, 145 S.E. 2d 332.

Upon the trial of this case on the issues, plaintiff offered evidence tending to show: From the beginning of their marriage, defendant had, from time to time, consumed alcoholic beverages to excess. By 19 February 1965, she had become an habitual drunkard, neglecting her children, her husband, and her home. While drinking, she was abusive, crude, and generally disagreeable. In June 1963, she became obsessed with the idea that plaintiff was enamored of a lady of excellent character who was the wife of a prominent businessman and who was a member of their church. Plaintiff testified that

this "was the thing that began the real difficulty." She accused plaintiff of "psychic infidelity" with this woman. Because of this obsession, she harangued plaintiff at night until he could not sleep; she scratched, beat, and otherwise assaulted him. On one of these occasions, on 22 December 1964, when she bent his finger, plaintiff hit defendant on the forehead; it was not a severe blow. She humiliated him publicly with charges of his interest in another woman. From time to time, she locked plaintiff out of their bedroom, ordered him to leave the home, and did so many "mean, hateful things" that he said he could only attribute her violent behavior to "mental illness." On Sunday morning, 14 February 1965, after an argument over "the other woman," she attempted to push him down the cellar stairs. Plaintiff testified: "The reason for my leaving was a series — lasting for more than two years — of unreasonable drinking, of physical and verbal abuse, which ended with her pushing me down the basement stairs, that made it impossible for me to stay." On the advice of counsel, plaintiff kept a diary of defendant's misdeeds from 3 June 1964 until he left the home on 20 February 1965.

Defendant's evidence tended to show: Plaintiff is a teetotaler. She herself enjoys an occasional cocktail and sometimes has sherry with her meals, but she has never been drunk nor has she ever consumed alcoholic beverages to excess. During the entire period of her three pregnancies, and while she was nursing her children, she also was a teetotaler. She never accused plaintiff of *physical* infidelity. Her accusations of "psychic infidelity" were the result of plaintiff's own conduct. He had often told her how attractive the "other woman" was, how slim and appealing she looked in comparison to defendant, and that she had "sexy lips." He asked defendant to make friends with her and to invite her to their home. Defendant testified that she had never refused plaintiff conjugal relations. She had never attempted to injure him, nor had she ever offered him any physical violence. He, however, had kicked her in the stomach while she was pregnant. On the occasions when she had reacted to him in some unusual manner, he had deliberately goaded her into it. She did not push him down the cellar stairs. On the contrary, after he had told her he was leaving her, she had struggled with him at the top of the stairs in an effort to keep him from going to the basement "to get something that he needed to leave with." On the witness stand, she said she had always loved plaintiff; she did not want him to leave their home; she had given him no cause to leave; and she had always been ready for a reconciliation.

At the conclusion of plaintiff's evidence, defendant moved for a judgment of nonsuit as to each of the issues. The motion was denied

and renewed at the conclusion of all the evidence, when it was again denied. Exceptions to these rulings were duly noted.

Issues were submitted to the jury and answered as follows:

"1. Were the plaintiff and defendant married, as alleged in the Complaint?

ANSWER: Yes.

"2. Did the defendant, Vanita B. Stanback, maliciously turn the plaintiff, Fred J. Stanback, Jr., out of doors, without adequate provocation on the part of the plaintiff, Fred J. Stanback, Jr., as alleged in the Complaint?

ANSWER: No.

"3. Did the defendant, Vanita B. Stanback, by cruel and barbarous treatment, endanger the life of the plaintiff, Fred J. Stanback, Jr., without adequate provocation on the part of the plaintiff, Fred J. Stanback, Jr., as alleged in the Complaint?

ANSWER: No.

"4. Did the defendant, Vanita B. Stanback, offer such indignities to the person of the plaintiff, Fred J. Stanback, Jr., as to render his condition intolerable and his life burdensome, without adequate provocation on the part of the plaintiff, Fred J. Stanback, Jr., as alleged in the Complaint?

ANSWER: Yes.

"5. Did the defendant, Vanita B. Stanback, become an habitual drunkard after her marriage to the plaintiff, Fred J. Stanback, Jr., as alleged in the Complaint?

ANSWER: No.

"6. Did the plaintiff, Fred J. Stanback, Jr., separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life, as alleged in the cross action?

ANSWER: No.

"7. Has Fred J. Stanback, Jr., unlawfully abandoned his wife, Vanita B. Stanback, without adequate provocation on the

part of the defendant, Vanita B. Stanback, as alleged in the cross action?

ANSWER: .....

"8. Has the plaintiff, Fred J. Stanback, Jr., offered such indignities to the person of his wife, Vanita B. Stanback, as to render her condition intolerable and life burdensome, without adequate provocation on the part of the defendant, Vanita B. Stanback, as alleged in the cross action?

ANSWER: ....."

The following statement appears on page 325 of the record and case on appeal:

"Upon the return of the verdict the court considered the matter of the custody of Bradford G. Stanback and Lawrence C. Stanback, the minor children of the parties. The court stated to counsel that further evidence would be heard on the question of custody if either party desired to offer such evidence but that under the court's interpretation of the opinion of the Supreme Court of North Carolina in the case of STANBACK v. STANBACK, 266 N.C. 72, the question of custody of said minor children, should be determined by the verdict of the jury in the trial of the issues in this action and that the court intended to be guided by the jury verdict in determining the matter of custody."

On the question of custody, the parties then offered in evidence the identical affidavits which had been introduced in the previous custody hearings before Walker and Gwyn, JJ. These affidavits were included in the transcript when this case was here on appeal from Judge Gwyn's order at the Fall Term 1965. *Stanback v. Stanback, supra.*

The court granted plaintiff a divorce from bed and board from defendant upon the verdict. In the same judgment he awarded plaintiff custody of the two older children of the marriage. The judgment recited that the court, after considering all the evidence presented at the trial and all the affidavits previously filed by both parties, finds as a fact that:

"(B)oth the plaintiff and the defendant are fit and suitable persons to have the custody and control of the two older minor children, Bradford G. Stanback and Lawrence C. Stanback; that the interest, welfare and health of Bradford G. Stanback and Lawrence C. Stanback will best be served by awarding

their custody to the plaintiff, Fred J. Stanback, Jr., with visitation rights in the defendant, Vanita B. Stanback, as hereinafter set forth. . . ."

The court thereupon awarded plaintiff the custody of the two children and granted defendant the right to have them in her home during the period of 1 September through 31 May for two hours on Tuesday for three consecutive weeks and, on every fourth week, from 3:30 Friday afternoon until 5:30 on Sunday afternoon. During the period of 1 June through 31 August, she was allowed to have them from noon on 15 June until noon on 6 July, and from noon on 27 July until noon on 17 August.

The judgment further recited that the custody of the third child, Clarence F. Stanback, then aged eleven months, had not been raised in this proceeding.

In a supplemental order, Judge May fixed the compensation for defendant's counsel upon findings of fact, which are summarized as follows:

1. On 28 February 1965, defendant employed George L. Burke and the firm of Kesler and Seay, attorneys of Salisbury, to represent her in this litigation. They filed her answer, prepared for and represented her in the hearing in Asheboro before Judge Hal Hammer Walker on 10 April 1965. At this hearing, plaintiff was awarded custody; defendant was awarded alimony *pendente lite;* and defendant's attorneys were allowed $2,000.00 for their services "to the date of this hearing, to wit, April 10, 1965." From 10 April 1965 to date, defendant's counsel have received no further compensation for the additional services rendered.

2. Thereafter, they prepared this case for jury trial at the May 1965 Civil Session of the Superior Court. At that session, plaintiff moved for a continuance. The motion was argued; the trial was continued.

3. In preparation for the two custody hearings before Judge Allen H. Gwyn in June 1965, counsel conferred with 39 witnesses, prepared affidavits for their signatures, and did extensive legal research. They journeyed to Reidsville, where Judge Gwyn began his hearings, which were concluded on 19 June 1965 in Salisbury. Judge Gwyn then modified Judge Walker's order by dividing the custody of the children equally between the parties. Plaintiff appealed from Judge Gwyn's order and sought *supersedeas* from the Supreme Court. At this time, the firm of Walser, Brinkley, Walser & McGirt, attorneys of Lexington, North Carolina, was associated with Messrs. Burke, Kesler and Seay as attorneys for defendant.

4. In connection with the appeal from Judge Gwyn's order,

counsel were required (1) to investigate the rules and practice of the Supreme Court with reference to the granting of writs of *supersedeas;* (2) to study plaintiff's case on appeal; (3) to appear before Judge Gwyn in Reidsville, where he finally settled the case, which produced a mimeographed record of 223 pages; (4) to prepare and file defendant's brief; and (5) to argue her case in the Supreme Court at the Fall Term 1965.

5. Thereafter, counsel prepared for and appeared at the adverse examinations of both plaintiff and defendant. These examinations were held on two separate dates.

6. When the case was calendared for trial at the March 1966 Session of the Superior Court, counsel again prepared the case for trial. Upon plaintiff's motion, and after argument, it was again continued. Counsel also argued a motion to compel defendant to answer certain questions.

7. Counsel arranged for the taking of depositions in behalf of defendant in New York. These arrangements, *inter alia,* required the association of New York counsel.

8. When the case was calendared for the 16 May 1966 Session, counsel prepared the case for trial the third time. The case was tried and consumed nine days.

9. From the beginning of this litigation, counsel have conferred with defendant at length and at frequent intervals. The nature of the litigation and the charges which plaintiff made against defendant, and the bitterness of the litigation required these conferences and had made it necessary for them to interview many witnesses.

10. Plaintiff has a net worth of $1,000,000.00. "His average income according to his own testimony has been approximately $42,000.00 per year for the past five years, although his income-tax returns show that his total income as reported was greatly in excess of this amount, being in excess of $146,000.00 during the year 1964." Defendant has no property of any substantial value and has no income.

11. The services rendered by defendant's counsel were reasonable and necessary for the proper preparation of her defense to plaintiff's action for divorce from bed and board and the prosecution of her cross action for alimony without divorce. Counsel rendered these services in expectation of payment in addition to the $2,000.00 received on 10 April 1965. The additional services rendered by defendant's counsel had a reasonable value of $20,000.00.

Upon these findings, Judge May directed plaintiff to pay to defendant's counsel the sum of $20,000.00 "as additional counsel fees *pendente lite* covering services rendered during the period from 10

April 1965, to and including the end of the trial in this action in the Superior Court of Rowan County."

Plaintiff appealed from the order allowing defendant's counsel additional compensation. Defendant appealed from the judgment awarding plaintiff a divorce from bed and board and the custody of the parties' two older children.

Shuford, Kluttz & Hamlin; Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Robert A. Melott for plaintiff.

Kesler & Seay; Walser, Brinkley, Walser & McGirt; George L. Burke, Jr., for defendant.

SHARP, J. We first consider defendant's appeal.

Five issues were submitted to the jury in plaintiff's action for divorce from bed and board. The first related to the marriage, which was admitted. The second, third, and fifth issues were answered in defendant's favor; the fourth, in plaintiff's. To obtain a divorce from bed and board, however, the law requires that defendant establish only one of the grounds specified in G.S. 50-7. Defendant attacks, with 19 assignments of error, the judgment divorcing the parties. Necessarily, these assignments relate only to the fourth issue. Although one or more of the others have substantial merit, it is necessary to consider only the ninth, which relates to the following portion of the judge's charge on the fourth issue:

> The constant nagging and berating of the husband by the wife may, under a given factual situation, constitute indignities. A certain amount of nagging and fussing by one's wife is apparently a thing to be taken and borne as part of the "buyer-beware" marital burden of the male, but when the nagging and criticism of the husband continues practically daily for a long period of time, there is a point reached where patience is no longer a virtue, and the law should afford relief. As the Supreme Court of Georgia so well said, in WILKINSON *against* WILKINSON, quoting the trial judge: "From the days of Socrates and Xantippe, men and women have known what is meant by nagging, although philology cannot define it or legal chemistry dissolve it into its elements. Humor cannot soften or wit divert it. Prayers avail nothing and threats are idle. Soft words but increase its velocity and harsh ones its violence. Darkness has for it no terrors, and the long hours of the night draw no drapery of the couch around it. The chamber where love and peace should dwell becomes an inferno, driving the poor man to the saloon, the rich one to the club, and both to the arms of the

harlot. It takes the sparkle out of the wine of life and turns at night into ashes the fruits of the labor of the day." And to this he might well have added the words of Solomon that *"It is better to dwell in the corner of the housetop than with a brawling woman and in a wide house."* (Italics ours.)

The foregoing excerpt from the charge is taken verbatim from 1 Lee, N. C. Family Law § 82, p. 316 (3d Ed., 1963). The portion in quotations is Judge Meldrim's familiar excursus on nagging, which, since Justice Hill of the Georgia Supreme Court included it in his opinion in *Wilkinson v. Wilkinson,* 159 Ga. 332, 339, 125 S.E. 856, 859, has often reappeared in the picturesque speech columns of both legal and popular periodicals. Judge Meldrim, however, when he delivered his animadversion upon nagging, was overruling a demurrer to a complaint in a divorce action. His philippic was never intended for use by a trial judge in instructing a jury in a jurisdiction where judges are circumscribed by a statute such as G.S. 1-180. It was Justice Hill, who, after quoting Judge Meldrim, added the words of King Solomon which we have italicized above (Proverbs 25:24). To the jury, however, it was Judge May who was superimposing Solomon's condemnation upon the excoriation which he had just quoted with approval from the Georgia court. The jurors most certainly understood that his Honor thought the reference to a "brawling woman" was applicable to defendant and that Judge Meldrim's were words "fitly spoken" of her. Defendant's Assignment of Error No. 9 is sustained.

G.S. 1-180 imposes upon the trial judge the duty to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, *without expressing any opinion of the facts. State v. Benton,* 226 N.C. 745, 40 S.E. 2d 617. "There must be no indication of the judge's opinion upon the facts to the hurt of either party, either directly or indirectly, by words or conduct." *Bank v. McArthur,* 168 N.C. 48, 52, 84 S.E. 39, 41. When such an indication occurs, there must be a new trial. *State v. Williamson,* 250 N.C. 204, 108 S.E. 2d 443; *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855; *Meadows v. Telegraph Co.,* 131 N.C. 73, 42 S.E. 534.

Defendant's Assignments of Error three, four, five, and six attack Judge May's judgment granting custody of the parties' two boys, Bradford and Lawrence, to plaintiff.

The familiar rule is that "the welfare of the child should be the paramount consideration which guides the court in making an award of custody." *Gafford v. Phelps,* 235 N.C. 218, 222, 69 S.E. 2d 313, 316; 3 Lee, N. C. Family Law § 224 (1963); 2 Strong, N. C. Index,

Divorce and Alimony § 24 (1959). Which of the two contending parents shall have the custody of their children is a question addressed to the discretion of the trial judge, who must decide the probative force of conflicting evidence and make the difficult and heart-rending decision. Once he has made it, it will ordinarily be upheld if supported by competent evidence. *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133.

Defendant does not controvert this rule. Her contention is that, in awarding custody, the judge did not exercise his discretion, but acted upon the mistaken premise — as shown by his statement made upon the return of the verdict — that the former opinion in this case required him to award custody to the party who won the jury's verdict.

Patently, Judge Walker's order awarding exclusive custody to plaintiff was based upon his finding that defendant had consumed excessive amounts of alcohol over a long period of time. It is equally clear that Judge Gwyn's modification of that order was based on his finding that defendant "no longer indulged in the use of alcoholic beverages . . . and has regained her normal emotional equilibrium." In reversing Judge Gwyn's order as having been prematurely made, this Court, speaking through Higgins, J., said: "This controversy illustrates the difficulty of determining disputed facts from *ex parte* affidavits. When this case is heard on the merits, where the witnesses are before the court and subject to cross examination, the findings thus established will, or may, justify a change in the order." *Stanback v. Stanback,* 266 N.C. 72, 77, 145 S.E. 2d 332, 335.

Determining the custody of minor children is never the province of a jury; it is that of the judge of the court in which the proceeding is pending. G.S. 50-13; G.S. 50-16; G.S. 17-39; G.S. 17-39.1; G.S. 110-21(3); G.S. 7-103. See 3 Lee, N. C. Family Law § 222 (1963). In the former opinion in this case, we did not say that the custody of the Stanback children *depended* upon the jury's findings upon the trial of the issues. The import of the statement therefrom quoted above is this: (1) Judge Walker's award of custody was made *pendente lite* upon facts which he found from the *ex parte* affidavits which were the evidence before him; (2) Between the date of Judge Walker's order and the trial, sufficient time would have elapsed to evaluate the permanency of the change which Judge Gwyn found had occurred; and (3) At the trial, the judge who heard and saw the witnesses was empowered to alter Judge Walker's order if, after considering all the circumstances and the evidence in the case, he should find a change of custody to be in the children's best interest.

The jury found that defendant never became an habitual drunk-

ard. The judge was required to consider this finding and to evaluate it in its relation to all the other facts and circumstances bearing upon the question of custody. He apparently did consider it, for he found that defendant, as well as plaintiff, was a fit and suitable person to have custody and control of her children. Yet the judge was not required to award defendant the custody of the children upon her exoneration of the charge of habitual drunkenness any more than he was required to deprive her of custody because of the jury's answer to the fourth issue. The crucial question, the best interest of the children, remained for him to determine in the exercise of his sound judicial discretion.

The verdict in a divorce action can be an important factor in the judge's consideration of an award of custody, but it is not legally controlling. It is merely *one* of the circumstances for him to consider, along with all other relevant factors. In 24 Am. Jur. 2d, Divorce and Separation § 788 (1966), it is said that "a survey of the results of a large number of cases in the majority of states" reveals that the courts do not confine themselves to the practice of awarding custody to the innocent spouse in the divorce action. This is true, of course, because it is possible for a bad wife to be a good mother. By the same token, an erring husband can be a good father. Notwithstanding the misconduct of one of the parents in relation to the other, the welfare of their child may best be served by awarding its custody to the offending spouse where his or her fault does not reflect a present unfitness to rear the child. "This welfare can be determined to some extent by the comparative acts of the father and mother showing love and affection for it and a parental interest in its welfare." 24 Am. Jur. 2d, Divorce and Separation § 788 (1966).

The judge's statement that he understood our former opinion to require the question of custody to be determined by the jury's verdict and that — although he would hear any further evidence either party desired to offer — he intended to be guided by the verdict indicates that he was laboring under a misapprehension of the law. "And it is uniformly held by decisions of this Court that where it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light." *State v. Grundler*, 249 N.C. 399, 402, 106 S.E. 2d 488, 490; *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E. 2d 137, 141.

Plaintiff argues, however, that the judgment indicates that the judge did, in fact, exercise his discretion in making the award of custody. Nothing contained therein, however, refutes the judge's statement that, despite his willingness to hear further evidence on

the question, he intended to be guided by the jury's verdict in awarding custody because he understood the former opinion to require him to be. His judgment is entirely consistent with his announced intention to award custody to the party who prevailed before the jury.

Since this case goes back for a trial *de novo,* there appears no immediate necessity to vacate Judge May's order of custody. Such a course would probably result in another hearing prior to the next jury trial of the action. In the absence of some showing of necessity for an earlier reconsideration, the order of May, J., will stand until the retrial. After the retrial, the presiding judge will consider the matter of custody *de novo* and enter the order which, under all the circumstances, he then deems to be in the best interest of the children involved.

PLAINTIFF'S APPEAL.

Plaintiff states the single question posed by his appeal as follows: "Did the trial judge abuse his discretion by ordering that the plaintiff pay the sum of twenty thousand dollars ($20,000.00) as counsel fees for the defendant?" He further states that he "recognizes that the law is clear and well reasoned that the amount of attorneys' fees to be awarded to the wife in a divorce action is within the sound discretion of the trial judge and is unappealable except for abuse of discretion. *Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899 (1949)."

Plaintiff did not except to any of the findings of fact upon which Judge May made the challenged allowance. He excepted only to "the order that the plaintiff pay the sum of twenty thousand dollars as counsel fees for the defendant." The question presented, therefore, is whether the findings of fact support the order, or — as plaintiff states — whether Judge May abused his discretion. *Putnam v. Publications,* 245 N.C. 432, 96 S.E. 2d 445; *Merrell v. Jenkins,* 242 N.C. 636, 89 S.E. 2d 242; 1 Strong, N. C. Index, Appeal and Error § 22 (1957) and cases therein cited.

Stadiem v. Stadiem, supra, was an appeal by the defendant-husband from an allowance of fees made to the plaintiff's attorneys under G.S. 50-16. After pointing out that, generally speaking, G.S. 50-16 runs parallel with G.S. 50-15 regarding allowances for attorneys' fees, the Court said:

> "There are so many elements to be considered in an allowance of this kind; — the nature and worth of the services; the magnitude of the task imposed; reasonable consideration for the defendant's condition and financial circumstance, — these

and many other considerations are involved. On this appeal the question before us is not whether the award may not have been larger than that anticipated or even usual in cases of that kind; but whether in consideration of the circumstances under which it was made it was so unreasonable as to constitute an abuse of discretion." *Id.* at 321, 52 S.E. 2d at 901.

Considering the circumstances under which the award to defendant's counsel was made, we cannot say that it manifests an abuse of discretion. "The purpose of the allowance for attorney's fees is to put the wife on substantially even terms with the husband in the litigation." *Harrell v. Harrell,* 253 N.C. 758, 762, 117 S.E. 2d 728, 731; *Medlin v. Medlin,* 175 N.C. 529, 95 S.E. 857. Upon the oral argument, counsel for plaintiff, answering a question from the court, said that Judge May had ascertained the amount of compensation which plaintiff's lawyers had received before he fixed the compensation for defendant's attorneys.

Defendant is a native of Nebraska; she has no relatives in this State. She owns no property and has no income. Her husband is a man of wealth and a member of a prominent and well-established North Carolina family. In this action, he seeks a decree which would relieve him of all obligation to support defendant and from all responsibility to her. In the beginning, at least, he sought to deprive her of all contacts with the children then born of the marriage. The ends of justice require that both sides of a controversy such as this be fully explored and presented to judge and jury before decision is made. Defendant was, and is, entitled to adequate representation. Such representation, under the circumstances disclosed here, is not always readily available to a wife. Many attorneys are reluctant to take domestic relations cases under any circumstances, for the demands which a bitterly contested divorce and custody case make upon the lawyers involved are time-consuming, strenuous, and tension-creating. This is more especially true of the demands which the penniless wife makes upon the time of her attorneys, for her dependence upon them is absolute. There are few lawyers who would be willing, or could afford, to take her case without the expectation of receiving adequate compensation in the end — and recompense is frequently delayed.

After reading the 247 pages of record and briefs in the first appeal of this case and the 446 pages in this one, we are satisfied that the facts which Judge May found support his award.

The decision is this: The judgment awarding plaintiff a divorce from bed and board is vacated, and a new trial is ordered upon all issues arising upon the pleadings. The judgment awarding custody

stands until the retrial of the issues unless, for good cause shown, earlier reconsideration should become necessary. After the retrial, the judge will consider the question of custody *de novo*. The judgment awarding defendant's attorneys compensation is affirmed.

On plaintiff's appeal

Affirmed.

On defendant's appeal

New trial.

E. D. KUYKENDALL, JR., ADMINISTRATOR OF THE ESTATE OF PATTIE B. RIDDICK, DECEASED, PLAINTIFF, v. MRS. DELIA M. ZIMMERMAN PROCTOR, INDIVIDUALLY, AND MRS. DELIA M. ZIMMERMAN PROCTOR, GUARDIAN OF THE ESTATE OF MRS. PATTIE B. RIDDICK, INCOMPETENT, AND MRS. DELIA M. ZIMMERMAN PROCTOR, SUCCESSOR TRUSTEE UNDER A TRUST INDENTURE EXECUTED BY LUCY W. BALL ON NOVEMBER 15, 1929, RECORDED IN DEED BOOK 101, PAGE 69, OFFICE OF THE REGISTER OF DEEDS OF DURHAM COUNTY, NORTH CAROLINA, AND DEED BOOK 1747, PAGE 534, OFFICE OF THE REGISTER OF DEEDS OF GUILFORD COUNTY, NORTH CAROLINA, FOR THE USE AND BENEFIT OF MRS. PATTIE B. RIDDICK, ET AL., DEFENDANTS.

(Filed 20 June, 1967.)

1. Pleadings § 19—

A demurrer for failure of the complaint to state a cause of action admits for the purpose of testing the complaint all facts well pleaded in the complaint and appearing in any document attached thereto, together with all reasonable inferences therefrom, but it does not admit conclusions of law.

2. Same—

General allegations that defendant did things not authorized by law, without specifying the particular acts complained of, constitute a mere conclusion not admitted by demurrer.

3. Same—

A demurrer for failure of the complaint to state a cause of action must be overruled when facts properly alleged in the complaint, together with inferences of fact reasonably deducible therefrom, entitle plaintiff to judgment granting any relief.

4. Guardian and Ward § 10; Insane Persons § 4—

A guardian may not be held liable for use of funds of the estate to provide necessities of life for the incompetent, even though some other person is under legal duty to provide support for the incompetent, but the guardian is required to collect such funds from the third person and may be held liable to the incompetent's estate for the amount the estate of the

incompetent is reduced by the failure to collect such funds, plus interest. G.S. 33-20.

5. Same—

Where a third person is under legal duty to provide funds for the support of an incompetent, which would have provided for the reasonable comfort of the incompetent, and the guardian fails to collect such funds, and is able to provide the incompetent only with the bare necessities of life from the incompetent's own estate, *held*, upon the death of the incompetent, her estate may hold the guardian liable for the wrong done the incompetent in failing to provide the incompetent with reasonable comforts above the bare necessities of life.

6. Abatement and Revival § 14—

The trustee of an incompetent failed to collect sums due from a third person for the support of the incompetent, and, as a result, was able to furnish the incompetent with the bare necessities of life only, instead of reasonable comforts under the circumstances. *Held:* Upon the death of the incompetent, the right of action for the amount by which the incompetent's estate was decreased by failure to collect such funds, and the right of action for the wrong done the incompetent in failing to provide her with reasonable comforts, survive to the incompetent's personal representative. G.S. 28-172; G.S. 28-175(3).

7. Trusts § 8— Provision that trustee should provide reasonable comforts to life beneficiary held mandatory.

Defendant was trustee of a trust indenture and the guardian of an incompetent life beneficiary of the trust. The trust provided that the trustee should use the rents and profits from certain trust property, or so much thereof as might be necessary, to keep the life beneficiary in comfort. *Held:* The requirement that the rents and profits be used to keep the life beneficiary in comfort is mandatory and not permissive, and the trustee is not relieved of the duty to use the funds by reason of the fact that the life beneficiary had other properties, and upon the death of the life beneficiary the administrator of her estate may recover from the trustee the amount by which the estate of the life tenant was lessened by the failure of the trustee to perform her duty to use the sums reasonably required, not in excess of the trust income, and for damages for failure of the trustee to provide support of the beneficiary in keeping with her age, condition and circumstances.

8. Trusts § 6—

A court of equity will always compel a trustee to exercise a mandatory power and will control his exercise of a discretionary power when it is shown that he has exercised such discretionary power dishonestly or from other improper motives.

9. Limitation of Actions § 16—

The question of the bar of the statute of limitations may not ordinarily be raised by a demurrer for failure of the complaint to state a cause of action.

APPEAL by plaintiff from *Armstrong, J.*, at the 21 November 1966 Session of GUILFORD.

The defendant, in her several capacities as individual, guardian and successor trustee, filed demurrers *ore tenus* to the complaint on the ground that it does not allege facts sufficient to constitute a cause of action and that the plaintiff is not the real party in interest. From a judgment sustaining the demurrers and dismissing the action, the plaintiff appeals.

Attached to and made a part of the complaint is the "Lucy W. Ball Trust Indenture," executed 15 November 1929, by which Mrs. Ball conveyed to M. W. Ball, Trustee, certain properties. A part of the properties were to be held for the use of the settlor for life. The remaining properties were to be divided into four shares, one of which the trustee was to hold for the benefit of Mrs. Pattie B. Riddick, the settlor's daughter, for life, the provisions of the indenture as to that share being:

> "[A] one fourth (¼) interest of the remainder to Mrs. Pattie B. Riddick for life to be held in trust by the said trustee for her use and benefit and the said Trustee is to manage said one fourth (¼) for the said Mrs. Pattie B. Riddick and use the rents and profits therefrom or so much thereof as may be necessary to keep her in comfort and at her death all of said one fourth (¼), together with any accumulated rents or profits thereon shall be conveyed in fee simple by said Trustee as follows: to wit: a one third (⅓) interest of the same to M. W. Ball; a one third (⅓) interest of the same to the children of my deceased daughter, Mrs. E. L. Miller, share and share alike and a one third (⅓) interest of the same to be added to the trust fund herein created for Mrs. W. T. Spencer and her children * * *"

The essence of the complaint, in addition to the provisions of the above trust indenture, is:

The plaintiff is the duly appointed and acting administrator of the estate of Mrs. Riddick.

On 1 February 1936, the defendant, Mrs. Proctor, was duly appointed guardian of the estate of Mrs. Riddick, an incompetent. Mrs. Riddick owned a life estate in certain valuable properties. As guardian, Mrs. Proctor received the income from these until the death of Mrs. Riddick.

By judgment entered in January 1938, Mrs. Proctor was appointed successor trustee under the Lucy W. Ball trust indenture and succeeded, as trustee, to the trust properties.

Both the properties held by Mrs. Proctor as guardian for Mrs. Riddick and the properties held by her as trustee for Mrs. Riddick, these being separate and distinct, produced income amounting to

"thousands of dollars" each year. Both as guardian and as trustee, Mrs. Proctor filed annual accounts with the clerk of the superior court. She kept the two funds and the receipts therefrom separate.

As one of the children of Mrs. E. L. Miller, Mrs. Proctor owned a vested remainder interest in the properties held by her as trustee. Consequently, she had a personal interest in the conservation and improvement of the corpus thereof and in the accumulation in her hands of rents and profits derived therefrom.

As guardian, Mrs Proctor spent all of the net income derived from the properties held by her as such guardian in providing for Mrs. Riddick "the bare necessities of life" and in doing "other things not authorized by the laws of North Carolina in the management of a fiduciary estate."

As trustee, Mrs. Proctor failed and refused to apply the rents and profits from the properties held by her as trustee for the purpose of providing Mrs. Riddick "with the comforts befitting her station in life during her lifetime, with the fixed intent and purpose of enhancing the value of the trust estate available for distribution among the remaindermen," including Mrs. Proctor, individually, upon the death of Mrs. Riddick.

As guardian, Mrs. Proctor failed to preserve and accumulate the income received by her from the properties held by her as guardian.

In consequence of such acts and omissions by Mrs. Proctor, as guardian, all of the income received by her, as guardian, was expended so that at the death of Mrs. Riddick there were no assets held by Mrs. Proctor, as guardian.

As trustee, Mrs. Proctor "failed in the performance of the duties owed by her to Pattie B. Riddick, the life beneficiary of the trust estate * * * and fraudulently and wrongfully accumulated in her hands as Successor Trustee the trust estate rents and profits and other income which should have been used * * * to provide for Mrs. Pattie B. Riddick the comforts befitting her station in life during her lifetime."

As guardian, Mrs. Proctor "failed in the performance of the duties owned by her to her ward, and mismanaged the properties owned by Pattie B. Riddick, incompetent, for her life, and mismanaged, misapplied, misappropriated, and fraudulently and wrongfully expended the rents, profits, and other income derived from said properties owned by Pattie B. Riddick, incompetent, for life," in that: She failed to require herself, as trustee, to expend from the income of the trust estate the amounts necessary to provide Mrs. Riddick with "the comforts befitting her station in life during her lifetime"; she spent and exhausted the income derived by her, as guardian, "in

providing the bare necessities of life" for Mrs. Riddick; she failed to require herself, as trustee, to reimburse herself, as guardian, for the amounts spent by her, as guardian, "in providing the necessities and comforts of life for Mrs. Riddick"; and she failed to hold, reserve, and accumulate and invest the net income received by her, as guardian, from the properties owned by Mrs. Riddick for her life.

By reason of the said acts and omissions of Mrs. Proctor, as guardian and as trustee, the plaintiff administrator has been damaged in excess of $150,000, which amount he is entitled to recover from Mrs. Proctor, individually.

Mrs. Proctor, as trustee, has, since the death of Mrs. Riddick, distributed to herself and others accumulated income of the trust estate in excess of $100,000, which should have been in the estate of Mrs. Riddick, for which amount Mrs. Proctor, individually, is liable to the plaintiff administrator.

The prayer of the complaint is: That Mrs. Proctor be required to render to the plaintiff an accounting of all rents, profits and other income received and all disbursements made by Mrs. Proctor, as trustee, and by Mrs. Proctor, as guardian; that the plaintiff recover of Mrs. Proctor, as trustee, as guardian, and individually all assets of the estate of Mrs. Riddick which are or should be in the custody of Mrs. Proctor in any of her said capacities; that the plaintiff recover of Mrs. Proctor, individually, all sums owing by her in any of her said capacities to the plaintiff; that the court appoint a competent person to audit the records and accounts of Mrs. Proctor, as trustee, and of Mrs. Proctor, as guardian.

Wharton, Ivey & Wharton and Watkins & Jarvis for plaintiff.
Claude V. Jones for defendant.

LAKE, J. In determining the sufficiency of a complaint to withstand a demurrer filed on the ground that it does not state facts sufficient to constitute a cause of action, all facts well pleaded in the complaint, including inferences of fact reasonably deduced therefrom and the provisions of any document attached to and made a part of the complaint, are deemed admitted by the demurrer, but conclusions of the pleader as to the proper construction of such instrument are not admitted by the demurrer and are not binding upon the court. *Gay v. Thompson,* 266 N.C. 394, 146 S.E. 2d 425; *McLeod v. McLeod,* 266 N.C. 144, 146 S.E. 2d 65; *Horton v. Redevelopment Commission,* 259 N.C. 605, 131 S.E. 2d 464; *McCallum v. Insurance Co.,* 259 N.C. 573, 131 S.E. 2d 435.

General allegations of wrongdoing, which do not specify the al-

leged wrongful act or omission, such as the allegation that the defendant "did other things not authorized by the laws of North Carolina in the management of a fiduciary estate," are mere conclusions of law. These must be disregarded in determining the sufficiency of the pleading attacked by the demurrer. The question is, Assuming the facts to be as alleged in the complaint, together with the inferences reasonably to be drawn therefrom, and no others, is the plaintiff entitled to a judgment granting some relief? If so, it was error to sustain the demurrers.

The guardian of the estate of an incompetent person, who has no other adequate means or source of support, is authorized, if not required, to use, for the support of the ward in keeping with his or her age, condition and station in life, so much of the income from the ward's properties as is reasonably required for such purpose. See: *Casualty Co. v. Lawing,* 225 N.C. 103, 33 S.E. 2d 609; *Long v. Norcom,* 37 N.C. 354; 39 C.J.S., Guardian and Ward, § 62; 25 Am. Jur., Guardian and Ward, §§ 68 and 69. Consequently, the guardian cannot be held liable to the ward, or the ward's estate after the termination of the guardianship, for such expenditures, nothing else appearing.

It is alleged in the complaint that the expenditures by Mrs. Proctor, as guardian, of the income of her ward's estate provided for the ward only the "bare necessities of life." Assuming that some other person was under a legal duty to provide such support for the ward but failed and refused to do so, it would not be a violation of a guardian's duty to use income from the ward's property in order to provide the bare necessities of life pending efforts by the guardian to persuade or compel such other person to perform his duty. The law does not require the guardian to allow the ward to starve while the guardian litigates the ward's right to support by another. Thus, the application by Mrs. Proctor, as guardian, of the income of her ward's property to the support of the ward would not, of itself, make Mrs. Proctor, as guardian, liable to the ward or to the ward's administrator.

It is, however, also the duty of the guardian to preserve the estate of the ward and to take practicable action to enforce the ward's rights against others. *Stewart v. McDade,* 256 N.C. 630, 124 S.E. 2d 822. G.S. 33-20 provides, "Every guardian *shall* take possession, for the use of the ward, of *all* his estate, and *may* bring *all* necessary actions therefor." (Emphasis added.) As stated by Settle, J., speak- for the Court, in *Armfield v. Brown,* 73 N.C. 81: "A guardian is liable not only for what he receives, but for all he ought to have received of his ward's estate. And while infallible judgment is not ex-

pected of him in the management of his ward's estate, yet ordinary diligence and the highest degree of good faith is expected and required of him in the execution of his trust." It is the duty of a guardian of the estate of an incompetent person to exercise due diligence in the collection of an obligation owing to the ward. The guardian is liable to the ward's estate for any loss to it by his failure to do so. *Coggins v. Flythe,* 113 N.C. 102, 18 S.E. 96; 39 C.J.S., Guardian and Ward, § 78. When the guardianship is terminated by the death of the ward, the right to compel the guardian to pay over the money of the ward then in his hands, or which ought then to be in his hands, passes to the administrator of the ward. *Lowder v. Hathcock,* 150 N.C. 438, 64 S.E. 194.

In *Culp v. Lee,* 109 N.C. 675, 14 S.E. 74, a guardian was sued for having accepted from the executor of an estate a smaller amount than should have been distributed to his wards. Clark, J., later C.J., speaking for the Court, said, "If the guardian received for his wards a less sum than they were entitled to receive, it is true they can sue the guardian and his sureties for his default, but they have their election to sue either the guardian or the executor from whom he insufficiently collected the fund devised to them or both." Again, in *Luton v. Wilcox,* 83 N.C. 21, where a guardian was charged with having accepted in settlement of a bond due the ward a sum less than its face amount, Dillard, J., speaking for the Court, said, "The rule of diligence established by the decided cases is, that a guardian in the management of his ward's estate must act in good faith and with that care and judgment that a man of ordinary prudence exercises in his own affairs."

In *Clodfelter v. Bost,* 70 N.C. 733, the plaintiff, after becoming of age, sued his former guardian for the negligent failure to collect from the United States Government a pension, payable under the law for the benefit of the plaintiff by reason of the death of his father from wounds received in the Mexican War, such pension being no longer recoverable by the plaintiff from the government at the time of the institution of the action. In holding the guardian liable, the Court, speaking through Bynum, J., said:

> "Thus he knew that his ward's father had been killed as a soldier in Mexico and that the plaintiff was his only child and heir at law. It was therefore his duty to enquire and ascertain whether the father owned any estate or rights of property which would fall to his ward. Such an enquiry would probably have led him to a knowledge of this right of pension. But he made no enquiries and appears to have lost sight of his ward and of his trust.

"We conclude that all the facts which were within his knowledge were sufficient to put the defendant upon the enquiry as to the pension, and this, added to his negligence in the matters before referred to, properly subject the defendant to the payment of the pension money lost by his default."

If Mrs. Proctor, as guardian, paid out money belonging to her ward's estate for the support of her ward when it was the legal right of the ward to require some other person to support her, it would then be the right and duty of the guardian to obtain reimbursement from the person so liable for the ward's support. It would, of course, be no less the duty of Mrs. Proctor, as guardian, to seek such reimbursement where she, herself, as trustee, was the person under a duty to support the ward.

This Court has held that where a father of a minor child is financially able to support the child, the father, as guardian of the child's estate, may not claim credit in his accounts for expenditures of the funds of the child for his or her support. *Burke v. Turner*, 85 N.C. 500; 39 C.J.S., Guardian and Ward, § 62d(3). There, the liability of the guardian was not for damages arising from the difference in quality of the support which the guardian supplied to the ward and that which the ward might have had if the person primarily liable had done his duty. The guardian's liability in that case was for diminution of the ward's estate resulting from the guardian's expenditure of the ward's funds and his failure to obtain reimbursement from the person liable for the support.

If this guardianship had terminated during the life of the ward, the ward could undoubtedly have sued the guardian for the recovery of assets which the guardian would have then had in possession if the guardian had diligently preserved the estate and had collected reimbursement from the person liable for the ward's support. Upon the death of the ward, this right would pass to the ward's administrator. The right of the ward to sue the guardian for lack of diligence in the care of the estate survives to the administrator. G.S. 28-172. The action being for the recovery of money due the administrator from the guardian, it is not one for relief which could not be enjoyed, or the granting of which would be nugatory after death, so as to fall within the class specified in G.S. 28-175(3).

Obviously, the estate in the hands of Mrs. Proctor, as guardian, for transfer to the plaintiff administrator at the death of Mrs. Riddick, could not have been enhanced by use of the income of the Ball Trust to keep Mrs. Riddick in more "comfort" than she enjoyed from the use of the funds of the guardianship estate. By hypothesis, the trust income so used by the trustee would have been

spent or consumed before Mrs. Riddick died. Thus, on the theory that it was the guardian's duty to obtain from the trustee reimbursement of the guardianship estate, the plaintiff's recovery from Mrs. Proctor, as guardian, could not exceed the total of the guardianship funds actually used by Mrs. Proctor, as guardian, for Mrs. Riddick's support, plus interest. The complaint alleges these were sufficient to supply only the "bare necessities of life."

However, it is the duty of the guardian of the estate of an incompetent to collect, insofar as practicable, all monies due the ward, including damages for wrongs done to the ward which are known to the guardian. To be sure, one cannot be made comfortable retroactively, but one can be presently compensated for comforts wrongfully withheld in the past. If Mrs. Riddick was entitled to be kept "in comfort" by the trustee, it was a wrong done her by the trustee for the trustee to deny her the difference between the "bare necessities of life," supplied by the guardian, and the "comfort" to which she was entitled under the trust.

Surely, had Mrs. Riddick been *sui juris,* she could have recovered damages from the trustee for an accomplished denial of her right under the trust indenture. If her guardian knew of such right of action in the ward, the guardian was under a duty to enforce it, collect the damages due the ward for "comfort" wrongfully withheld in the past and add the sum so collected to the guardianship estate. Had the guardian done so, the estate in the guardian's hands at the death of the ward, then payable over to the plaintiff administrator, would have been enhanced beyond its mere reimbursement for the guardianship funds used to supply the ward with the "bare necessities of life."

The complaint alleges, and the demurrer admits for present purposes, that the guardian not only knew of this wrongdoing by the trustee, she, herself, being also the trustee, but brought it about and participated in it for the purpose of deriving, as remainderman of the trust properties, a personal gain thereby. Such conduct is not compatible with the duty of a guardian of an incompetent's estate to use due diligence to collect and preserve for the ward's benefit all sums due the ward from others.

Thus, had the guardianship terminated during the life of Mrs. Riddick, she, upon the allegations of this complaint, admitted by the demurrer for present purposes, would have had a right to recover from Mrs. Proctor, as guardian, the damages which Mrs. Proctor, as guardian, was under a duty to collect from the trustee and wilfully failed to collect. This right also survived the death of Mrs. Riddick and passed to the plaintiff administrator.

We must, therefore, determine whether Mrs. Proctor, as trustee, was under a duty to provide for the support of Mrs. Riddick out of the income of the trust established by Mrs. Ball, and, if so, to what extent. This turns upon the construction to be given the following language in the trust indenture:

> "A one-fourth (¼) interest * * * to Mrs. Pattie B. Riddick for life to be held in trust by the said Trustee for her use and benefit and the said Trustee is to manage said one-fourth (¼) for the said Mrs. Pattie B. Riddick and use the rents and profits therefrom or so much thereof as may be necessary to keep her in comfort and at her death all of said one-fourth (¼), together with any accumulated rents or profits thereof shall be conveyed in fee simple by the Trustee as follows * * *"

This language is mandatory, not permissive. It does not provide that the trustee is authorized to use but states that the trustee "is to" use the rents and profits of the trust properties to keep Mrs. Riddick in "comfort." We think it clear that the settlor of this trust, the mother of Mrs. Riddick, used the words "so much thereof as may be necessary" to limit the expenditures to the total amount reasonably required for Mrs. Riddick's support in "comfort" and did not mean thereby that no funds were to be used for this purpose so long as Mrs. Riddick had other properties. The latter interpretation would deprive this incompetent daughter of any benefit from the trust established for her by her mother unless it could be shown that the daughter was in actual financial need.

In Scott on Trusts, 2d ed., § 128.4, it is said:

> "It is a question of interpretation whether the beneficiary is entitled to support out of the fund even though he has other resources. Where the trustee is directed to pay to the beneficiary or to apply for him so much as is necessary for his maintenance or support. The inference is that the settlor intended that he should receive his support from the trust estate, even though he might have other resources."

To the same effect, see: Bogert, Trusts and Trustees, 2d ed., § 811; Restatement of Trusts, 2d ed., § 128(e); 54 Am. Jur., Trusts, § 184; Annot., 101 A.L.R. 1461, 1465.

We, therefore, hold that it was the duty of Mrs. Proctor, as trustee, to apply the income of the trust to the support of Mrs. Riddick in "comfort," in accordance with her age, her station in life and her physical and mental condition, irrespective of any income which might be derived from her own properties.

The right of Mrs. Riddick, under the trust, was not to have the total income of the trust paid to her or used for her benefit, but to have the trustee use the income "to keep her in comfort." Obviously, the amount to be spent and the purpose of the expenditure were left by the settlor to the sound discretion of the trustee in the light of the amount of income available and all the conditions of and surrounding the beneficiary. Scott on Trusts, 2d ed., § 128.4; 54 Am. Jur., Trusts, § 182; Annot., 101 A.L.R. 1461, 1484 *et seq.* Nevertheless, where, as is here alleged in the complaint and admitted for present purposes by the demurrer, the trustee fails to provide support and accumulates the trust income for the trustee's own advantage, this is an abuse of discretion, and the court will determine the amount which ought to have been used to "keep the beneficiary in comfort."

The court of equity will always compel a trustee to exercise a mandatory power and will control his exercise of a discretion vested in him when it is shown that he has exercised it dishonestly or from other improper motive. *Woodard v. Mordecai*, 234 N.C. 463, 67 S.E. 2d 639. Here the complaint alleges, and the demurrer admits for present purposes, that Mrs. Proctor, as trustee, did not use the trust income for the support of Mrs. Riddick, as it was her duty to do, her motive being to retain it for her own benefit as remainderman. For such a breach of trust, the court of equity will not only give the beneficiary, during her lifetime, relief for the future, but will also require the trustee to pay to the beneficiary, or to her guardian, the amount which the trustee should have expended for her support in the past and did not. In *Collister v. Fassitt*, 163 N.Y. 281, 57 N.E. 490, the court required such payment to the beneficiary for past niggardliness by the trustee, saying:

> "We are of the opinion that the defendant took the residuary estate of the testator charged with the payment of a reasonable amount for the support of the plaintiff in accordance with the terms of the will, and, as she failed to honestly and fairly exercise the discretion vested in her, it was competent for a court of equity to ascertain the amount and decree its payment."

The amount so recoverable by or for the beneficiary, on account of such past breach of the trustee's duty, in the absence of proof of special damages, such as injury to the beneficiary's health due to malnutrition or lack of medical attention, is the amount, not in excess of the trust income, which would have been reasonably required in such past period to support the beneficiary in keeping with her then age, her then physical and mental condition, the amount of the trust income, her usual associates and social activities as contem-

plated by the settlor and any other circumstances throwing light upon the settlor's intention as to the meaning of "comfort," less payments actually made by the trustee for such purpose and less amounts for which the trustee is under a duty to reimburse third persons, including the guardian of the beneficiary, for sums expended by them for the beneficiary's support.

The right of action against the trustee, both for reimbursement of the guardian for funds paid by the guardian for the support of Mrs. Riddick and for damages, if any, for the beneficiary's loss of "comfort" through the trustee's failure to carry out the trust, was vested in the guardian during the continuance of the guardianship. G.S. 33-20. Like other property rights constituting the guardianship estate, it passed to the plaintiff administrator upon the death of the ward. It is not necessary for us to determine whether, in view of the fact that the guardianship and the trusteeship are vested in the same person, any part of the claim against the trustee is barred by the statute of limitations, since that defense cannot be raised by a demurrer for failure of the complaint to state a cause of action. *Harrell v. Powell*, 251 N.C. 636, 112 S.E. 2d 81.

We hold, therefore, that the complaint states facts sufficient to constitute a cause of action against the defendant for violation of duties, both in her capacity as guardian and in her capacity as trustee, that the cause of action is now vested in the plaintiff administrator, that he is the real party in interest and that the superior court had jurisdiction. G.S. 28-147. Consequently, the demurrers *ore tenus* should have been overruled.

The truth or falsity of the allegations of the complaint is yet to be determined. Solely for the purpose of determining the sufficiency of the complaint to allege a cause of action, we have here treated the allegations as admitted by the defendant to be true.

Reversed.

STATE OF NORTH CAROLINA v. WAYNE DARNELL BUMPERS.

(Filed 20 June, 1967.)

1. Jury § 3—

The court correctly permits the solicitor to ask prospective jurors whether they have scruples against capital punishment and in the event they express such scruples the court correctly excuses them for cause, since the State, as well as defendant, is entitled to impartial jurors.

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

The search with the free assent of the owner of a house in which defendant lived, as established by the owner's testimony, and the seizure of a gun belonging to the owner of the house from a part of the house not assigned to defendant, *held* not to require a search warrant, and the gun was properly admitted in evidence upon ballistics identification of it as the one used in the commission of the offenses, and defendant's motion to suppress the evidence was properly denied.

3. Searches and Seizures § 1—

Defendant, against whom incriminating evidence is procured by the search of premises with the consent of the owner, has no ground for complaint, since no constitutional right can be violated by a search with the consent of the owner of the premises. Constitutional guarantees must be applied with a view of protecting the public against criminals as well as protecting the innocent who are unjustly accused.

4. Criminal Law §§ 97; 110—

If the solicitor was guilty, in this case, of commenting in his argument upon defendant's failure to testify, such impropriety was cured by the court's explicit instruction that defendant's failure to testify created no presumption against him whatsoever, that there was no requirement that defendant testify, but that the State was required to prove defendant's guilt beyond a reasonable doubt.

APPEAL by defendant from *Hobgood, J.*, 24 October 1966 Criminal Session, ALAMANCE Superior Court.

The defendant Wayne Darnell Bumpers was charged in a bill of indictment with the rape of one Loretta Briggs Nelson on 31 July 1966. In another bill he was charged with a felonious assault upon her with a .22 caliber rifle, and in a third bill with a felonious assault upon Monty Jones. The three cases were consolidated for trial and were tried at the October 1966 Criminal Session.

The State offered evidence through the testimony of Loretta Nelson, twenty-one years of age, and who is separated from her husband, which is summarized herein. She said that on the night of 31 July 1966, she went for a ride in her 1965 Corvair with Monty Jones, whom she had been dating for some time. They parked on a secluded road and had been there for about ten minutes when the defendant Wayne Bumpers came up to the car and tapped on the window. She rolled the window down about two inches, and he asked her to open the door. Upon her refusal, he put a rifle in the window and told her to get out of the car. When she did, he demanded her favors, which she refused. Bumpers then pointed the gun at Monty Jones, and said "Are you going to give it to me?" She then consented, and he said, "Well, strip." She took her clothes off, laid on the back of the car, and the defendant raped her. He had made Monty get in the back seat and kept the rifle in his hand pointed towards Monty's

head. The defendant hit Loretta in the head with a gun, causing it to bleed. She testified that he had intercourse with her. She put her clothes back on, and the defendant then made the couple walk down the road. He followed about fifteen feet behind them with his gun. He ordered them to get in the car, with Loretta in the driver's seat, the defendant sitting beside her, and Monty on the back seat. He held a gun on Monty and told Loretta that if she tried to run off the road he would shoot Monty. They came to a little road, and the defendant made them stop the car, get out, and walk down to some bushes. He made them lie down on the ground and told them to stick their hands up in the air. Loretta begged him to let them go, to which Bumpers replied, "I can't do it; you will go to the cops." He said he was going to kill them. Monty then told Bumpers to tie them to a tree, that he didn't have to kill them. At Monty's suggestion, the defendant made Loretta tie Monty to a tree with her belt with his hands behind him, blindfolding and gagging him. The defendant then tied Loretta to a tree, after which he raped her again, having taken off her shorts and pants. After this, the defendant asked Monty where his heart was and then stepped back and shot him. He reloaded the gun and shot Loretta through the left breast, the bullet going all the way through her. The defendant left in Loretta's car. She got her hands free and untied Monty. They walked up the road to a farm house (McPherson's), called for help, and told Mr. McPherson that a negro boy had shot them. McPherson called the Sheriff's Department and an ambulance, which took them to Alamance County Hospital.

Loretta said that from the time they first saw the defendant until they got loose was about an hour and a half. "During that time I had an opportunity to hear him talk. I got an opportunity to look at his face, when he opened the car door. The light in the car come on. It was a full moon out there that night otherwise; we could see pretty clear." She identified the defendant as her assailant, said she had never seen him before July 31, but "I know I saw him on July 31. In my own mind I am certain, and nothing could really dissuade me from it."

The testimony of Loretta's companion, Monty Jones, was similar to hers in that he described the events just as she did. He said, also, that he was shot in the middle of the chest, and the bullet lodged in his back. It was taken out three days later. Monty was taken to Alamance Hospital and later transferred to Memorial Hospital in Chapel Hill where he stayed for two weeks. He testified that the doctor sewed up both sides of his stomach, took out his spleen and did something to his lip. He said "I saw the man who assaulted me

on July 31 in the courtroom. (Witness indicates the defendant.) I am indicating the defendant Wayne Darnell Bumpers . . . I seen my attacker in the car. I knew what he looked like. I seen him in the car. I only knew what he looked like."

The State offered evidence to corroborate the testimony of these two witnesses relating to what they had told them and also as to the identification of the defendant as the assailant.

Dr. William M. Crutchfield testified that he was an intern at Memorial Hospital in Chapel Hill, that he treated Monty Jones and described the latter's injury, that Dr. Hartzog performed an exploratory operation with Dr. Crutchfield assisting. He said "The missile track indeed went through the anterior or front portion of the diaphragm, went through the left side of the liver, through the lower part of the stomach and lacerated or injured the spleen . . . and you could feel the bullet underneath the skin on the left side of the chest . . . the spleen had to be removed because it was bleeding . . . the bullet was not removed at this time for many reasons, one being the area had a lot of air in the skin . . . Six days after he was admitted to the hospital, . . . we put this (anesthetic) in the skin, made a very small incision, and the bullet popped right out." He testified that the next day he gave the bullet to Mr. Minter, agent of the S.B.I.

J. M. Minter testified that he is a member of the State Bureau of Investigation, that he went to the place which was described as the scene in question where he found a .22 cartridge. He also saw some dress material, or cotton, one piece tied three or four feet above the ground with some parts lying on the ground and some strands of thread from which cloth had been removed. He testified that on August 2 he went to the home of Mrs. Hattie Leath, grandmother of the defendant who lived with her, where he found a .22 caliber, single-shot rifle which was taken to the S.B.I. laboratory in Raleigh and turned over to Agent John Boyd. He identified a .22 caliber bullet that he received from Dr. William Crutchfield at Chapel Hill, and it was also taken to the S.B.I. laboratory in Raleigh and given to Agent John Boyd who further identified a .22 spent cartridge which was found at the scene of the shooting in the area where the cloth was tied on the tree. This was also taken to Raleigh and turned over to Agent John Boyd.

John Boyd testified that he has been employed with the State Bureau of Investigation for fifteen years and is the Special Agent in charge of the Firearms Section of the Crime Laboratory. His specialty is firearms identification and ballistics work. The Court held that he was an expert in that field. He identified the cartridge

case and the two bullets received from Mr. Minter as having been fired from the rifle which had previously been identified as being the one found in the home of Mrs. Hattie Leath.

Dr. Allen D. Tate, Jr., whom the Court held to be a medical expert, testified that he made a pelvic examination of Loretta Nelson on the evening of July 31, made a slide, which showed the presence of sperm. He said he was not able to tell how long it had been there but gave it as his opinion that she had engaged in sexual intercourse within the past twenty-four hours prior to the time he saw her. He said she had a contusion and a laceration of her forehead, which was bleeding slightly and required three stitches.

The defendant moved for judgment as of nonsuit at the close of the plaintiff's evidence, which was denied. The defendant offered no evidence and again moved for judgment of nonsuit, which was denied.

The jury returned verdicts of guilty as charged in the bills of indictment (for felonious assault) and a verdict of guilty of rape with the recommendation of life imprisonment. The Court thereupon pronounced sentences of ten years imprisonment, to run consecutively, in each of the felonious assault cases, and that he "be imprisoned in the State Prison for the remainder of his natural life, to be assigned to work as by law provided," which was to begin at the expiration of the two ten-year sentences in the felonious assault cases.

From the judgments, the defendant appealed.

Smith, Moore, Smith, Schell & Hunter by Norman B. Smith, Attorneys for the defendant. Of Counsel: Lee, High, Taylor & Dansby by Herman L. Taylor.

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

PLESS, J. The defendant makes a very interesting argument in his brief to the effect that it was error for the Court to excuse prospective jurors on the ground that such persons did not believe in capital punishment. He recognizes that this position has been adversely determined in the very recent case of *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453, but requests that the Court reconsider and reverse the ruling therein made. However, this decision was adopted by a unanimous Court within the past few weeks, and the reasoning of it is sound and convincing. The following excerpts, some of which are quotations from other courts, are well chosen and concisely stated in the opinion of Chief Justice Parker:

"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.

"'. . . What (the defendant) 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.'

"'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 that under the Statute the verdict must be unanimous both as to guilt and as to punishment. As a result, . . . 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.'

"'Upon the theory that conscientious scruples against infliction of the death penalty under any circumstances, or equivalent beliefs, equally disqualify a jury 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.'"

Fifty-three prospective jurors were examined, sixteen of whom stated that they were opposed to capital punishment, and they were thereupon excused from service. If the argument of the defendant is to be carried to extremes, it would mean that if the State had exhausted its peremptory challenges when these sixteen jurors were examined that the entire jury would have been opposed to capital

punishment. It is well-known that in many horrible cases the defendants are anxious to avoid the possibility of a death sentence and will offer, and in fact plead for permission, to enter a plea of guilty which will mean the imposition of a life sentence. However, the Solicitor in many of these cases feels that the public interest requires that a jury, rather than he, should take the responsibility of saving the defendant from the death penalty, if it is to be done, and therefore puts the defendant on trial in which the death penalty is sought.

Every litigant, whether it be the State or the defendant, in a criminal case or the parties in a civil case, is entitled to an impartial jury. Where a juror states in advance that under no circumstances would he accept the contentions and positions of a party, he is not impartial to that party but, as a corollary, must necessarily be partial to the adversary.

If a prospective juror stated that under no conditions would he acquit a defendant or that no evidence could cause him to convict the defendant, it should not be claimed that he was an impartial juror. In a case in which the prosecution was relying exclusively upon circumstantial evidence, no court would require the State to accept a juror who stated that under no conditions would he convict a defendant upon circumstantial evidence. Where a venireman states that he has read or heard so much about a case that he had formed the opinion that the defendant was guilty, and he would not under any conditions acquit him, no court would permit such person to serve on the jury; and we can conceive of no reasonable person who would argue that he should. This, however, is merely the corollary of the defendant's position in this case.

The result in this case refutes the argument of the defendant. A jury wholly composed of persons who believe in capital punishment have still not imposed it upon the defendant in a case where the facts overwhelmingly would sustain the death penalty.

The defendant complains of the search of his grandmother's house which resulted in finding a rifle that has been identified as the one which fired the shots into the bodies of Mrs. Nelson and Monty Jones. But it must be remembered (1) that his premises were not searched — they were his grandmother's; (2) *his* rifle was not taken — it was his grandmother's; (3) *she* gave permission for the search and has not yet complained of it. Since the Solicitor announced that he was not relying upon the search warrant but upon permission given by the owner of the premises for its search, the question arises as to whether her consent was voluntarily given. While there are decisions that the presence of officers and the announcement that

they wish to search premises constitutes a condition in which coercion and intimidation may be present, they are not applicable here.

The defendant sought an order of the Court requiring the State to return the rifle and to suppress evidence regarding it. In support of the motion they offered the affidavit of Mrs. Hattie Leath in which she said: "On Tuesday, August 2, 1966, at about 2:00 P.M., four white men drove up to her house in two cars. She knew these men to be officers of the Alamance County Sheriff's Department, although they were not in uniform . . . One of the deputies came up on the porch of her house and walked up to the front screened door. She was standing immediately inside the door. The deputy said he had a notice or a warrant or something like that, for searching her house. He did not appear to have any paper in his hand, and he did not read anything to her. After hearing this, she did not stop to think about whether the officers had a right to search her house. She simply answered the officer right away by saying, 'Go ahead,' as she opened the door and stepped out onto the porch. The officers began at once to search the house."

During the trial the State offered the rifle which was found in the house, and upon objection to its admission, the Court excused the jury, and Mrs. Leath testified in person. Some of her statements are quoted as follows (the underscoring is ours): "I own my own house; it belongs to me . . . The defendant Wayne Darnell Bumpers was living with me on that date . . . He has been living with me at this place all of his life . . . Sheriff Stockard came out to my home . . . Four of them came. I was busy about my work, and they walked up and said, 'I have a search warrant to search your house,' and I walked out and *told them to come on in.* . . . I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied . . . I told Mr. Stockard to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything . . . I let them search, and it was *all my own free will.* Nobody forced me at all." She also said, "I did have a .22-caliber Remington, single-shot rifle at my house on July 31. Most of the time it stayed inside the wardrobe and then behind the door, out from the living room. This is my rifle . . . I have owned it since my husband bought it."

It is to be noted that the rifle was not found in the defendant's private room, nor in any part of the house assigned to him, but "inside the wardrobe, or behind the door."

Following Mrs. Leath's testimony, the following entry was made by the Court:

> "THE COURT: The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers. MOTION DENIED for suppression of the evidence with references to the .22-caliber rifle, marked State's Exhibit No. 2."

We know no better way to establish that one's actions were voluntary than by the statement and attitude of the person concerned. No interpretation can be placed upon Mrs. Leath's testimony that would sustain any claim of coercion or pressure or intimidation. The defendant cites *Mapp v. Ohio,* 367 U.S. 643 (1961), and we have also had called to our attention the very recent case of *Maryland Penitentiary v. Hayden,* decided by the U. S. Supreme Court 29 May 1967. Upon consideration of them, we find them inapplicable here. Rather, the terse statement of Denny, J., later C.J., speaking for the Court in *State v. Moore,* 240 N.C. 749, 83 S.E. 2d 912, is controlling:

> "The first question posed is whether a search warrant was required to search the premises of the defendant if he consented to the search. The answer is no. It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether. . . . The second question is whether the defendant consented for the officers to search his premises . . . The Court found as a fact that the defendant, at the request of the officers, voluntarily gave them permission to search his premises . . . the ruling of a trial judge on a *voir dire,* as to the competency or incompetency of evidence [adduced upon the search], will not be disturbed if supported by any competent evidence."

It cannot be successfully argued that when the owner of premises voluntarily gives consent for search that all of the other occupants of the house are required to agree. "One cannot complain of an illegal search and seizure of premises or property which he does not own . . . and one may not object to an illegal or unreasonable search of the property of another, if his own privacy is not unlawfully invaded." 79 C.J.S. 811, *et seq.* Had the rifle-user concealed

the weapon under a stack of hay in a neighbor's barn, his permission need not be granted before the barn could be searched.

In *Commonwealth v. Tucker,* 189 Mass. 459, 76 N.E. 127, the officers searched the home where the defendant resided after his mother had invited them to make any search they desired. They found evidence that incriminated the defendant. He contended that the articles taken in the search were not admissible against him. The Court said, "It is argued that the defendant did not consent and that his mother could not consent for him. But that is immaterial. The officers did not act under the warrant but under the invitation of the mother."

The object of government is to protect the rights of the public — the people. Otherwise, there is no reason for it — and the individual would have to protect his home, his possessions, and his family. In protecting the public, we must always remember that innocent persons may be unjustly accused, and their rights, too, must be safeguarded. But we must not become too zealous in protecting the accused that we overlook and ignore those who have been robbed, raped and murdered.

The United States and North Carolina Constitutions wisely and properly inhibit unreasonable and unwarranted searches. These provisions are not intended to shield the criminal — they are to protect the innocent citizen in his privacy, and to make every man's home his castle. They should not give to a criminal an impenetrable fortress in which he can barricade himself against all proof of guilt.

Here, a young woman is twice raped, and then she and her companion are told that they must die, lest they reveal the identity of the rapist and murderer. One bullet from his cruel rifle penetrates the entire body of one. The other is lodged near the heart of the other. Is it unreasonable and unwarranted that the officers, charged with the duty of apprehending the heartless and inhuman perpetrator, should use every energy in locating the weapon used, and apprehending its user? An overwhelming majority of the public would immediately answer that *any* means would be justified. But the officers, recognizing the restraints under which they must work (some might call them unreasonable and unrealistic), make a search of the premises in which they have ample evidence that the accused lived — and do so with the voluntary permission of the person who owns and controls them. Their search might reveal nothing, and to some extent absolve the suspect. The fact that it did reveal the presence of the guilty weapon, to which the already identified assailant had access, justifies the search. Recurring to the fundamental that the object is not to protect criminals and to provide them with the right

to perpetrate such a horrible crime without fear of apprehension, it is clear that his rights have not been violated. Rather, his wrongs have been detected.

For the reasons above stated, we are of the opinion that the evidence with regard to the rifle was competent, and the exceptions relating thereto are overruled.

The defendant also excepts to the following argument alleged to have been made by the Solicitor in his address to the jury: "The State has tried to bring in all the evidence. If there are some questions you want answered, it is not the State's fault that they have not been answered." However, no objection was made at the time, and it is thus waived. *State v. Costner,* 127 N.C. 566, 37 S.E. 326; *State v. Jenks,* 184 N.C. 660, 113 S.E. 783; *State v. Bryant,* 236 N.C. 745, 73 S.E. 2d 791; *State v. Lewis,* 93 N.C. 581; *State v. Steele,* 190 N.C. 506, 130 S.E. 308.

The record is not explicit, but apparently, following the argument of the Solicitor, the defendant made an exception to parts of it at which time the Court made the following entry:

> "THE COURT: The defendant objected to the State implying that the defendant did not testify or go upon the stand or present evidence. The Court will instruct the jury as to that phase of the law, and the Court does not recall any reference that the Solicitor made to the defendant's failure to testify, and the Court was present, sitting on the Bench during the entire argument of the Solicitor."

The Court fulfilled the above, and fully protected the defendant's rights (*State v. Lewis,* 256 N.C. 430, 124 S.E. 2d 115) when he charged the jury as follows:

> "Now, members of the jury, in this case the defendant has not testified in his own defense, neither has he offered any evidence in his own defense in any of the three cases for which he stands for trial. The Court instructs you that the defendant may or may not testify in his own behalf as he may see fit and his failure to testify shall not create any presumption against him whatsoever. Therefore, the Court further instructs you with reference to the same that there is no requirement upon the defendant to testify, there is no requirement that he give evidence in the case because the requirement is that the State proves the defendant guilty beyond a reasonable doubt as the Court has defined that term of any of the charges against him or any lesser degrees of those charges.
>
> "Therefore, please bear in mind the instructions that the defendant's failure to testify shall not create any presumption

against him whatsoever and certainly no presumption of guilt."

There can be no doubt that an atrocious crime was committed upon the young lady here involved and that her assailant intended to take two lives to avoid identification. There can be little doubt of the good faith of Loretta Nelson in identifying the defendant. It is only human nature that she would insist that the guilty person, and not someone else, be punished. That is also true of her companion. The evidence of these two alone would be amply sufficient to sustain the verdict of the jury and the judgment of the Court. The evidence that the rifle found in the home where the defendant lived was the one that fired the shots into the bodies of the State's witnesses merely "makes assurance doubly sure" that the defendant is guilty. We hold that his rights have been fully protected, and that in his trial there was

No error.

GEORGE M. MOORE, ADMINISTRATOR, v. HARTFORD FIRE INSURANCE COMPANY GROUP, HARTFORD FIRE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 20 June, 1967.)

1. Insurance § 47.1—

The statutory requirement that a policy of automobile liability insurance issued in this State should provide protection against injury and damage inflicted by an uninsured motorist is remedial and will be liberally construed to accomplish its beneficial purpose, and the statutory provisions enter into and form a part of the policy, and policy provisions in conflict with the statutory provisions are void. G.S. 20-279.21.

2. Same; Insurance § 59—

A policy provision that its uninsured motorist clause should constitute only excess insurance over any other similar insurance available to the injured person, is contrary to the statutory provisions of G.S. 20-279.21(b)(3), and the personal representative of a passenger killed as the result of the negligence of an uninsured motorist may recover on such clause, within the statutory limits, notwithstanding that the personal representative has theretofore received payment of a part of the claim under another policy of insurance covering the loss, provided that the recovery under both policies does not exceed the actual damages.

3. Limitation of Actions § 15—

A stipulation of the parties that if the court should find that defendant is liable under the policy of insurance sued on, the court should then hear evidence and rule on the question of damages, waives any plea of the statute of limitations to the determination of damages.

APPEAL by plaintiff from *McLaughlin, J.*, 23 May 1966 Civil Session of MONTGOMERY. Docketed and argued as Case No. 601, Fall Term 1966, and docketed as Case No. 603, Spring Term 1967.

Civil action by plaintiff, administrator of the estate of his wife,

Beth G. Moore, to recover damages for the wrongful death of his intestate under the uninsured motorist clause of a policy of automobile liability insurance issued by Hartford Accident and Indemnity Company.

The parties waived trial by jury, and the case was heard upon written stipulations containing an agreed statement of facts, and the pleadings. The judge made findings of fact. We summarize so much of the judge's findings of fact as is necessary for a decision, the numbering of the paragraphs being ours:

(1) On 9 January 1965 plaintiff's intestate, Beth G. Moore, was killed while riding as a passenger in a 1958 Chevrolet automobile driven by her husband, George M. Moore, and owned by Moore Recapping Company, Inc., when that vehicle collided with a Mercury automobile driven by Willie Tillman, an uninsured motorist. The Mercury automobile driven by Willie Tillman was owned by Elsie Lee Tillman. Neither Elsie Lee Tillman nor Willie Tillman had liability insurance, and neither said driver nor owner was or is financially responsible.

(2) The sole proximate cause of the collision and the resulting death of Beth G. Moore was the negligent operation of the Mercury automobile by Willie Tillman.

(3) At the time of the collision the automobile in which Beth G. Moore was riding when she was killed was covered by an automobile liability insurance policy issued by the Insurance Company of North America, which contained an uninsured motorist provision for $5,000 each person and $10,000 each accident. Two additional passengers riding in the Chevrolet automobile were also injured in said accident, and the Insurance Company of North America divided its $10,000 uninsured motorist coverage equally between the three injured persons riding in said automobile, so that the plaintiff's intestate was paid from this insurance policy the sum of $3,333.33.

(4) Hartford Accident and Indemnity Company had issued a policy of automobile liability insurance to George M. Moore, individually, on a personal automobile owned by him (a different automobile from the one being operated by him at the time of the accident), which was in full force and effect at the time of the accident. Plaintiff's intestate, Beth G. Moore, was the wife of George M. Moore and a resident member of his household at the time of the collision. This policy contained an uninsured motorist endorsement with limits of $5,000 each person and $10,000 each accident.

(5) The Hartford policy contains the following condition in its uninsured motorist endorsement:

"6. Other Insurance. With respect to bodily injury to an insured while occupying an automobile not owned by the named insured under this endorse-

ment, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all such other insurance."

A true copy of the uninsured motorist endorsement on the policy of the Hartford Accident and Indemnity Company is attached to defendant's answer. This uninsured motorist endorsement on this policy contains, *inter alia,* the following provisions:

"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. . . .

* * *

"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. . . .

"(b) INSURED AUTOMOBILE. The term 'insured automobile' means:

* * *

"(3) any other automobile while being operated by the named insured, or by his spouse if a resident of the same household. . . ."

The court concluded as a matter of law that no coverage is afforded to the plaintiff under the facts of this case, and plaintiff is therefore not entitled to recover anything from the Hartford Accident and Indemnity Company. Wherefore, the court adjudged and decreed that the plaintiff recover nothing of the defendants, or either of them; that plaintiff's action be dismissed; and that the costs be taxed against the plaintiff.

From this judgment, plaintiff appeals.

S. H. McCall, Jr., and W. Kenneth Hinton for plaintiff appellant.

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

PARKER, C.J. G.S. 20-279.21(b)(3) provides, *inter alia,* that

> "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. . . ."

Subsection (c) of G.S. 20-279.5 provides that the minimum amount of such insurance must be $5,000, exclusive of interest and cost, of

bodily injury to or death of one person in any one accident, and $10,000 for bodily injury to or death of two or more persons in any one accident.

Farther on G.S. 20-279.21(b)(3) states:

> "In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer."

G.S. 20-279.21(f) provides, *inter alia:*

> "Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein: (1) The liability of the insurance carrier with respect to the insurance required by this article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs. . . ."

The Court said in *Buck v. Guaranty Co.*, 265 N.C. 285, 144 S.E. 2d 34:

> "G.S. 20-279.21(b)(3) was enacted as Chapter 640, Session Laws of 1961, entitled 'An Act to amend G.S. 20-279.21 defining motor vehicle liability insurance policy for financial responsibility purposes so as to include protection against *uninsured motorists.*' (Our italics.)"

Our uninsured motorist statute was enacted by the General Assembly as a result of public concern over the increasingly important problem arising from property damage, personal injury, and death inflicted by motorists who are uninsured and financially irresponsible. Its purpose was to provide, within fixed limits, some financial recompense to innocent persons who receive bodily injury or property damage, and to the dependents of those who lose their lives through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages. A compulsory motor vehicle insurance act is a remedial statute and will be liberally construed so that the beneficial purpose intended by its enactment by the General Assembly may be accomplished. 7 Am. Jur. 2d, Automobile Insurance § 6.

"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." *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654.

The specific question for decision is this: May Hartford Accident and Indemnity Company, an automobile liability insurance carrier, providing coverage against bodily injury or death in accord with the mandatory requirements of G.S. 20-279.21, after accepting a premium for such coverage, deny coverage on the ground that the insured has other similar insurance available to him?

The State of Virginia has a statute substantially similar to our G.S. 20-279.21. We summarize the facts in *Bryant v. State Farm Mutual Automobile Insurance Co.,* 205 Va. 897, 140 S.E. 2d 817, from the statement of facts in the opinion as follows: Plaintiff while driving a Ford truck, belonging to his father, was negligently injured by an uninsured motor vehicle being driven by "W." He brought suit against the driver and owner of the vehicle, and recovered a judgment against them for $85,000. At the time of the accident, plaintiff was insured under the terms of a bodily injury liability insurance policy issued by State Farm to his father, which covered his car "and any other person while occupying the insured motor vehicle," and he was also the named insured in a bodily injury liability insurance policy issued to him by State Farm. Each policy had a limit of $10,000 for each person injured. State Farm acknowledged liability on its policy issued to his father and paid plaintiff $10,059 on his $85,000 judgment in settlement of all claims of plaintiff under his father's policy. Action was brought by plaintiff to recover on the policy issued to him by State Farm. State Farm, his insurer, denied liability, relying upon substantially the exact language of the "other insurance" clause which is involved in the present case. The lower court held for State Farm and the Supreme Court of Appeals of Virginia reversed, and granted to the plaintiff judgment against the defendant for $10,000 with interest. The Virginia Court stated in substance, except when quoted: That the "controlling instrument is the statute and that provisions in the insurance policy that conflict with the requirements of the statute, either by adding to or taking from its requirements, are void and ineffective." Section 38.1-381(b), Code of Virginia (1964 Cum. Supp.), requires all automobile liability insurance policies issued in the State to include an endorsement undertaking "to pay the insured *all sums* which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." (Emphasis ours). The Virginia Court held that the "other insurance" clause, approved by the Virginia State Corporation Commission, was in derogation of the requirement of the statute and, therefore, of no effect.

Defendant in its brief relies upon and quotes at length from the case of *"United States Fidelity and Guaranty Co. v. Sellers,* 185 So. 2d 689 (Fla., 1965)." The citation is wrong. It should be 179 So. 2d 608. The decision in 179 So. 2d 608, from which the brief quotes extensively, was rendered by the District Court of Appeals of Florida, First District, on 4 November 1965. The Supreme Court of Florida on appeal reversed the judgment of the District Court of Appeals, First District, 179 So. 2d 608, in a decision rendered on 20 April 1966, rehearing denied 17 May 1966, and this case is reported under the name of *Sellers v. United States Fidelity and Guaranty Co.,* 185 So. 2d 689. The extensive quotation in defendant's brief from the opinion rendered by the District Court of Appeals of Florida does not appear in the opinion rendered in the same case by the Supreme Court of Florida. The Supreme Court of Florida, after reviewing the *Bryant* case from Virginia, stated:

> "Both the Virginia statute and the Florida statute contain subrogation clauses providing that an insurer making payments under its uninsured motorist coverage is entitled to the proceeds of any recovery against the uninsured motorist or any other person or organization legally responsible for the injury by the insured, at least to the extent of the insurer's payment. Section 627.0851(4), Florida Statutes, F.S.A.; Section 38.1-381(f), Code of Virginia (1964 Cum. Supp.)."

The Court held, as correctly summarized in the following headnotes in the opinion reported in 185 So. 2d 689:

> "1. Automobile liability carrier providing coverage against injury by an uninsured motorist in accord with requirements of statute, after accepting premium for such coverage, may not deny coverage on ground that insured has other similar insurance available to him. F.S.A. §§ 324.021(7), 627.0851 and (4).
>
> "2. Statutes requiring automobile liability policy to include uninsured motorist protection invalidated condition in automobile liability policy providing uninsured motorist coverage but attempting to limit insurer's liability through other insurance, excess-escape or pro rata clauses. F.S.A. §§ 324.021(7), 627.0851 and (4).
>
> "3. Statute requiring uninsured motorist provision in automobile liability policies does not permit insured to pyramid coverages under separate automobile liability policies so as to recover more than his actual bodily injury loss or damage, but, if he is beneficiary of more than one policy, he may recover maximum allowed under each policy to extent of his loss or, if

his loss is more than limit but less than sum of limits of multiple policies protecting him, proration among insurers would be in order. F.S.A. § 627.0851(4).

"4. Insured protected by multiple policies containing uninsured motorist provision can proceed against any one or more of insurers, but in any event he shall not be entitled to recover from all of them more than amount of his loss and bodily injury caused by an uninsured motorist and his recovery from any one of them shall be within limits of the particular policy. F.S.A. § 627.0851."

The Supreme Court of Florida further stated in its opinion:

"Hypothetical situations under standard Condition 5 were discussed by Mr. Norman Broad in a note found in University of Florida Law Review, Volume XIV, No. 4, page 455. He concludes that 'Courts attempting to reconcile conflicting "other insurance" provisions will always disappoint the contractual expectations of at least one insuring company.' After exhaustive analysis of the subject, he concludes that the fairest solution would be to void these clauses as hopelessly in conflict and prorate the loss between the carriers in the proportion that the policy limits bear to the total amount of insurance available."

In very recent years the courts have frequently been confronted with situations where there are two or more automobile policies which provide coverage for the particular event. Many cases have arisen in the last few years involving conflicts between insurance policies, both of which purport to restrict or escape liability for a particular risk in the event that there is other insurance. The courts have rendered many decisions since the article on automobile insurance in 7 Am. Jur. 2d was written, and the volume containing that article was published in 1963. The same is true in respect to the pertinent volume of Corpus Juris Secundum. The Court of Appeal of Louisiana, Third Circuit, in *LeBlanc v. Allstate Insurance Company,* 194 So. 2d 791, in the majority opinion written by Judge Savoy, rendered 11 January 1967, rehearing denied 15 February 1967, has correctly analyzed many of these more recent decisions, many of which are cited and quoted from in defendant's brief. The facts in that case are these: On 27 October 1963, a vehicle owned and operated by Pellerin collided with an automobile owned and operated by Deshotel. LeBlanc, the plaintiff, was a guest passenger in the Deshotel vehicle and was injured in the collision. The husband of the plaintiff in a companion case was also a passenger in the Deshotel automobile, and was killed as a result of the collision between the two vehicles. The Pellerin automobile was uninsured, and on the

trial it was established that the negligence of its driver was the sole proximate cause of the accident. State Farm Mutual Automobile Insurance Company was the insurer of the Deshotel vehicle, and it deposited the sum of $10,000, the limit of liability under the uninsured motorist provision of the Deshotel policy, into court to be distributed among the three claimants. In the distribution, the widow of Joseph Courville received $5,000, plaintiff $3,000, and Deshotel $2,000. It was stipulated that the damages of plaintiff and Marie Courville were each in excess of $10,000. At the time of the collision plaintiff was insured by Allstate Insurance Company as a passenger in a non-owned automobile under the provisions of the family policy covering his own automobile. In like manner, Joseph Courville was an insured under a policy of public liability insurance on his family automobile, which policy was written by State Farm Mutual Automobile Insurance Company. In the present suit and in the companion suit plaintiff and the widow of Joseph Courville are suing the insurers of their respective family automobiles under the uninsured motorist coverage in the policies issued to each passenger. The trial judge rendered judgment in favor of each plaintiff in the amount of $5,000, the policy limit for a single person under the uninsured motorist endorsement. The two insurance companies appealed claiming that the distribution of the $10,000 fund deposited in the court under the policy covering the automobile of Deshotel extinguished further liability under plaintiff's policy. The policies of both insurance companies appealing had a provision for other insurance substantially similar to the provision for other insurance in the instant case. In his opinion, Judge Savoy speaking for three members of the Court said:

> "One of the earliest decisions concerning the 'other insurance' provisions of an uninsured motorist clause was the case of *Burcham v. Farmers Insurance Exchange* (1963), 255 Iowa 69, 121 N.W. 2d 500. In that case the plaintiff was riding in a non-owned automobile which was insured, including uninsured motorist coverage with limits of 5/10, when she sustained injuries as a result of the negligence of an uninsured motorist. The primary insurer of the car in which she was riding made settlement with the plaintiff. The plaintiff's father, with whom she resided, had in force and effect three policies of insurance with Farmers Exchange, all affording uninsured motorist coverage for a per person limit of $5,000.00. The plaintiff brought action against Farmers Insurance Exchange on the three policies issued to her father, claiming that those policies were applicable to the accident and injuries which she had sustained. The trial court ren-

dered judgment in favor of the defendant, and the plaintiff appealed to the Supreme Court. The Supreme Court held that all of the policies involved in the litigation contained the same 'other insurance' clause (which was substantially the same as the other insurance clause contained in all of the policies in the instant case), and that that clause afforded Farmers Insurance Exchange a complete defense because the policy limits for one person were the same in each policy. The court construed the 'other insurance' provision to express the intention that each company intended to provide, and the insureds intended to buy, coverage to the extent stated in the 'other insurance' clause, and that neither company intended an insured to receive more than $5,000.00 from all sources under uninsured motorist coverage while occupying a non-owned automobile.

"The appellate courts of New York have also considered the effect of the 'other insurance' clause of uninsured motorist policies containing the same provisions as are here involved with reference to non-owned automobiles, and have reached the same conclusion as was reached in the *Burcham* case, *supra,* to the effect that where the primary coverage affords limits not less than those of additional policies, that no excess insurance is available. *Globe Indemnity Company v. Baker's Estate* (1964), 22 A.D. 2d 658, 253 N.Y.S. 2d 170.

"The courts of California have also considered the identical 'other insurance' provisions as are contained in the instant case, and have reached the same conclusions as were reached in the *Burcham* and *Globe Indemnity Company* cases, *supra.* See *Kirby v. Ohio Casualty Insurance Company* (1965), 232 Cal. App. 2d 9, 42 Cal. Rptr. 509; and *Grunfeld v. Pacific Automobile Insurance Company* (1965), 232 Cal. App. 2d 4, 42 Cal. Rptr. 516.

"The State of Washington, in the case of *Miller v. Allstate Insurance Company* (Washington, 1965), 405 P. 2d 712, likewise considered similar provisions and held that where the primary policy afforded coverage not less than that afforded by a possible excess policy, the excess policy was not applicable.

"In the recent New Hampshire case of *Maryland Casualty Company v. Howe* (1965), 106 N.H. 422, 213 A. 2d 420, it was held that when the insured had received the amount provided in the higher limits of either of the policies, he had recovered under uninsured motorist coverages all that was available to him.

"The only states wherein a contrary result has been reached are the states of Oregon, Virginia and Florida.

"In the Oregon case of *Smith v. Pacific Automobile Insurance Company* (1965), 240 Or. 167, 400 P. 2d 512, Pacific Automobile Insurance Company insured the plaintiff for uninsured motorist coverage and had a standard 'other insurance' provision such as we have in the instant case. Smith was riding in a non-owned automobile operated by Damewood. Damewood was insured under a policy of insurance with Oregon Mutual, but Oregon Mutual's policy had a non-standard provision with respect to the uninsured motorist clause. The court (after Oregon Mutual had paid Smith $2,500.00) considered the provisions of the two policies and found they were repugnant one to the other and allowed Smith to recover. The *Smith* case, *supra,* although reaching a contrary result because of the repugnant provisions, is completely distinguishable from the facts here involved.

"The other two states, Virginia (*Bryant v. State Farm Mutual Automobile Insurance Company* (1965), 205 Va. 897, 140 S.E. 2d 817; and *White v. Nationwide Mutual Insurance Company v. Allstate Insurance Company* (D.C. Virginia, 1965), 245 F. Supp. 1), and Florida (*Sellers v. United States Fidelity & Guaranty Company* (Florida, 1966), 185 So. 2d 689), reached contrary results solely because the courts found that the 'other insurance' provisions of the policies were contrary to their particular state statutes. In each of those states prior decisions had been rendered in Federal courts construing the uninsured motorist provisions giving full effect to the 'other insurance' provisions of the policy. The *Bryant* decision, *supra,* effectively overruled the Federal court decision in *Travelers Indemnity Company of Hartford, Conn. v. Wells* (4 Cir. Virginia, 1963), 316 F. 2d 770; and the *Sellers* decision, *supra,* effectively overruled the Federal court decision in the case of *Chandler v. Government Employees Insurance Company* (5 Cir. Florida, 1965), 342 F. 2d 420. Both the *Sellers* decision, *supra,* in Florida, and the *Bryant* and *White* decisions, *supra,* in Virginia were based upon the court's interpretation of state statutes so as to require the excess insurer to afford full uninsured motorist coverage without limiting its liability based upon any primary coverage.

"Louisiana statutes do not make the requirement of the Virginia or Florida statutes, and specifically reserve to the insurer the right to limit its liability so long as the uninsured motorist provision guaranteed to an insured minimum limits of coverage

as a result of bodily injury sustained at the hands of an uninsured motorist.

"We are of the opinion that the purpose of the statute in Louisiana is as set forth in Couch on Insurance 2d, (1964), Section 45:623, Volume 12, page 570:

> " '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 if he had been injured in an accident caused by an automobile covered by a standard liability insurance policy.'

"Under the result which we have reached, LeBlanc can recover only a total of $5,000.00 from both insurers. As stated above, he had already received $3,000.00 from the primary insurer, State Farm. Hence, he is entitled to recover $2,000.00 from the defendant, Allstate, as excess insurer.

"For the reasons assigned, the judgment of the district court is amended by reducing the award to plaintiff from the sum of $5,000.00 to the sum of $2,000.00, and, as amended, is affirmed."

Judge Fruge dissented on the ground that the Florida Court in the *Sellers* case and the Virginia Court in the *Bryant* case, though they constituted a numerical minority, are correct. Judge Tate agreed with Judge Fruge's dissent.

This is said in 7 Am. Jur. 2d, Automobile Insurance, § 201 (1963): "As distinguished from a 'pro rata' or proportionate recovery clause, some automobile policies, and especially automobile liability policies, provide that as to a particular coverage, it shall be 'excess insurance' only. Under such a policy, and as to such a coverage, the insurance company issuing the policy is not liable for any part of the loss or damage which is covered by other insurance — it is liable only for the amount of loss or damage in excess of the coverage provided by the other policy or policies of insurance."

We have read all the cases cited in the briefs of the parties, and many cases on the subject not cited in the briefs. It seems plain that the decisions are based on the particular language of the statutes in the various states in respect to compulsory automobile liability insurance, and the construction each state court puts on its statute. To analyze the statute of each state would be a herculean labor and would serve no useful purpose, for the reason that our decision must rest upon our own statute.

"Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it. In case a pro-

vision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls." *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610.

In the written stipulations of agreed facts this is stated:

"12. That the only matters in controversy in this action are:

"(a) Whether the uninsured motorist endorsement in the defendants' Policy No. 220F687604 issued to George M. Moore provides any insurance coverage to the plaintiff's intestate under the facts as above stipulated.

"(b) If it does provide coverage, does it provide coverage up to $5,000.00; or is coverage limited to a maximum of $5,000.00 less the amount of $3,333.33 received by plaintiff's intestate under another uninsured motorist policy?

"(c) What amount of damages, if any, is the plaintiff's intestate entitled to recover of the defendant?

"13. The parties further stipulate that if the Court finds that coverage is available under the policy issued by the defendant Hartford Accident and Indemnity Company, that the Court may then hear evidence of and rule on the question of damages; and the parties do hereby waive their right to trial by jury."

We consider that G.S. 20-279.21(b)(3) provides for a limited type of compulsory automobile liability coverage against uninsured motorists. It requires coverage for bodily injury or death caused by an uninsured motorist to the extent of $5,000 for one person. It does not permit "other insurance" clauses in the policy which are contrary to the statutory limited amount of coverage. In our opinion our statute is designed to protect the insured as to his actual loss within such limits, but being of statutory origin it was not intended by the General Assembly that an insured shall receive more from such coverage than his actual loss, although he is the beneficiary under multiple policies issued pursuant to the statute. It seems clear that our statute does not limit an insured only to one $5,000 recovery under said coverage where his loss for bodily injury or death is greater than $5,000, and he is the beneficiary of more than one policy issued under G.S. 20-279.21(b)(3). To hold that plaintiff under the facts stipulated is not entitled to recover anything under the policy issued by Hartford Accident and Indemnity Company because he received $3,333.33 from the policy issued by the Insurance Company of North America is to amend our statute, not construe it. In *Bryant v. State Farm Mutual Automobile Insurance Company, supra,* the Virginia Court held the sum plaintiff was entitled to re-

cover from defendant's policy is the unpaid part of his judgment for $85,000 within the limit of defendant's policy.

The answer to the precise question stated before in this opinion is, No. The answer to the question presented in Paragraph 12(a) in the written stipulations of agreed facts is, Yes.

One of the written stipulations of agreed facts states in part: "The plaintiff's intestate at the time of her death was 45 years of age, was a housewife in good health. . . ." So far as the record before us shows the amount plaintiff is entitled to recover from Willie Tillman for the wrongful death of his intestate has not been determined. The trial judge concluded that under the agreed facts defendant's policy afforded no coverage, and that the plaintiff recover nothing of defendant. In this he committed prejudicial error.

The judgment appealed from is reversed, and the case is remanded to the Superior Court of Montgomery County to the end that according to the stipulation of agreed fact "that if the Court finds that coverage is available under the policy issued by the defendant Hartford Accident and Indemnity Company, that the Court may then hear evidence of and rule on the question of damages; and the parties do hereby waive their right to trial by jury." By this stipulation the defendant has waived any plea of the statute of limitations to the determination of damages. When the court determines the amount of damages which plaintiff is entitled to recover for the wrongful death of his wife by the sole proximate negligence of Willie Tillman, it will enter judgment that the plaintiff have and recover of defendant the unpaid part of the damages, if any, after deducting from such amount the sum of $3,333.33 that he has received from the Insurance Company of North America, within the limit of defendant's policy, to wit, $5,000.00.

Reversed and remanded with directions.

JAMES ALLEN WHITE v. NELSON MOTE AND TOWN OF SILER CITY.

(Filed 20 June, 1967.)

1. Automobiles § 41t—

Evidence held to raise issue of negligence for jury in operating chemical fogging machine at nighttime without adequate warning or signals and in failing to provide the rear of the vehicle with lights as required by statute.

2. Automobiles § 11—

The failure to provide motor vehicles operating at night with the lights prescribed by statute is negligence *per se*. G.S. 20-129.1.

3. Automobiles § 38—

Plaintiff's statement that he was traveling 35 to 40 miles per hour in a 35 mile per hour speed zone cannot be considered an admission of excessive speed upon defendant's motion to nonsuit on the ground of contributory negligence, since the evidence must be taken in the light most favorable to plaintiff.

4. Automobiles § 39—

The distance traveled by a truck after being impelled forward by a vehicle colliding with its rear does not establish that the vehicle striking the truck was traveling at excessive speed when the driver of the truck testifies that after the collision the truck was running full throttle for a good distance before the driver regained control; an impact at a speed of 35 miles per hour is reasonably sufficient to bend the wheel of a truck.

5. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's own evidence establishes this defense so clearly that no other conclusion may be reasonably drawn therefrom, and when the evidence presents diverse inferences, the issue is for the jury.

6. Automobiles § 42d—

The failure of a driver to see a chemical fogging machine in time to avoid running into the rear of such machine on a dark night cannot constitute contributory negligence as a matter of law when plaintiff was not exceeding the statutory speed limit. G.S. 20-141(e).

7. Same—

Where plaintiff testifies that immediately he saw the vehicle upon which defendant's chemical fogging machine was being operated he took his foot off the gas but struck the rear of the vehicle before he could put his foot on the brake, the question of contributory negligence in following too closely does not arise, and the evidence does not establish contributory negligence as a matter of law in failing to keep a proper lookout, since a motorist will not be held to the duty of bringing his vehicle to an immediate stop on the sudden arising of a dangerous situation which he could not have reasonably anticipated.

8. Municipal Corporations § 5—

A municipal corporation, in operating a chemical fogging machine for the control of insects, is engaged in a governmental function.

9. Municipal Corporations § 10—

Where a municipal corporation procures liability insurance on a vehicle used by it in the performance of a governmental function, it waives its governmental immunity for the negligent operation of such vehicle to the extent of the liability insurance thereon, unless the municipal corporation takes affirmative action against waiver. G.S. 160-191.1.

10. Insurance § 3—

Laws in effect at the time of the issuance of a policy of insurance become a part of the insurance contract, and provisions in the policy contrary to the statute are void.

11. Insurance § 57—

The fact that a policy of liability insurance issued to a municipality refers to the insured in its text as an individual rather than a municipal corporation, is immaterial.

12. Insurance § 54—

The fact that a policy defines the vehicle insured as a "garbage truck" and the accident in suit occurred while the vehicle was being used for the transportation and operation of a chemical fogging machine, is immaterial, the vehicle being identified as to make, year, and model and identification number, and there being no clause excluding liability if the vehicle were used for any purpose other than a garbage truck.

13. Insurance § 3—

Policies of insurance are to be liberally construed in favor of insured.

APPEAL by defendants from *Hobgood, J.*, September 1966 Civil Session of CHATHAM.

Civil action to recover for personal injuries and property damage suffered by plaintiff when his automobile, driven by him, collided with the rear of a fogging machine being operated at the time by defendant Mote and owned by defendant Town of Siler City.

The undisputed physical evidence shows that shortly after 9:00 P.M. on 25 May 1965 plaintiff left a service station operated by him and proceeded in an easterly direction on East Third Street (also U.S. 64A) at about a speed of 35 to 40 miles per hour. He continued in this direction until he collided with the rear of the fogging truck which was operating in the same direction as plaintiff on East Third Street, on the right hand side of the road, at a speed of approximately 8 miles per hour.

The section of road on which the collision occurred is a straight stretch for approximately one mile without noticeable obstructions. The collision occurred near the middle of this stretch. Other than the vehicles involved in the collision, there was no traffic on the road at the time. It was night and dark and the weather was cloudy. Streetlights were interspersed along the road at such a distance that the illumination therefrom did not overlap, but instead left an area of relative darkness midway between them.

Plaintiff testified in part as follows:

> "As I went down this road I observed no traffic. I didn't see anything until I did see this fog. I saw the fog and just as I saw the fog, I just had time to let off the gas and ran into the

back of the truck. It wasn't but just a split second from the time I saw the fog until I struck the truck.

"As to what I referred to as fog, it is just a white mist, a real heavy white mist. It is something similar to a fog. It is heavier than fog . . . and it is just impossible to see. As I approached the fog from some distance back, I did not see the fog, I didn't see a thing. I was looking straight ahead and I have 20/20 vision, do not and have never worn glasses. The headlights on my car were both good.

". . . I had my lights on high beam and I did not hear any unusual noise before I hit the truck. . . . I didn't have the radio on in my car and I don't recall hearing any unusual noise at all. The temperature was warm and I had my windows down on the driver's side. . . .

"On May 25, 1965, as I was going down the highway, I suddenly saw fog, and I just hit it. There was no light on the back of the truck, or on top that could be seen. There were no reflectors visible from the rear — if there were, I did not see them for the smoke. . . .

"When I first observed the fog was when I first took my foot off the gas; I went to go for the brake but I didn't have time and just as I saw the fog, I ran right into it.

". . . As to whether I am indicating to the court and the jury that the street lights were not burning on that night, no, sir, I am not saying they were not burning, but what I am trying to say is that it was dark there where I had my wreck."

Plaintiff's witness, Henry Kimball, testified that he was a police officer with the Town of Siler City on 25 May 1965 and had occasion to investigate the wreck; that when he observed the truck after the wreck it had only one light on it, which could have been a reflector; that there were two small lights and some reflectors, but they weren't burning at the time. He further testified that he had traveled behind the fogging truck when it was in operation on occasions prior to the collision. He stated: "As to whether or not it was difficult to see the spray or the truck, it was difficult to see lots of times. . . . I made a report on the accident in which it is stated that the weather was cloudy. . . . I didn't see any lights but one small light on the left hand side of the spray truck, it could have been a reflector or flare lights, I won't say."

Plaintiff introduced in evidence an automobile insurance policy issued to the Town of Siler City by Insurance Company of North America. The coverage period as shown on the policy was from 3 August 1964 to 3 August 1965, and the policy purported to cover,

among others, a 1955 International 2-ton garbage truck. Mrs. Margaret Vestal, Clerk and Treasurer of the Town of Siler City, testified:

> "The original policy describes and includes one 1955 International two-ton garbage truck, Number R 16240157, and it also includes a 1942 Ford street cleaner bearing certain numbers. There is also a motor vehicle registration certificate issued from the Department of Motor Vehicles, State of North Carolina, being #3648583, which describes an International truck with the number, serial identification number, that is, of R 16240157. That is the same number which appears on the policy following the words 'International two-ton garbage truck.' This is the truck that the fogging machine is now and has for some years been mounted on and used by the Town of Siler City. . . .
>
> ". . . I do not have any source of knowledge or information relative to the governing Board of the Town of Siler City taking any affirmative action with respect to the tort liability other than the procuring of this insurance, if it does that."

Defendant Nelson Mote testified that he was operating the truck with an insecticide sprayer on it as a regular part of his job with the Town of Siler City at the time of the collision; that the fog which was emitted from the machine on the back of the truck came from a nozzle which was pointed down and to the right of the truck. "The Spray machine makes a whistling noise; it sounds a little like a jet airplane but not as much. It makes a noise you can hear for probably a block if you are standing out. . . . There were three lights on the rear of the truck, a turn signal on each side of the body, and one tail light. There was one reflector on the truck; I put it there myself. . . . There were three lights on the rear. Two of them were left and right turn signals which didn't burn when you were driving down the highway unless you indicated a right turn or a left turn. I had not indicated a right or a left turn anywhere from the funeral home down to where I was hit; so neither of these two tail lights were burning for the last several minutes prior to being hit. The only light on the rear of the truck was just the average tail light like is on a truck, probably three inches in diameter, with one bulb in it, a double contact bulb. . . . As to whether you could see the fog or not, and whether it wasn't a usual thing that cars would run up and blow at me and fuss because they couldn't see good, not every night, but I have had them to run up and blow. Sometimes this was done frequently, and was partly because I drove along slowly, five to eight or ten miles an hour. This foggy substance makes

seeing very difficult, just like any fog, and it is difficult to see in or see through it at certain times. The only light I had on the back was the small light at the rear of the truck. . . . I told you back in July of last year that it was not raining but that it might be a little foggy or cloudy; that's what I said and is correct. And it's possible I said that White couldn't see the tail light because of the fog."

Curtis Head, another employee of the Town of Siler City, testified that he was riding on the passenger side of the truck operated by Mote when the wreck occurred. He stated that there were turn signal lights on each side of the truck, reflectors on each side and one tail light. He testified further: "On this particular night, the fog was not spreading over the entire road, not at all times, but sometimes the wind might come and whirl it back to the left side, but mostly that night, it was going south. The fog is gray in color and can be seen from the light of the street lights. You can see it anywhere from 300 to 400 feet. After you pass along the road, the fog will remain anywhere from 300 to 350 feet, depending upon the wind. On this night, it was remaining on the road about 350 feet behind the truck. . . . I got out of the truck and went back to Mr. White's car. He was lying over there on the right hand side of the road and I walked up to him and said: 'Are you hurt,' and he said: 'What are you all doing, standing here in the middle of the road and no lights.' I said: 'We have got lights.' "

Defendants offered evidence tending to show that the right rear wheel of the truck was knocked sideways under the chassis of the truck and that the spray equipment was off the truck some 100 feet from where the truck stopped.

Issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of plaintiff. Upon the rendition of the verdict of the jury, defendants moved for judgment *non obstante veredicto,* and also moved that the verdict be set aside. Both motions were denied and judgment was entered on the verdict. Defendants appealed.

Andrews & Stone for plaintiff.

T. F. Baldwin, City Attorney, and Miller, Beck and O'Briant for defendants.

BRANCH, J. Defendants contend the trial court erred in overruling their motions for nonsuit when plaintiff rested and at the close of all the evidence. In support of this contention defendants argue: (1) That there was not sufficient evidence of actionable negligence to justify submitting the issue to the jury, and (2) plaintiff

was guilty of contributory negligence as a matter of law. Defendants further contend the action was barred in that defendant Town of Siler City had not waived its immunity from tort liability while performing a governmental function.

Plaintiff alleged defendants were negligent in that:

> "(a) They failed to display adequate warnings, signs or indications for motorists on said street of the hazardous conditions which they knew or should have known would be created by their spraying operations.
>
> (b) They failed to display a rear flashing light or provide any signal whatsoever to approaching rear traffic while knowing that the fog which was being emitted was impenetrable, blinding, and generally hazardous.
>
> (c) They failed to exercise that degree of care in the operation of said vehicle required of a reasonably prudent person under the circumstances then and there existing.
>
> (d) They failed to exhibit a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of such vehicle, as required by North Carolina General Statutes 20-129(d).
>
> (e) They negligently failed to equip said truck with two light reflectors, one on each side, as required by North Carolina General Statute 20-129.1."

Considering the evidence in support of allegations (a), (b) and (c), we find this Court considered a similar situation in the case of *Moore v. Plymouth,* 249 N.C. 423, 106 S.E. 2d 695, where the municipality operated a fogging machine on its streets after sunset without warning or signals except for the lights on the vehicle and the noise of the operation, and a vehicle approached from its rear, ran into the fog, turned to its left of the highway, sideswiping a vehicle standing on the shoulder, and then colliding with another vehicle traveling in the opposite direction, which was also driving in the fog. Holding that the evidence was sufficient to be submitted to the jury on the question of negligence and proximate cause as to the municipality and its employees, this Court, speaking through Parker, J. (now C.J.), stated:

> "Considering the evidence in the light most favorable to plaintiff (as we are required to do in passing on a motion for judgment of nonsuit, *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492), it is susceptible of a legitimate and fair inference by a jury that had it not been for the chemical fog or smoke created on the highway after sunset by the Town of Plymouth and its

employees Basnight and Barnes, who were acting within the course of their employment, totally or materially obscuring the vision of the traveling public at the time and place and interfering with the rights of the traveling public by creating a dangerous condition, with no warning or signals to the traveling public of such condition, except such as appeared from the truck and fogging machine and fog and its noise in operation, the head-on collision between the trucks of Daniel and Manning, in which plaintiff was injured, might not have occurred, and that under all the surrounding facts and circumstances the Town of Plymouth, Basnight and Barnes could have reasonably foreseen that some injury or harm would probably result from the chemical fog or smoke on the highway."

Here, plaintiff's evidence allows legitimate inferences which might be drawn therefrom by the jury tending to show that had it not been for the chemical fog created by defendants after sunset, materially obscuring the vision of plaintiff and interfering with his right and the right of the traveling public by creating a dangerous condition, without warnings or signals to warn the public of such condition, except such as appeared from the truck, fog and fogging machine and its noise of operation, the collision which caused plaintiff's injuries and property damage might not have occurred, and under the circumstances defendants could or should have reasonably foreseen that some injury or harm would probably result from the chemical fog or smoke on the highway. Further, considering the evidence in the light most favorable to plaintiff, as we are required to do in passing on a motion for nonsuit, *Moore v. Plymouth, supra,* there is sufficient evidence for the jury to find that the defendant Town of Siler City failed to equip its truck with two reflectors on the rear, one at each side, in violation of G.S. 20-129.1, and that defendant Town failed to equip its truck with a rear light of a type which has been approved by the Commissioner of Motor Vehicles, and which exhibits a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle, in violation of G.S. 20-129(d).

It is stated in *Scarborough v. Ingram,* 256 N.C. 87, 122 S.E. 2d 798: "The statutes prescribing lighting devices to be used by motor vehicles operating at night (G.S. 20-129 and 129.1) were enacted in the interest of public safety. . . . A violation of these statutes constitutes negligence as a matter of law. *Bridges v. Jackson,* 255 N.C. 333; *Lyday v. R. R.,* 253 N.C. 687, 117 S.E. 2d 778."

We must agree with the trial judge that there was sufficient evi-

dence of actionable negligence on the part of defendants to justify submitting the issue of negligence to the jury.

The more troublesome question is whether plaintiff was guilty of contributory negligence as a matter of law. Defendants so contend on the grounds that (a) plaintiff operated his automobile at a speed greater than was reasonable under existing conditions, (b) he followed defendants' vehicle too closely, and (c) he failed to keep a proper lookout and failed to exercise ordinary care.

There is not sufficient evidence of excessive speed to show contributory negligence as a matter of law. Defendants cannot rely on plaintiff's statement that he was going "35 to 40 miles per hour" to sustain their contention that he was guilty of contributory negligence as a matter of law, as the evidence shows this was in a residential-business area, and, taking the statement in the light most favorable to plaintiff, we must take the speed to be the lawful 35 miles per hour in a residential area. Further, the physical facts do not establish clearly that no other conclusion might be drawn except a conclusion of excessive speed. Plaintiff testified he did not have time to apply brakes or to slow down between the time he saw the fog and the time he collided with defendants' truck. The impact at a speed of 35 miles per hour reasonably could have been sufficient to bend the wheel of the truck and loosen the equipment which was described as being "relatively permanently affixed to the truck." The driver testified that after the collision "the truck was running full throttle a good distance down the road before I regained control of it." Thus, the driver's testimony would explain the distance the truck traveled and the fact that the equipment was some distance from the place where the truck was stopped.

"A nonsuit on the ground of contributory negligence will be granted only when the plaintiff's evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom." *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19.

The evidence presents diverse inferences as to excessive speed on the part of plaintiff, and, on this point, a question of fact is presented for the jury.

Defendants contend the fact that plaintiff was the following driver involved in a rear-end collision affords sufficient evidence to make him guilty of contributory negligence as a matter of law. To support this contention defendants cite *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735; *Morris v. Transportation Co.,* 235 N.C. 568, 70 S.E. 2d 845; *Smith v. Metal Co.,* 257 N.C. 143, 125 S.E. 2d

377. Both the *McKinnon* and *Morris* cases were decided prior to the amendments to G.S. 20-141(e) by the 1953 General Assembly, which added the proviso: "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator."

Further, in *Smith v. Metal Co., supra,* and *McKinnon v. Motor Lines, supra,* the plaintiffs continued to drive some distance after being "blinded" by the lights of another vehicle before striking the parked or slowly moving vehicles without attempting to stop their respective vehicles. The Court held this was contributory negligence. Here, plaintiff testified: "When I first observed the fog was when I first took my foot off the gas; I went to go for the brake but I didn't have time. . . ." The distinction in the cases relied on by defendants and this case is that in the instant case plaintiff immediately acted upon seeing the danger, while in the cases cited by defendants the plaintiffs continued in the same course of action for some time and distance after being faced with apparent danger.

Defendants also rely on the case of *Burnett v. Corbett,* 264 N.C. 341, 141 S.E. 2d 468, which holds that the mere fact of a collision with the vehicle ahead offers some evidence that the motorist in the rear was not keeping a proper lookout or that he was following too closely. "The following driver is not, however, an insurer against rear-end collisions for, even when he follows at a distance reasonable under the existing conditions, the space may be too short to permit a stop under any and all eventualities." *Beanblossom v. Thomas,* 266 N.C. 181, 146 S.E. 2d 36. *Burnett v. Corbett, supra,* is bottomed on a violation of G.S. 20-152(a) which appeared from the plaintiff's own testimony. Here, there is no evidence which would tend to show that plaintiff followed any vehicle more closely than was reasonable and prudent under the circumstances.

The more serious question raised by the rear-end collision is whether plaintiff was keeping a proper lookout. We recognize the rule that "One who operates a motor vehicle must be reasonably vigilant and anticipate the use of the highways by others. A failure to maintain a reasonable lookout is negligence." *Clark v. Emerson,* 245 N.C. 387, 95 S.E. 2d 880. But he will not be held to the duty of being able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not have rea-

sonably anticipated. *Privette v. Lewis*, 255 N.C. 612, 122 S.E. 2d 381. In this connection plaintiff testified that he was looking straight ahead while operating his automobile, which was equipped with good headlights. He further stated that he heard no unusual noise.

Plaintiff's witness Henry Kimball also testified: "As to whether or not it was difficult to see *the spray or the truck,* it was difficult to see lots of times." (Emphasis ours)

Plaintiff's evidence would permit a jury to find that he was driving his automobile at nighttime at a legal rate of speed, with good headlights and while keeping a proper lookout; that the atmospheric conditions were such that the fog or smoke hung closely to the truck so that neither the fog nor the truck was apparent or visible to plaintiff until it was too late for him to avoid a collision with the truck. There being evidence of contributory negligence on the part of plaintiff and also competent evidence from which the jury could reasonably reach a contrary conclusion, we hold that the plaintiff was not guilty of contributory negligence as a matter of law. *Waters v. Harris, supra.*

Defendant Town of Siler City was engaged in a governmental function at the time of the accident. *Moore v. Plymouth, supra.* The final question presented is whether the Town of Siler City had waived its governmental immunity prior to the date of the accident by procuring the insurance policy introduced in evidence by plaintiff in the absence of the jury.

G.S. 160-191.1 provides:

> "The governing body of any incorporated city or town, by securing liability insurance as hereinafter provided, is hereby authorized and empowered, but not required, to waive its governmental immunity from liability for any damage by reason of death, or injury to person or property, proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such city or town when acting within the scope of his authority or within the course of his employment. Such immunity is waived only to the extent of the amount of the insurance so obtained. Such immunity shall be deemed to have been waived in the absence of affirmative action by such governing body."

Where a municipal corporation procures liability insurance on a vehicle used by it in the performance of a governmental function, it may, but is not required to, waive its governmental immunity for the negligent operation of such vehicle to the extent of the amount of liability insurance. *Moore v. Plymouth, supra; Seibold v. Kin-*

ston, 268 N.C. 615, 151 S.E. 2d 654. In regard to the defendants' contention that the municipality had not waived governmental immunity, the statute (G.S. 160-191.1) clearly states: "Such immunity shall be deemed to have been waived in the absence of affirmative action by such governing body." Laws in effect at the time of issuance of a policy of insurance become a part of the contract, and provisions in the policy contrary to the statute are of no effect. *Brown v. Casualty Co.,* 241 N.C. 666, 86 S.E. 2d 433.

In the instant case the uncontradicted evidence is that prior to May 25, 1965 defendant Town of Siler City secured liability insurance on one 1955 International 2-ton garbage truck, No. R 16240157, which was the same truck involved in the accident. Further, that no affirmative action relative to tort liability was taken by the Town of Siler City other than the procuring of the insurance. The judgment recovered was within the limits of the policy issued, and the policy was in effect on 25 May 1965.

We see no merit in defendant's contention that the policy issued to it has language which refers to an individual rather than a municipality. It is clear that the policy was issued to defendant Town of Siler City, a municipal corporation, and that the intent of the parties was to insure the municipality against tort liability within specified limits. "An insurance policy is only a contract and the intention of the parties is the controlling guide in its interpretation." *Gaulden v. Insurance Co.,* 246 N.C. 378, 98 S.E. 2d 355. The policy issued to defendant Town of Siler City contains in Sec. 4 of the Declarations a coded "Liability Classification" designating the insured vehicle as one to be used for commercial purposes. Part III of the Insuring Agreement reads in part as follows:

> "III. Definition of Insured: (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and, *if* the named insured is an individual, . . ."

The above wording clearly contemplates insurance on entities other than individuals. Nor should defendants be absolved from liability because the truck involved was described as a garbage truck. The vehicle was identified as to make, year, model and identification number. There can be no mistake as to its identity.

Since policies of insurance are prepared by the insurer, they are liberally construed in favor of the insured, and strictly construed against the insurer. *Barker v. Insurance Co.,* 241 N.C. 397, 85 S.E. 2d 305.

Surely, in this case it was not the intent of either party that an

insurance policy solely for the benefit of an individual be issued to a municipal corporation as the insured. Further, had it been the intent of the insurer to escape liability because of the description or use of a named vehicle, the excluded description or use could have and should have been written into the policy.

The judgment of the court below is

Affirmed.

HARRY L. ESTRIDGE, PLAINTIFF, v. FRED DENSON AND WIFE, DEFENDANTS, S. D. No. 40-359

AND

CAROLINA PAVING CO., INC., PLAINTIFF, v. FRED DENSON AND WIFE, DEFENDANTS, S. D. No. 40-360

AND

LULA WILSON, EXECUTRIX OF THE ESTATE OF DAMUS WILSON, PLAINTIFF, v. FRED DENSON, DEFENDANT, S. D. No. 40-386.

(Filed 20 June, 1967.)

1. Assignments for Benefit of Creditors § 1; Fraudulent Conveyances § 1— Transfer by debtor of his property in exchange for other property of different form is not unlawful.

An assignment by a debtor of property to a new corporation without obligations of its own, in exchange for stock in the corporation, even though such corporation is formed for the purpose of satisfying creditors, *held* not to constitute a voidable assignment even though at the time the debtor was insolvent, since the debtor obtained full value for his property in the form of stock, and it is not unlawful for an insolvent debtor to transfer his property for other property of a different form. G. S. 23-1, G.S. 23-2. Whether the transfer by the debtor of his shares of stock in the corporation to particular creditors is subject to attack by other creditors is not presented, nor is the right of other creditors to compel the corporation to permit them, or any of them, to share in the distribution of the funds presented for decision.

2. Execution § 16—

Judgment creditors may not by supplemental proceedings reach funds which the judgment debtor had validly transferred prior to the institution of the judgment creditors' suits.

3. Judgments § 29—

An order entered in the cause is not binding on one who was not made a party until after the order was entered.

4. Appeal and Error § 49—

Findings of fact and conclusions of law relating to matters not presented for decision by the lower court will be stricken on appeal in order that possible future proceedings bringing such matters in issue may not be prejudiced.

ESTRIDGE *v.* DENSON AND PAVING CO. *v.* DENSON AND WILSON *v.* DENSON.

APPEAL by plaintiffs from *Jackson, J.*, at the 16 May 1966 Non-Jury Civil Session of MECKLENBURG, docketed and argued at the Fall Term 1966 as No. 281.

These are three suits separately instituted by the respective plaintiffs for the recovery of amounts alleged to be due them from the respective defendants. The plaintiffs having recovered judgments and issued executions thereon, which were returned unsatisfied, brought supplemental proceedings. Crab Orchard Development Company, Inc., and R. S. Pate were permitted to intervene by orders entered in the respective suits by Hasty, S.J., which orders the plaintiffs also assign as error upon the present appeal. The remaining facts are set forth in the opinion.

John G. Newitt for plaintiff appellant Wilson.

W. A. Dennis for plaintiff appellants Estridge and Carolina Paving Company, Inc.

J. Donnell Lassiter and Kennedy, Covington, Lobdell & Hickman for R. S. Pate, Intervenor.

W. Faison Barnes and Carl W. Howard for Intervenor Crab Orchard Development Company, Inc.

LAKE, J. Each of the plaintiffs sued Denson (or Denson and wife) and recovered judgment against him (or them), the validity of which judgment is not in question. Each plaintiff caused to be issued on such judgment an execution which was duly returned unsatisfied. Each plaintiff thereupon instituted supplemental proceedings, asserting by verified petition that the judgment debtor (or debtors) had funds on deposit with First Federal Savings and Loan Association of Charlotte (hereinafter called First Federal), which deposit was pledged to secure an indebtedness to First Federal, but in which the judgment debtor (or debtors) had an equity which should be applied to the payment of the judgment. Each such petition asserted that Denson (or Denson and wife) had formed Crab Orchard Development Company, Inc. (hereinafter called Crab Orchard) and had transferred assets to it. Each petition prayed that First Federal be restrained from dealing with the deposit without prior order of the court, that a lien in favor of the plaintiff be impressed upon the deposit and that the judgment debtor (or debtors) be restrained from transferring assets and be directed to appear and show, among other things, what interest he (or they) has (or have) in Crab Orchard.

In each case, Judge Campbell entered an order directing the Densons, First Federal, Crab Orchard and Fred Denson, Inc., to appear and be examined relative to any assets of Denson (or Denson

and wife) which should be applied to the payment of the judgment, and restrained the transfer of such assets subject to further orders of the court.

The three matters were consolidated for such hearing. The record before us does not disclose what evidence was offered at the hearing before Judge Campbell. Crab Orchard appeared but was not then made a party to any of the proceedings. It does not appear to what extent it participated in that hearing.

Judge Campbell entered an order reciting that it appeared to the court that the Densons are the owners of the certificates of deposit and that First Federal had a first lien thereon. He ordered that any payment by First Federal on account of such certificates be made to the clerk, to be held by him pending the further order of the court. This order made no reference to any right or claim of Crab Orchard.

Pursuant to the order of Judge Campbell, funds were paid over by First Federal to the clerk. Each plaintiff then filed a motion that the clerk apply such funds to the payment of the judgments. Crab Orchard then filed in each case a petition that it be made a party thereto and be permitted to assert its right to the funds, alleging that on 28 October 1960, a year before the entry of any of the judgments and some months before the filing of any of these suits, Denson and wife assigned to Crab Orchard the certificates of deposit so issued by First Federal, subject to its lien. Judge Hasty entered an order in each case making Crab Orchard a party and permitting it to file a petition setting forth its claim to the funds, which it did. Thereafter, R. S. Pate filed a petition that he be made a party, asserting a partial assignment by Crab Orchard to him. This was ordered by Judge Hasty. Pate's right, if any, is derived through the alleged assignment to Crab Orchard by the Densons. Allen Griffin also sought and obtained permission to intervene but thereafter assigned his rights to Crab Orchard, the basis of his alleged right not being stated in the present record.

In its several petitions asserting its claim to the funds, Crab Orchard alleges:

> "Although this Intervenor was originally organized by Fred Denson and certain of its shares of capital stock were issued to Fred Denson in exchange for the assignment of said certificates of deposit, said exchange was for the sole and express purpose of reassigning said shares of capital stock to the creditors of Fred Denson and wife, Letha B. Denson. Said stock certificates were in fact assigned to creditors of Fred Denson and wife, Letha B. Denson in satisfaction of their respective claims and

such creditors now constitute the sole owners of all validly outstanding shares of this intervenor."

Crab Orchard alleges in its petition in the suits by plaintiffs Estridge and Carolina Paving Company that these plaintiffs, together with other creditors of the Densons, were offered shares of Crab Orchard in satisfaction of their claims against the Densons, but rejected the offer, electing instead to bring these suits against the Densons. These two plaintiffs admit this in their answers to the petitions, thus establishing that prior to the institution of these actions they knew of the proposal to organize Crab Orchard and that they were offered shares in Crab Orchard in satisfaction of their claims against the Densons and rejected the offer. Crab Orchard does not allege that a similar proposal was made to the plaintiff Wilson, whose claim against Denson was apparently overlooked.

Each plaintiff, answering the petitions of Crab Orchard and Pate, alleges the assignment from the Densons to Crab Orchard was fraudulent as to such plaintiff and that at the time of the partial reassignment by Crab Orchard to Pate he knew that the assignment from Denson to Crab Orchard was a preferential transfer forbidden by G.S. 23-1.

The matter then came on for hearing before Judge Jackson to determine the rights of the parties in the funds so held by the clerk under the order of Judge Campbell. Crab Orchard offered evidence which included testimony by Leon Olive, who had been the attorney for Denson and had performed the legal services in connection with the organization and incorporation of Crab Orchard, Lewis R. Frost, President of Crab Orchard, and W. A. Dennis, attorney for the plaintiffs Estridge and Carolina Paving Company, he being called as an adverse witness.

Mr. Dennis testified that in 1960, or early 1961, this being prior to the bringing of the present suits, he, representing the plaintiffs Estridge and Carolina Paving Company, attended a conference of Denson creditors in the office of Mr. Olive at which a proposal to issue stock in Crab Orchard was discussed, but he does not recall any mention of an assignment of the certificates of deposit.

Mr. Olive testified that Crab Orchard was organized "for benefit of Mr. Denson and his creditors." Mr. Frost "put $3,000 of his own money in the company and received stock for that." Mr. Olive communicated with creditors of Denson, including the plaintiffs Estridge and Carolina Paving Company, through their attorney Mr. Dennis, telling them of his plan for getting the Densons' creditors "off their backs," which plan he testified was this:

"The mechanics of the issuance was that we would issue the stock directly to Mr. and Mrs. Denson who would in turn endorse it back over to the creditor, and then we would issue the new certificates of stock directly to the creditors. We offered to do exactly this on the indebtedness on the Carolina Paving and to Mr. Estridge, with their full knowledge as to what we are doing. At first, Mr. Dennis told me that they would go along. We actually issued the stock certificates to Carolina Paving and then Mr. Estridge, and then Mr. Dennis came back and said 'No' that his clients would not go along on this and therefore we voided those stock certificates and they are now in the stock book showing their issuance to Mr. and Mrs. Denson and the endorsement over, and then their reissuance to Mr. and Mrs. Estridge and Carolina Paving and they are marked 'voided' when they were not accepted in payment of our debt, which was not a judgment at that time. At that time there was no judgment whatsoever on the record that had been obtained by either Carolina Paving or Mr. Estridge. I might add that at that time I was not aware of any claim that had been made or any indebtedness to Mr. Wilson. I don't remember talking to Mr. Newitt (Attorney for Wilson) at all. I may have but I don't remember that.

"As a consideration passing to Crab Orchard Development Company in exchange for the issuance of stock, to Mr. and Mrs. Denson, Mr. and Mrs. Denson assigned directly by written consignment *(sic)* all of his rights, title and interest to the stock certificates, or certificates of deposit, at First Federal Savings & Loan Association, in the sum at that time I believe of $70,500.

* * *

"The stock certificates issued to Mr. and Mrs. Denson were subsequently reassigned by them to their creditors. * * *

"As to the purpose of the incorporation, in the very beginning, there was some talk by the directors, at the very first meeting that we might do some building. That was one of the purposes putting in the money by Mr. Frost, to give the corporation some cash, that we might involve in building. About, oh, within another one month or six weeks or that area there was another meeting of the directors, at which time we determined that we would not get involved in any kind of business venture with anyone and that we would remain a corporation solely for the purpose of holding the certificates of deposit and

then, of course, to pay the stockholders whatever equity that we ever got from First Federal from the certificates of deposit. * * *

"I told Mr. Dennis about the original assignment. He saw them. He was aware of what we were doing in this case, what the Densons had asked us to do, and that the stock or interest in Crab Orchard Dev. Co. was going to be given to the creditors, all creditors including Carolina Paving and Estridge and all other creditors that we knew about in satisfaction of what indebtedness that the Densons had to these creditors and most of the creditors went along and accepted and *they are the present stockholders. And those creditors are the same stockholders in Crab Orchard today except Carolina Paving and Harry L. Estridge.* * * * (Emphasis added.)

"I believe there was fifty shares that was issued to Mr. and Mrs. Denson that have not been reassigned or was not reassigned to his creditors and where that 50 shares is I don't know. I haven't the slightest idea whether he still owns these or whether he has assigned those shares to someone who has not forwarded them on to the corporation for reissuance."

Mr. Frost testified that he paid cash for his stock and that Crab Orchard originally opened an office for the purpose of developing a tract of land owned by Denson, with whom Mr. Frost had no previous affiliation.

Mrs. Wilson testified that neither she nor her husband had been offered stock in Crab Orchard, and a vice-president of First Federal testified that it had no notice of the assignment to Crab Orchard of Denson's equity in the certificates of deposit until some time after the above mentioned order by Judge Campbell.

Judge Jackson made "Findings of Fact," including these:

"On October 26, 1960 [prior to the institution of these suits] the Densons entered into an agreement with Crab Orchard under the terms of which Crab Orchard agreed to issue shares of its capital stock to the Densons in consideration for the assignment by the Densons to Crab Orchard of all of the Densons' right, title and interest in and to the certificates * * *. Said agreement between Crab Orchard and the Densons further provided that the shares of Crab Orchard's stock so issued to the Densons would be reassigned to the Densons' creditors in satisfaction of their respective claims and upon the further provision that any shares not so reassigned to the Densons' creditors would be returned to the corporation as treasury stock.

"On October 28, 1960, prior to the institution of these actions and, pursuant to said agreement with Crab Orchard, the Densons made an assignment under seal to Crab Orchard of all of the Densons' right, title and interest in and to certificates of deposit having a full value of $70,500 owned by the Densons and held by First Federal subject to First Federal's right to hold the same under its collateral assignment thereof.

"In consideration for the assignment of said certificates of deposit, Crab Orchard issued to the Densons * * * shares * * *. All of the shares so issued to the Densons were reassigned to their various creditors except 500 shares of the par value of $1.00 each. Certificates for shares so reassigned were transferred on the stock book of the corporation.

"Prior to the commencement of their respective actions, the plaintiffs Estridge and Carolina Paving Company were afforded an opportunity to accept some of the Crab Orchard stock which had theretofore been issued to the Densons in satisfaction of their respective claims against the Densons. Said plaintiffs rejected such offer. There is no evidence that the plaintiff Wilson was afforded a similar opportunity. The attorney who acted in behalf of the Densons and Crab Orchard was not aware of the plaintiff Wilson's claim. An effort was made by said attorney to satisfy all known creditors of the Densons by offering them Crab Orchard stock.

"At the time of the assignment of said certificates of deposit by the Densons to Crab Orchard, the Densons had substantial assets other than said certificates of deposit * * *.

"There is no evidence that the Densons were insolvent at the time of their assignments of said certificates of deposit to Crab Orchard."

Upon these facts Judge Jackson made "Conclusions of Law," which included these:

"The assignment of certificates of deposit by the Densons to Crab Orchard * * * did not constitute an assignment for the benefit of creditors within the meaning of Section 23-1 of the General Statutes of North Carolina. Said assignment was for valuable consideration and was not fraudulent as to the plaintiffs.

"Neither of the Densons has any present right, title or interest in or to the funds * * * and neither of them had any right, title or interest in or to the certificates of deposit * * *

at the time of the institution of the supplemental proceedings by the plaintiffs herein.

"The plaintiffs are not entitled to reach any part of the funds now held by the clerk by these supplemental proceedings * * *."

Judge Jackson thereupon ordered the clerk to pay from the funds held by him under Judge Campbell's order the claim of R. S. Pate, assignee of Crab Orchard, and to pay over the remainder to Crab Orchard. First Federal was ordered to pay any remainder of the deposit to Crab Orchard when the same is released from the First Federal lien.

The multiplicity of pleadings, motions and testimony contained in the present record fails to bring into sharp, clear focus all aspects of the total picture of the transactions of the Densons. However, it is clear that what the plaintiffs have sought to do by these proceedings supplemental to execution is to obtain a preference over others who are, or were, creditors of Denson (or Denson and wife) insofar as the funds now in the hands of the clerk are concerned. The question for Judge Jackson's determination was whether in these supplemental proceedings in execution the plaintiffs are entitled to an order directing the clerk to apply these funds to the payment of their judgments. He has ruled that they are not so entitled, and in this there is no error. He has ruled that Crab Orchard is the owner of the funds, and entitled to have them paid over to it by virtue of the assignment to it by the Densons prior to the institution of these suits by the plaintiff. In this there was no error. He has based these rulings upon his conclusion that at the time the plaintiffs started their respective suits against Denson (or against Denson and wife), obtained their respective judgments against him (or against Denson and wife), issued executions on those judgments and instituted these supplemental proceedings to reach Denson's (or Denson and wife's) property, Denson (or Denson and wife) had no property right in the deposits from which these funds were derived. In this there is no error.

Judge Jackson did not have before him and did not decide the right of the plaintiffs, or of any of them, in a proceeding brought for that purpose against Crab Orchard, to compel Crab Orchard to permit these plaintiffs, or any of them, to share in any distribution of these funds by it to its stockholders. Consequently, that question is not before this Court on this appeal. All that is before us is the correctness of Judge Jackson's order declaring that the assignment by Denson (or Denson and wife) to Crab Orchard was valid and that it antedated all of these suits, judgments, executions and supplemental proceedings so as to preclude any right in any of the plain-

tiffs to compel the clerk to pay these funds, or any part thereof, to them. There was no error in this order.

According to the record before us, the assignment of Denson's interest in the certificates of deposit now in question was to Crab Orchard, a new corporation, in consideration for the issuance by it to Denson of certificates of stock in Crab Orchard. It is true that the record indicates that the corporation was formed "to get the creditors off their [the Densons'] backs." Whatever the purpose may have been, the testimony before Judge Jackson was that the procedure for carrying it out was the organization of a new corporation, the transfer to it of property owned by Denson, the issuance of stock to Denson in exchange for that property, and the subsequent transfer of stock certificates by Denson to his creditors or others. The record shows that there was at least one other stockholder, Lewis R. Frost, who paid cash to the corporation in return for stock issued by it direct to him.

When these transactions were completed, the corporation was the owner of property transferred to it by Denson, Frost and possibly others. In return it had issued its stock certificates, making those individuals the owners of its shares. It appears that thereafter Denson, who has disappeared, transferred most, if not all, of the shares so issued to him. If he did not transfer all of them, we do not know what has become of the other shares issued to Denson. He may still hold them. They may have been pledged by him to secure bona fide loans to him. The transferees of some, or all, of the shares originally issued to Denson may or may not hold such shares subject to the claims of these plaintiffs. If so, that does not alter the nature of the transaction between Denson and Crab Orchard. It does not make the certificates of stock issued to Denson invalid, nor does it defeat the title of the corporation to that which it received for its shares.

To set aside or disregard the assignment to Crab Orchard of these accounts receivable will destroy or seriously deplete the value of the outstanding stock. The record indicates nothing as to the identity or bona fides of the present owners of those shares. A transfer by Denson of some of those shares to one or more of his creditors may, itself, be deemed an assignment for the benefit of his creditors. See: *Bank v. Tobacco Co.*, 188 N.C. 177, 124 S.E. 158; 6 Am. Jur., 2d, Assignments For Benefit Of Creditors, § 47. That, however, is not the transaction before us on this record.

G.S. 23-1 forbids a preference to one or more creditors in an assignment for the benefit of creditors. G.S. 23-2 authorizes an assignee for benefit of creditors to sue to recover a preferential transfer by

the debtor within four months prior to registration of the deed of assignment, if the creditor so preferred knew or had reasonable ground to believe the transferor-debtor was insolvent. Apart from these statutes a transfer, admittedly preferential, by a debtor admittedly insolvent, is not unlawful or subject to attack on that ground. *Guggenheimer v. Brookfield*, 90 N.C. 232. Nothing else appearing, a preferential transfer is not a fraudulent conveyance.

A transfer by a debtor, even though insolvent, to a newly formed corporation in exchange for shares of stock in that corporation is a transfer for value, at least where, as appears upon this record, the corporation issues other shares to other stockholders for cash. It is not unlawful for an insolvent debtor to transfer his property in exchange for other property of a different form. This being a newly formed corporation, without obligations of its own, it would appear that Denson received full value, in the form of stock, for the property transferred by him, but even if he made a bad bargain and received less in value than he transferred, that circumstance would not make the transfer to the corporation unlawful or invalid.

It is well settled that the corporate entity will be disregarded when used to shield fraud. *Terrace, Inc. v. Indemnity Co.*, 243 N.C. 595, 91 S.E. 2d 584; *Erickson v. Starling*, 233 N.C. 539, 64 S.E. 2d 832; *Mills v. Building & Loan Asso.*, 216 N.C. 664, 6 S.E. 2d 549. However, this record does not support an application of that principle.

To set aside the transfer by Denson to Crab Orchard would put in jeopardy the rights of the present holders of the stock issued by the corporation in exchange for the property so transferred to it by Denson. The record indicates that most, if not all, of them were creditors of Denson (or of Denson and wife) who took their shares in full settlement of their claims against him (or them). The evidence before Judge Jackson would not support a finding that they are not bona fide purchasers of their shares for value. Two of the plaintiffs, being offered the same opportunity, elected not to avail themselves of it, but to pursue their present course.

There is in this record evidence that Denson was insolvent when the transfer from him to Crab Orchard took place. The contrary finding, or conclusion, in Judge Jackson's order is error. However, for the reasons above mentioned, the solvency of Denson at that time is not a material fact in the present inquiry and this error in Judge Jackson's order is not sufficient basis for granting a new trial. If Denson was then insolvent, there would still be no sufficient evidence in this record to warrant the superior court in ignoring or setting aside the transfer from Denson to Crab Orchard.

This is a supplemental proceeding to subject the funds in question to the payment of the plaintiffs' judgments against Denson, executions issued against his property having been returned unsatisfied. The insurmountable barrier in the plaintiffs' path is that these funds were no longer Denson's property when these proceedings were instituted and they cannot be reached by them in this way. Judge Jackson has so found and there is ample evidence to support this finding.

Crab Orchard was not made a party to the proceeding at the time of Judge Campbell's order with reference to these certificates of deposit. It is true that Crab Orchard was ordered to appear at the hearing which resulted in Judge Campbell's order, but the purpose of so ordering it to appear seems to have been that it might "be examined" relative to the assets of the Densons. Crab Orchard did not become a party to these proceedings until it was allowed to intervene by the order of Judge Hasty for the purpose of asserting its present claim. Judge Campbell's order does not purport to determine its rights. Furthermore, Crab Orchard, not being a party at the time of the entry of the order by Judge Campbell, is not barred by that order from asserting its claim at this time. *Kayler v. Gallimore,* 269 N.C. 405, 152 S.E. 2d 518; *Bank v. Casualty Co.,* 268 N.C. 234, 150 S.E. 2d 396.

There was no error in the several orders of Hasty, S.J., permitting intervention by Crab Orchard and Pate in these proceedings.

In order that the rights, if any, of the plaintiffs in any proceeding which they deem it advisable to institute against Crab Orchard, its stockholders or assignees be not prejudiced thereby, we vacate and set aside Finding of Fact Number 13 in the judgment of Jackson, J., reading: "There is no evidence that the Densons were insolvent at the time of their assignment of said certificates of deposit to Crab Orchard." In so doing, we are not to be understood as intimating that the Densons, or either of them, were or was then insolvent, the determination of that question not being material to the matter before Jackson, J., or before us.

For the same reason, we vacate and set aside so much of Conclusion of Law Number 1 in the judgment of Jackson, J., as reads: "did not constitute an assignment for the benefit of creditors within the meaning of Section 23-1 of the General Statutes of North Carolina." Whether the assignments of the certificates of deposit to Crab Orchard constituted an assignment for benefit of the creditors of Den-

son within the meaning of G.S. 23-1 was not before Jackson, J., and is not before us. We express no opinion with reference thereto.

Except as so modified, the judgment of Jackson, J., is

Affirmed.

ADELIA WILLIS DALE, BY AND THROUGH HER AGENT AND ATTORNEY IN FACT, WHEELER DALE, v. CITY OF MORGANTON, NORTH CAROLINA.

(Filed 20 June, 1967.)

1. Appeal and Error § 50—

On appeal from an order granting or refusing an interlocutory injunction, the Supreme Court is not bound by the findings of fact of the trial court, but may review the evidence and find facts for itself.

2. Municipal Corporations § 4—

A municipality, in the exercise of the proprietary function of furnishing electricity to consumers, is under the common law duty not to discriminate in service or rates, notwithstanding that it is exempt from regulation by the Utilities Commission, G.S. 62-3(23), and may not lawfully refuse electrical service because of a controversy with a consumer concerning a matter which is not related to the service sought, and therefore may not refuse service in order to coerce the consumer to comply with the municipality's police regulations enacted in the exercise of a governmental function in regard to the safety of the consumer's house.

3. Same—

Since a city engaged in the proprietary function of supplying electricity to consumers is liable for injuries due to its negligence, a city may, in order to obviate possible future liability, refuse to render service to a customer when its inspection of the customer's house reveals that the electrical wiring therein is in a dangerous condition.

4. Municipal Corporations § 24—

Where a municipality is given express legislative authority in regard to a matter, an ordinance enacted pursuant to such power need not refer to the statute.

5. Municipal Corporations § 2—

Chapter 1009 of the Session Laws of 1959 has remained in full force and effect since July 1959, G.S. 160-453.23, notwithstanding its provision that prior laws governing annexation should remain in force to 1 July 1962.

6. Same—

The introduction of an annexation ordinance into evidence, which ordinance recites compliance with all procedures made prerequisite to annexation, establishes *prima facie* substantial compliance with the requirements and provisions of the statute, and a party attacking the validity of the

ordinance who fails to carry the burden of showing by competent evidence failure of the municipality to comply with any statutory requirement, must fail.

7. Same—

The requirement of G.S. 160-453.19 that a map of annexed territory, together with a certified copy of the ordinance, be recorded in the office of the register of deeds and in the office of the Secretary of State, is not a condition precedent to effective annexation of territory by a municipality, but is a duty to be performed after annexation is complete.

8. Same—

The failure of a city to extend sewer lines and other services into an annexed area pursuant to the plan of annexation is not a condition precedent to annexation, and the remedy of a property owner for failure of the city to provide him with such services is solely by suit for *mandamus* to compel the city to provide such services. G.S. 160-453.17(8).

9. Municipal Corporations § 24—

A municipal corporation has no inherent police power, and statutes conferring such powers are to be strictly construed.

10. Municipal Corporations § 25—

Where a municipal code substantially incorporates in its ordinance the conditions specified in G.S. 160-182 as prerequisite to the closing of a dwelling house unfit for human habitation, its ordinance adopting the code is within the statutory power conferred, and it is not necessary to determine whether the municipality had any other authority to enact such police regulation.

11. Municipal Corporations § 24—

Where an ordinance adopting a building code specifies that, in the event of conflict between the building code adopted and the provisions of the ordinance, the ordinance should control, procedural requirements in the ordinance and the applicable statute must be substantially complied with in order to confer upon the municipality authority to forbid the occupancy of a dwelling, and any wider latitude delegated by the building code is immaterial.

12. Same—

Where a municipal building code provides that the occupant of a dwelling should be given notice and an opportunity to be heard upon the question of the fitness of the dwelling for human habitation before the municipality should have the right to prevent occupancy of the house as a dwelling, a notice posted on the dwelling stating that its occupancy had been prohibited by the municipal building official, without compliance with procedural prerequisites, is void and of no legal effect, and the city should be required to remove such notice until the requisite procedure has been complied with.

13. Appeal and Error § 49—

A conclusion of law of the Superior Court in regard to matters not presented for decision will be stricken on appeal in order that subsequent proceedings may not be prejudiced thereby.

DALE *v.* MORGANTON.

APPEAL by plaintiff from *Clarkson, J.,* at the 7 October 1966 Session of BURKE.

The plaintiff is the owner of a dwelling house designated as 106 Dale Circle in an area which the city of Morganton asserts it annexed. The plaintiff denies the validity of the annexation. When the house was vacated by the former tenant of the plaintiff, the city caused it to be inspected and, upon finding that the house was unfit for human habitation, it caused to be posted thereon a notice reading, "THIS BUILDING IS UNSAFE, AND ITS USE FOR OCCUPANCY HAS BEEN PROHIBITED BY THE BUILDING OFFICIAL." The plaintiff contends that this notice is void and of no legal effect. During the occupancy of the house, it was supplied with electricity and water through connection with the city owned electric and water distribution systems. When the former tenant moved out, the city cut off its electricity. Following the posting of the above notice, the plaintiff rented the house to a new tenant who called upon the city for reconnection of the electric service and tendered the usual deposit. The city refused to provide electric service to the house. In consequence, the new tenant did not move into it.

The alleged annexation of the area including these premises occurred in October, 1963. Thereafter, the plaintiff paid taxes levied upon her by the city on account of this property, there being no suggestion that she paid them under protest. Subsequently, the city adopted an ordinance called the "Southern Housing Code."

The plaintiff prays for: (1) An injunction requiring the city "to cease its interference with the use of the premises" by the plaintiff; (2) a mandatory injunction requiring the city to furnish electricity to the premises; (3) that the city be required to remove its notice of condemnation; and (4) damages for loss of rents and profits due to the city's refusal to supply electricity.

The defendant was ordered to appear and show cause why the injunction, as prayed for in the complaint, should not be granted pending the final determination of the action. At the hearing the plaintiff offered in evidence the annexation ordinance, the Southern Housing Code, the notice posted on the building by the city, letters from the city to the plaintiff advising her that the city had inspected this and other houses belonging to the plaintiff and found them "unfit for human habitation as provided by the Morganton Housing Code," and a map of the annexed area including this property.

P. D. Heffner, housing official of the city, testified on behalf of the city that he had inspected this property and found it in a "terribly run down condition," which he described in detail, including the statement, "The wiring is dangerous." He testified that he discussed the matter with the plaintiff's agent when the former tenant moved

out and the electric service was cut off, the agent then agreeing that "the house was run down and not fit for people to live in." In the opinion of Mr. Heffner, "This house is not fit for human habitation." Other houses owned by the plaintiff are in the same condition but are presently occupied by tenants. The city is still furnishing electric power to those houses until the present occupants vacate them. There is no sewer line available to this property, which the plaintiff contends is a violation of the city's duty under its housing code.

The defendant also offered in evidence the affidavit of J. Bill Hines, assistant housing official of the city, to the effect that he had inspected the house, that it fell "far below the minimum requirements of the Housing Code," and that "the wiring in all of these houses is unsafe and dangerous." Photographs of the house were also introduced in evidence.

Among other findings of fact, the court found: The area in question was annexed to the city; the plaintiff paid city taxes on the property; when the house became vacant, the electrical service was cut off; the city has adopted the "Southern Standard Housing Code" and pursuant thereto its housing official inspected the house, met the plaintiff's agent on the premises and discussed the condition of the house with him; the above described notice was thereupon affixed to the door; there is no other available source of electric power for use in this house; the city refused, and continues to refuse, to supply electric power to the new tenant of the plaintiff or the plaintiff at this house, notwithstanding the tender by the tenant of the deposit usually required for such service connection; the city so refused "as a method of enforcing the provisions of the 'Southern Housing Code' "; and the house is unfit for human habitation. Upon these and other findings of fact not essential to the determination of this appeal, the court concluded that the plaintiff is estopped to deny the validity of the annexation of this property to the city; that the city has a right to prevent "the occupancy and use of this dwelling house by people," and has the right to refuse to permit the house to be connected to its electrical distribution system. Accordingly, the court denied the injunctive relief sought by the plaintiff. From this order the plaintiff has appealed.

Simpson & Simpson and C. David Swift for plaintiff appellant.
John H. McMurray for defendant appellee.

LAKE, J. On appeal from an order granting or refusing an interlocutory injunction, this Court is not bound by the findings of fact of the trial judge, but may review such evidence submitted to him and find facts for itself. *Milk Commission v. Food Stores,* 270

N.C. 323, 154 S.E. 2d 548; *Milk Commission v. Dagenhardt,* 261 N.C. 281, 134 S.E. 2d 361; *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116. The evidence by the defendant is that two of its housing officials inspected this house and found the electrical wiring to be in a dangerous condition. This is not contradicted or disputed. We, therefore, find it to be a fact.

The plaintiff complains of two separate and distinct actions by the city. The first is the condemnation of the plaintiff's property for use as a dwelling. The second is the refusal to connect this property with the city's electrical distribution system for the furnishing to it of electric current. The first is an exercise by the city of a governmental function. The second is an exercise of a proprietary function. *Utilities Commission v. Municipal Corporations,* 243 N.C. 193, 90 S.E. 2d 519; *Grimesland v. Washington,* 234 N.C. 117, 66 S.E. 2d 794; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42.

Municipal corporations are specifically excluded from the definition of a "public utility" in G.S. 62-3(23). Consequently, a municipal corporation distributing and selling electric energy to its inhabitants, and to others in its vicinity, is not subject to regulation by the North Carolina Utilities Commission, and the provisions of Chapter 62 of the General Statutes do not apply to it, except as otherwise expressly stated therein. However, the duty now imposed by G.S. 62-140 upon privately owned distributors and sellers of electric power not to discriminate in service or rates is merely a development of "the common law obligation of equal and undiscriminating service." See *Public Service Co. v. Power Co.,* 179 N.C. 18, 30, 101 S.E. 593, 12 A.L.R. 304, reh. dis., 179 N.C. 330, 102 S.E. 625. Upon the rehearing of that case, Brown, J., speaking for the Court, said:

> "It [a privately owned power company] cannot sell to one and arbitrarily refuse to sell to another. * * * A public-service corporation cannot arbitrarily refuse to supply one class which it has undertaken to serve. It must justify its refusal by good reasons."

In *Fulghum v. Selma,* 238 N.C. 100, 105, 76 S.E. 2d 368, this Court recognized that, in the absence of a statute, there is a duty upon a municipal corporation engaged in the distribution and sale of water to its inhabitants to serve without discrimination. There is no difference in this respect between a municipal corporation engaged in the distribution and sale of water and one engaged in the distribution and sale of electricity. That a municipal corporation engaged in such a proprietary function may not discriminate unreasonably between its inhabitants desiring such service, see also: *Home Owners'*

Loan Corp. v. Baltimore, 175 Md. 676, 3 A 2d 747; *Toan v. Perry,* 269 App. Div. 894, 56 N.Y.S. 2d 572; *Hall v. Village of Swanton,* 113 Vt. 424, 35 A 2d 381; *City of Montgomery v. Greene,* 180 Ala. 322, 60 So. 900. In McQuillin, Municipal Corporations, 3rd Ed., 35.35, it is said that a municipal corporation engaged in such a proprietary activity "is under a duty to supply the services which it offers to all persons who apply, without discrimination and at reasonable rates, insofar as it may reasonably do so," and that in the operation of such business, "the municipality possesses the same rights and powers with reference to its management and control that a private owner possesses." To the same effect, see *Holmes v. Fayetteville,* 197 N.C. 740, 747, 150 S.E. 624, app. dis., 281 U.S. 700. Thus, the right of a municipal corporation operating a plant for the distribution and sale of electricity to its inhabitants to refuse to serve is neither greater nor less than that of a privately owned electric power company to do so.

It is well settled that a privately owned supplier of electric power, or other public service, may not lawfully refuse its service because of a controversy with the applicant concerning a matter which is not related to the service sought. *Seaton Mountain Electric etc. Co. v. Idaho Springs Investment Co.,* 49 Colo. 122, 111 P 834; *Snell v. Clinton Electric etc. Co.,* 196 Ill. 626, 63 N.E. 1082; *Hicks v. Monroe Utilities Comm.,* 237 La. 848, 112 So. 2d 635; *Ten Broek v. Miller,* 240 Mich. 667, 216 N.W. 385; 43 Am. Jur., Public Utilities and Services, § 23; Annot., 55 A.L.R. 771.

The facts in *Ten Broek v. Miller, supra,* were very similar to those in the case now before us. There, the proprietor of a summer resort which had been furnishing water and light to the plaintiff's cottage refused to continue to do so unless he built a septic tank approved by the Board of Health. The occupant of the cottage refused to so do on the ground that he had just constructed a cesspool which was satisfactory to him. In holding that the company must supply light and water, the Supreme Court of Michigan said:

> "The installing of a septic tank was purely a collateral matter, and had no relation to the duty of defendant company to furnish the light and water and receive its pay therefor. [Citation omitted.] If plaintiff was violating a rule of the state health department, he could be proceeded against for its infraction in the proper forum. This would be a more orderly way of disposing of a dispute than for defendant to substitute itself for a court and punish plaintiff by cutting off his water and light."

Whatever may be the right of the city of Morganton, in the exercise of its governmental power, to forbid the occupancy of the plain-

tiff's house as a human habitation, that is a matter collateral to the duty of the city to supply electric power for use in this structure. A city may not deprive an inhabitant, otherwise entitled thereto, of light, water or other utility service as a means of compelling obedience to its police regulations, however valid and otherwise enforceable those regulations may be. The right of a city to cut off or refuse a service rendered by it in its proprietary capacity must be determined as if the city, in its capacity of supplier of such service, were a person separate and apart from the city as a unit of government. In the present case, it becomes apparent that for the city to deny electric service to this building, in order to compel obedience to its decree forbidding use of the building for human habitation, is arbitrary when it is remembered that electric service and water service may lawfully be demanded for purposes other than domestic consumption.

It is equally well settled, however, that a privately owned power company, and therefore a city, may lawfully refuse to supply electric energy to a building which is not properly wired. A city engaged in such proprietary activity is liable for injury due to its negligence upon the same principles applicable to a privately owned power company. *Bowling v. Oxford,* 267 N.C. 552, 148 S.E. 2d 624, and cases there cited. A privately owned power company, and so a city, which introduces into a structure electric power, knowing that the wiring of such structure is in a dangerous condition, is liable in damages for injury to persons or property proximately caused thereby. See *Keith v. Gas Co.,* 266 N.C. 119, 146 S.E. 2d 7. Such company or city may, therefore, refuse to serve a customer when its inspection of his building reveals that the wiring therein is in a dangerous condition. *Alabama Power Co. v. Sides,* 229 Ala. 84, 155 So. 686; *State v. Louisiana Gas Service Company* (La. App.), 117 So. 2d 617; *Tismer v. New York Edison Co.,* 170 App. Div. 647, 156 N.Y.S. 28; *Carroway v. Carolina Power & Light Company,* 226 S.C. 237, 84 S.E. 2d 728; *Hawkins v. Vermont Hydro-electric Corporation,* 98 Vt. 176, 126 A 517, 37 A.L.R. 1359.

It having been established that the wiring in the plaintiff's house was in a dangerous condition, there was no error in the conclusion of the court below that the city had a right to refuse to allow this dwelling house to be connected to its electrical distribution system.

The plaintiff contends that the annexation by the city of the area which includes her property was void and, therefore, her property not being within the city limits, the city had no authority to forbid its use for residential purposes. In support of her position, she asserts that the annexation ordinance adopted by the city 7 October

1963 did not refer to Chapter 1009 of the Session Laws of 1959 and the city did not record the map showing the annexation, as required by G.S. 160-453.19, until 14 May 1966.

If a city is authorized by the Legislature to adopt an ordinance, no reference in the ordinance, or in the minutes of the governing body of the city, to the statute conferring such authority upon the city is necessary in order to make the ordinance valid. Chapter 1009 of the Session Laws of 1959 is now codified as Part of Article 36, Chapter 160 of the General Statutes. It provided that the laws theretofore governing the annexation of territory by municipalities should remain in force to 1 July 1962, but the authorities granted to municipalities by the 1959 Act were and have been in full force on and after 1 July 1959. G.S. 160-453.23.

The annexation ordinance adopted by the city of Morganton, by which the plaintiff's properties were brought into the city, was introduced in evidence in the court below. It recites compliance by the city with all of the procedures made prerequisite to annexation by the 1959 Act. This Court held that where an appeal is taken from the adoption of an annexation ordinance, as provided in that statute, and the proceedings show *prima facie* that there has been a substantial compliance with the requirements and provisions of the statute, the burden is upon the party attacking the annexation to show, by competent evidence, failure on the part of the municipality to comply with the statutory requirements. *In Re Annexation Ordinance,* 255 N.C. 633, 122 S.E. 2d 690. If it be assumed that the validity of an annexation may be attacked collaterally, as here, the rule as to the burden of proof would not be more favorable to the attacking party. There is in this record no evidence of such failure by the city in the annexation procedures in question.

The requirement in G.S. 160-453.19 that a map of the annexed territory, together with a certified copy of the ordinance, be recorded in the office of the register of deeds and in the office of the Secretary of State is, obviously, not a condition precedent to the effective annexation of the territory but the imposition of a duty to be performed after the annexation is complete. Similarly, the failure, if any, of the city to extend sewer lines and other services into the annexed area, pursuant to the plan of annexation, is not a condition precedent to annexation, the statutory remedy for such failure being an application, by a person owning property in the annexed territory, for a writ of *mandamus* to compel such performance of the plan. G.S. 160-453.17(8).

Therefore, we hold that the annexation by the city of the area including the plaintiff's property was valid. It conferred upon the

city such governmental powers within that area as it is authorized to exercise elsewhere within its territorial limits.

It is well settled that a municipal corporation has no inherent police power and statutes conferring such powers upon them are to be construed strictly. *State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275; *Kass v. Hedgpeth,* 226 N.C. 405, 38 S.E. 2d 164.

The city relies upon an ordinance adopted by it 25 October 1965, referred to as "The Southern Standard Housing Code." Reference to the Code of the City of Morganton, § 8-84, discloses that the ordinance adopting this housing code provided:

> "The Southern Standard Housing Code, 1965 edition, * * * is hereby adopted as the housing code of the city; provided that in the event of conflict with the provisions of said code with this Code or state law, the provisions of this Code or state law shall prevail."

The City Code, §§ 8-85 to 8-99, substantially incorporate the provisions of G.S. 160-183 to G.S. 160-189, the governing body of the city having found to exist therein the conditions specified in G.S. 160-182 as prerequisites to the adoption of an ordinance for the closing of a dwelling house unfit for human habitation. Although G.S 160-191 provides that the powers conferred upon municipal corporations by the above cited statutes are in addition to and supplemental to powers conferred by any other law, it is plain that the City Council has acted pursuant to these statutory provisions and has made its ordinance called the "Southern Standard Housing Code," subject to powers conferred upon the city by G.S. 160-183, *et seq.* It is, therefore, not necessary to inquire whether the city has any other authority to enact such police regulation.

G.S. 160-184 provides that an ordinance enacted pursuant to the authority so conferred upon the city *shall* include certain provisions. The City Code of Morganton, §§ 8-86 to 8-92, does so. Among these is the provision that whenever it appears to the officer, charged with the duty of administering such regulation, that any dwelling is unfit for human habitation, such officer shall issue and cause to be served upon the owner a complaint stating the charges in that respect and containing a notice of a hearing to be held. Another provides that if such officer, "after such notice and hearing," determines that the dwelling is unfit for human habitation he shall state "in writing his findings of fact in support of such determination," and shall issue and cause to be served upon the owner an order requiring the repair of the house under certain circumstances and its removal under other circumstances. It is then provided that if the owner fails

to comply with such order, the officer may cause the building to be "vacated and closed," and may cause to be posted upon the main entrance to the building a placard stating, "This building is unfit for human habitation; the use or occupation of this building for human habitation is prohibited and unlawful."

We do not deem the variation between the wording of the notice posted upon the plaintiff's property and that prescribed by the statute to be material. However, the record before us clearly indicates that the building inspector of the city did not comply with the procedural requirements of the statute and of the City Code. Substantial compliance with these procedures is a condition precedent to the authority of the city to forbid the use of a dwelling house for human habitation. If the "Southern Standard Housing Code" purports to confer a more extensive authority upon the city officer, which we do not determine, it is, by the very terms of the ordinance adopting it, subject to these procedural requirements in the City Code and in the statute. Thus, it cannot confer upon the officer authority to forbid the occupancy of this dwelling without compliance with these procedural requirements.

It is not contended that the city had ordered the destruction of the house in question. The authority of the city to do so is, therefore, not before us. We express no opinion with reference thereto.

The city not having afforded the plaintiff the opportunity to be heard upon the question of the fitness of her house for human habitation, and this being a prerequisite to such finding by the city official, the fitness or unfitness of the house for such use was not properly before the superior court and is not before us. The finding of fact by the superior court that "this house is unfit for human habitation" is, therefore, vacated and set aside without prejudice to the right of the city to make a determination of such matter pursuant to the procedures above mentioned. The conclusion of the superior court that notice of the condition of the house was given to the plaintiff "in substantial compliance with the code" is error and is vacated and set aside. The conclusion of the superior court that "the City of Morganton had the right to prevent the occupancy and use of this dwelling house by people" is erroneous and is vacated and set aside without prejudice to the right of the city to issue such order as may be justified by proper findings of fact, supported by evidence, made pursuant to the procedural requirements above mentioned.

There was no error in the denial of the plaintiff's motion for a temporary mandatory injunction requiring the city to supply electric service to her house. There was, however, error in the denial of

her motion for a temporary injunction requiring the defendant to remove its notice of condemnation from her property and to cease its interference with the use of the premises by the plaintiff. This matter is remanded to the superior court for the issuance of such injunction without prejudice to the right of the city to enter such order as may be appropriate after compliance by the city with the above mentioned procedural provisions of its code and the statutes above cited.

Error and remanded.

ARTHUR W. WRIGHT, ADMINISTRATOR OF THE ESTATE OF BEATRICE WRIGHT, DECEASED, v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

AND

ARTHUR W. WRIGHT, ADMINISTRATOR OF THE ESTATE OF BEATRICE WRIGHT, DECEASED, v. LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 20 June, 1967.)

1. Pleadings § 12—

A demurrer admits for the purpose of testing the sufficiency of the complaint the truth of all factual averments well stated and all relevant inferences reasonably deducible therefrom, together with exhibits attached to the complaint and made a part thereof, but a demurrer does not admit inferences or conclusions of law.

2. Same—

A demurrer does not admit the construction placed upon an instrument by the pleader when the instrument itself is incorporated in the pleading and the pleader's construction is repugnant to the language of the instrument.

3. Insurance § 3—

Statutory provisions in effect at the time of the issuance of a policy become a part thereof, and policy provisions in conflict with the statute are void.

4. Insurance § 47.1— Complaint held to state cause of action against insurer on uninsured motorist clause.

The assigned risk policy in suit obligated insurer to pay all sums which insured or his wife, or their legal representative, should become legally entitled to recover as damages from the operator of an uninsured automobile, and provided that the amount of such damages should be determined by agreement between the insured, or the personal representative of insured, and insurer, or by arbitration, or in an action against insurer in which the insurer might require the insured to join the tort-feasor. *Held:* The policy provisions are free from ambiguity, and the personal represen-

tative of the spouse of the insured may maintain an action for wrongful death resulting from the negligence of an uninsured motorist without a prior determination of the legal liability of the alleged tort-feasor or whether or not he was in fact an uninsured motorist, and demurrer *ore tenus* should have been overruled.

5. Statutes § 5—

The transcript of a Session Law as certified by the Secretary of State is controlling over the statement of its contents as codified.

6. Insurance § 47.1—

The provisions of Chapter 640, Session Laws of 1961, as certified by the Secretary of State, includes "hit and run" motorists within the protection of the compulsory uninsured motorist clause, and is controlling over the 1965 replacement codification, which omitted the provision relating to "hit and run" motorists.

7. Same—

Since in many cases it is impossible to determine the identity of a "hit and run" driver, a provision in an uninsured motorist clause requiring institution of action by the insured against such driver as a condition precedent to an insurer's liability would in most cases defeat recovery against the insurer, and any such provision would be in conflict with the purport of the statute and void.

8. Same—

Provision of an uninsured motorist clause stipulating that, upon failure of insurer and insured, or insured's legal representative, to agree as to the right of recovery under the clause and if so the amount, the matter should be settled by arbitration, in effect, ousts the jurisdiction of the courts and conflicts with the beneficient purposes of the uninsured motorist statute, and is void.

9. Same—

Institution of action against the operator or owner of an uninsured vehicle is not a condition precedent to the right of the administrator of a passenger in an insured vehicle with which the uninsured vehicle collided to recover for such death under the uninsured motorist clause in the policy.

10. Same; Pleadings § 15—

Where it does not appear from the complaint that insured had rejected coverage under the uninsured motorist clause in the policy, G.S. 20-279.21 (b)(3), demurrer on the ground that insurer had a statement in its file rejecting such coverage by insured, which insurer would offer in evidence, cannot warrant the sustaining of a demurrer to the complaint, since matters *de hors* the pleading may not be considered in passing upon the demurrer.

APPEAL by plaintiff from *Johnston, J.*, 16 May 1966 Civil Session of GUILFORD — High Point Division. Docketed and argued as Case No. 683, Fall Term 1966, and docketed as Case No. 686, Spring Term 1967.

WRIGHT *v.* CASUALTY CO. AND WRIGHT *v.* INSURANCE CO.

Two actions were instituted by plaintiff on the same day in the Superior Court of Guilford County against two separate insurance companies on the uninsured motorist clause of an automobile liability insurance policy issued by each of the two separate defendants. The two actions were consolidated in the Superior Court of Guilford County, and were heard upon a demurrer filed by each defendant to the complaint in the action against it.

Plaintiff appealed from a judgment in each case sustaining the defendant's demurrer to the complaint in each case.

Schoch, Schoch and Schoch by Arch K. Schoch, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Beverly C. Moore for defendant appellee, Fidelity & Casualty Company of New York.

Lovelace, Hardin & Bain by Edward R. Hardin for defendant appellee, Liberty Mutual Insurance Company.

PARKER, C.J. This is a brief summary of the essential parts of plaintiff's complaint in the first action: About 2:30 p.m. on 4 July 1964, plaintiff's intestate was a passenger in an automobile being operated by Betty Jo Carter, her daughter-in-law. This automobile was owned by Charles Nathan Carter, husband of Betty Jo Carter, and at the time was being operated by Betty Jo Carter with the full knowledge and consent of her husband. She was not a resident of plaintiff's intestate's household. When Betty Jo Carter had brought this automobile to a complete halt at the Delaware Bridge tollgate on the New Jersey Turnpike in New Jersey, and after her automobile had been stopped for several seconds waiting for traffic to pass through the tollgate, it was struck violently from the rear by a 1961 Cadillac operated by Leroy Chapman and owned by Robert Fields. Both Chapman and Fields were "uninsured motorists" and the said Cadillac was an "uninsured automobile," all as defined in Section 11(c) of a policy of automobile liability insurance issued by defendant insurance company, Fidelity and Casualty Insurance Company of New York.

As a direct result of the automobile in which plaintiff's intestate was riding as a passenger being struck while it was standing still by the automobile driven by Chapman, plaintiff's intestate sustained severe personal injuries causing her to suffer greatly in body and mind and to incur substantial medical and hospital expenses until her death on 24 December 1965. The collision between the automobile driven by Chapman with the rear end of the stopped automobile in which plaintiff's intestate was a passenger was caused by the sole

proximate negligence of Chapman, which acts of negligence were alleged with particularity in the complaint.

On 8 November 1963 Fidelity issued to plaintiff a policy of automobile liability insurance, which policy was in full force and effect on 4 July 1964. Plaintiff's intestate was his wife, resided in his household, and was therefore insured under the uninsured motorist clause of defendant's policy. This policy provides for payment of all sums which the insured or his legal representative shall be legally entitled to recover as damages from the operator of an uninsured automobile, said liability being limited to $5,000. Defendant has made no payment under its policy to plaintiff for her injuries occasioned by an uninsured motorist. Wherefore, plaintiff prays judgment against defendant for the sum of $5,000 and the costs of this action.

This is a summary of the complaint in the second action in this case, which is identical with the complaint in the first action with these exceptions: On 9 February 1964 Liberty Mutual Insurance Company issued a policy of automobile liability insurance to Charles Nathan Carter, which policy was in full force and effect on 4 July 1964, and covered the operation of the automobile owned by him which was involved in the said collision. At no time did Charles Nathan Carter reject, either orally or in writing, the "uninsured motorist coverage" under the said policy, and, therefore, pursuant to G.S. 20-279.21(b)(3), this policy included protection against uninsured motorists. This policy provides for payment of all sums which the insured or its legal representative shall be legally entitled to recover as damages from the operator of an uninsured automobile, said liability being limited to $5,000, none of which amount has been paid by defendant to plaintiff or his intestate. Wherefore, plaintiff prays judgment against the defendant in this action for the sum of $5,000 and the costs of the action.

A copy of the policy of automobile liability insurance issued by Fidelity to plaintiff is attached to the complaint in the first action and made a part thereof. A copy of the policy of automobile liability insurance issued by Liberty to Carter is attached to the complaint in the second action and made a part thereof.

Fidelity in the action against it demurred *ore tenus* to the complaint for that the complaint failed to state a cause of action against it. The judge entered a judgment sustaining the demurrer and dismissing the action.

Liberty demurred to the complaint in the action against it on these grounds: It appears upon the face of the complaint that there is a defect of parties defendant in this action, in that the sole negligence alleged in the complaint is the negligence of one Chapman,

who was operating an automobile owned by one Fields; that there has been no adjudication as to the liability of said parties for the injuries and damages complained of in the complaint, and further no finding that if said parties were liable that they were "uninsured," and further that it is patent upon the face of the complaint and the policy attached thereto that the said policy did not afford coverage for uninsured motorists. Judgment was entered sustaining the demurrer to the complaint in the second action, and dismissing the action.

A demurrer to a complaint admits, for the purpose of testing the sufficiency of the complaint, the truth of all factual averments well stated and all relevant inferences of fact reasonably deducible therefrom. A demurrer does not admit inferences, or conclusions of law. 3 Strong's N. C. Index, Pleadings, § 12.

Exhibits attached to the complaint and made a part thereof should be considered on a demurrer. *Coach Lines v. Brotherhood,* 254 N.C. 60, 118 S.E. 2d 37.

A demurrer does not admit the alleged construction of an instrument when the instrument itself is incorporated in the pleadings and the construction alleged is repugnant to the language of the instrument. *Lindley v. Yeatman,* 242 N.C. 145, 87 S.E. 2d 5.

G.S. 1-151 requires "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."

"G.S. 20-279.21(b)(3) was enacted as Chapter 640, Session Laws of 1961, entitled 'An Act to amend G.S. 20-279.21 defining motor vehicle liability insurance policy for financial responsibility purposes so as to include protection against *uninsured motorists.*' (Our italics.)" *Buck v. Guaranty Co.,* 265 N.C. 285, 144 S.E. 2d 34.

The Fidelity policy issued to plaintiff is an assigned risk policy. Attached to the policy is an endorsement "North Carolina Protection Against Uninsured Motorists Insurance." An insuring agreement in this endorsement reads:

"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.
>
> For the purpose of this endorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree and the insured so demands, by arbitration; but if the insured elects not to arbitrate, the liability of the company shall be determined only in an action against the company and no prior judgment against any person or organization alleged to be legally responsible for such damages shall be conclusive of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company. In any action against the company, the company may require the insured to join such person or organization as a party defendant."

It contains a definition as follows:

> "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. . . ."

The first action here is on the uninsured motorists endorsement contained in the automobile liability insurance policy issued by Fidelity to plaintiff, and the decision here in the first action depends upon the provisions of that contract contained in the uninsured motorists endorsement.

"Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it. In case a provision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls." *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610.

The endorsement to Fidelity's policy providing protection against uninsured motorists states that Fidelity will pay all sums which he is legally entitled to recover as damages from the operator of an uninsured automobile because of bodily injury to his spouse, a resident of his household, resulting from an accident and arising out of the ownership, maintenance or use of such uninsured automobile. G.S. 20-279.21 provides in part:

> ". . . (A)n 'uninsured motor vehicle' shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the same denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or G.S. 20-279.25 in lieu of such bodily injury and property damage liability insurance, or the owner of such motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33. . . ."

The question of the validity of the basic contract here is essentially a judicial question. The briefs of the parties state in substance that the first question presented for decision is this: Does an action lie against an automobile liability insurer under an uninsured motorists endorsement prior to the determination of "legal liability" of the alleged tortfeasor, and whether or not he was, in fact, insured?

The institution of an action by plaintiff in the first action against the uninsured motorist is not a condition precedent to Fidelity's legal liability under the uninsured motorist coverage provided in its endorsement to its policy for this reason: "For the purpose of this endorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree and the insured so demands, by arbitration; but if the insured elects not to arbitrate, the liability of the company shall be determined only in an action against the company. . . ." In this endorsement provision is made that "In any action against the company, the company *may require* the insured to join such person or organization as a party defendant." (Emphasis ours.)

This provision in the endorsement of Fidelity's policy is free from ambiguity, and it must be construed according to its terms. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410.

Williams v. Insurance Co., 269 N.C. 235, 152 S.E. 2d 102, is a civil action to recover under an uninsured motorists provision of a

policy. In that case 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 and his spouse were residents of the same household. We have examined the automobile liability insurance policy attached to the complaint and made a part thereof in the office of the clerk of this Court, and it contains a provision in the very words of the provision in Fidelity's policy for the purpose of determining the legal amount plaintiff is entitled to recover, if any, by agreement, or, if they fail to agree and if the insured so demands, by arbitration, and if not, by the institution of an action against the insurer. The action in that case was brought directly against the insurer. The trial judge entered an order sustaining the demurrer to the complaint on the ground that the facts alleged did not state a cause of action. This Court reversed the judgment of the trial court. The question of whether or not plaintiff must institute an action against the uninsured motorist as a condition precedent to defendant's liability in that case was not raised in the briefs of counsel and was not referred to in the opinion. The clear inference of the opinion is that it was not a condition precedent to defendant's legal liability. In the opinion, Branch, J., speaking for the Court, said:

> "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."

The provision in the endorsement gives the insured the option to demand arbitration. It is not necessary for us in this case to pass upon the validity of this arbitration clause. This is said in 29A Am. Jur., Insurance, § 1611:

> "In accordance with general principles applicable to all contracts, it is the rule that a provision in an insurance policy that all disputes arising under the policy shall be submitted to arbitrators, or a provision similar in substance and effect, is not binding. On the other hand, the view prevailing in nearly all jurisdictions is that a stipulation not ousting the jurisdiction of the courts, but leaving the general question of liability for a loss to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is valid."

"Uninsured motorists coverage" is designed to close the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation, and this insurance coverage is intended, within fixed limits, to provide financial recompense to innocent persons who receive injuries and the dependents of those who are killed, through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, cannot be made to respond in damages. North Carolina, in company with several other states, requires compulsory "uninsured motorists coverage." G.S. 20-279.21(b)(3). There appears to be a trend to make this coverage compulsory, and within the short period since 1957 legislation has been enacted in California, New Hampshire, New York, and in Virginia requiring its inclusion in automobile liability insurance policies. Anno. 79 A.L.R. 2d 1252. The same annotation on page 1254 (1961) states: "To date comparatively few cases involving uninsured motorists insurance have received the attention of the courts outside of New York and those cases have presented a variety of questions relating to different phases of such coverage. It is to be recognized that the process of judicial construction, interpretation, and enforcement of such insurance contracts is necessarily in an early stage of development, and the existing decisions are too few and too fragmentary to permit the statement of controlling rules or principles." The same statement is more or less accurate today.

Considering the complaint in the first action liberally with a view to substantial justice between the parties, it is our opinion, and we so hold, that it contains factual allegations well stated sufficient to state a cause of action, and the demurrer to it was improvidently allowed. The judgment sustaining the demurrer is overruled.

The second action is on the uninsured motorist protection provision in the automobile liability insurance policy issued by Liberty to Charles Nathan Carter. This is not an assigned risk policy. Liberty's policy contains this provision:

> "PART IV—PROTECTION AGAINST UNINSURED MOTORISTS
> Coverage U—Uninsured motorists (Damages for Bodily Injury): 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 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; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and

if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

"No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company."

Chapter 640, Session Laws of North Carolina 1961, states in relevant part:

"Section 1. G.S. 20-279.21(b), as the same appears in the 1959 Cumulative Supplement to Volume 1C of the General Statutes, is hereby amended by:

* * *

"(3) Adding thereto a new subdivision to be designated as subdivision 3 and to read as follows:

Secretary of State."

" '3. 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 paragraph 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 . . .' " (Emphasis ours.)

Page 1704 of the Session Laws of North Carolina 1961 reads:

"STATE OF NORTH CAROLINA,
DEPARTMENT OF STATE,
RALEIGH, JUNE 26, 1961

"I, THAD EURE, Secretary of State of North Carolina hereby certify that the foregoing (manuscript) are true copies of the original acts and resolutions on file in this office.

/s/ Thad Eure

Chapter 640, Session Laws of North Carolina 1961, when it was codified in G.S. 20-279.21(b)(3), left out "hit-and-run motor vehicles." What is stated in Chapter 640, Session Laws of North Carolina 1961, is controlling over the statement of it as codified in the General Statutes.

In many cases it is impossible to determine the identity of a hit-and-run driver. To hold that the institution of an action by the insured against a hit-and-run driver, and to recover damages from him for his tort, is a condition precedent to the insurer's liability under uninsured motorist coverage, would in most such cases defeat insurer's liability against uninsured motorist coverage. Liberty's policy affording protection against uninsured motorist reads in part: ". . . (D)etermination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration." This provision, in effect, ousting the jurisdiction of the court to judicially determine liability and damages and providing for compulsory arbitration between the insurer and the company, if they do not agree, conflicts with the beneficent purposes of our uninsured motorist statute favorable to the insured, and the provision of the statute controls. *Howell v. Indemnity Co., supra;* 29A Am. Jur., Insurance, § 1611. ". . . (I)f 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." *Williams v. Insurance Co., supra.*

We hold that the institution of an action by plaintiff against Chapman and Fields, either or both, is not a condition precedent to Liberty's liability under the uninsured motorist coverage in Liberty's policy, if there was such coverage. *Hill v. Seaboard Fire & Marine Insurance Company,* 374 S.W. 2d 606, (Mo. App. 1963); *Wortman v. Safeco Insurance Company of America,* 227 F. Supp. 468; *Application of Travelers Indemnity Company,* 226 N.Y.S. 2d 16; Blashfield, Automobile Law and Practice, Vol. 7, § 274.12; Couch on Insurance 2d, Vol. 12, § 45:627. It follows there is no defect of parties in the second action.

It is alleged in the demurrer in the second action "that it is patent upon the face of the complaint and specifically Exhibit A thereof that the automobile liability policy referred to in the complaint did not afford coverage under Section 'U' for uninsured motorists."

The complaint in the second action alleges: "At no time did said Charles Nathan Carter reject, either orally or in writing, 'uninsured motorist coverage' under the above policy" of Liberty.

G.S. 20-279.21(b)(3) is concerned with "uninsured motorist coverage," and reads in part: "The coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage."

From an examination of Liberty's policy attached to the complaint in the second action, and made a part thereof, it does not plainly appear, and it is not patent, upon the face of the policy that said policy did not afford coverage for uninsured motorists. It is stated in defendant appellees' brief: "As a matter of fact, Liberty Mutual has in its file a statement rejecting this coverage and signed by the plaintiff appellant which Liberty is prepared to offer in evidence. . . ." This quotation from the brief is a matter *dehors* the pleadings and may not be considered in passing upon the demurrer. 3 Strong's N.C. Index, Pleadings, § 15.

Plaintiff, in order to be entitled to the benefits of a provision of Liberty's policy against uninsured motorists, must show, *inter alia*, that Liberty's policy provides uninsured motorist coverage.

Considering the complaint in the second action liberally with a view to substantial justice between the parties, it is our opinion, and we so hold, that it contains factual allegations well stated sufficient to state a cause of action, and the demurrer to it was improvidently allowed. The judgment sustaining the demurrer is overruled.

STATE OF NORTH CAROLINA v. EDWARD KEITH TIPPETT.

(Filed 20 June, 1967.)

1. Burglary and Unlawful Breakings § 4—

Nonsuit *held* correctly denied in this prosecution for burglary in the first degree upon evidence sufficient to support a finding that the dwelling house in question was broken and entered into at nighttime with the intent to commit a felony specified in the bill of indictment, together with ample circumstantial evidence tending to identify defendant as the perpetrator of the offense.

2. Burglary and Unlawful Breakings § 1—

In order to constitute burglary it is not necessary to show physical damage to a door or window, but it is sufficient to show a mere opening of an unlocked door or the raising or lowering of an unlocked window.

3. Burglary and Unlawful Breakings § 4—

The State must prove that defendant, at the time of breaking, had the intent of committing a felony specified in the indictment, and defendant's commission of a felony conceived after the breaking will not support con-

viction of burglary; nevertheless, defendant's intent may be found by the jury from evidence as to what defendant did within the house after breaking, and evidence that defendant actually committed after the breaking the felonies specified in the indictment, while not conclusive of the requisite intent, is evidence from which such intent may be inferred.

4. Same—

Stipulations by defendant that he owned keys found upon the floor of the dwelling immediately after an intruder had fled therefrom upon being apprehended after feloniously breaking and entering, is alone sufficient to support a finding that defendant was the intruder.

5. Same—

In order to establish that the breaking and entering occurred at nighttime it is not required that the actual entry be observed by an eye witness, but it is sufficient, in the absence of evidence to the contrary, that his presence in the building was first discovered during hours of darkness.

6. Burglary and Unlawful Breakings § 6—

When all the evidence tends to show that the dwelling broken and entered during the nighttime was actually occupied at the time, the court is not authorized to submit the question of defendant's guilt of burglary in the second degree.

7. Same—

Evidence which tends to show that the occupants of the dwelling in question were present in the house during the evening and night except for a half hour period after 11:00 p.m. and retired without going into one of the bedrooms, and that defendant was in the house less than an hour thereafter, *held* to require the submission to the jury of the question of defendant's guilt of burglary in the second degree, since, under the evidence defendant might have entered the dwelling while it was unoccupied.

8. Arrest and Bail § 3; Searches and Seizures § 1—

Some two hours after a felonious breaking, officers apprehended a person, answering the description of the perpetrator, hiding behind a bush two blocks from the scene of the crime. *Held:* Under the circumstances it was lawful for the officer to arrest such person without a warrant and, as an incident to the arrest, to search him and take from him any property which might be competent as evidence in proving his guilt.

9. Same—

Where the circumstances are such as to authorize a police officer to arrest defendant without a warrant, it is not required, as a prerequisite to a search incidental to the arrest, that the officer make a formal declaration of arrest, and it is sufficient if the officer tells defendant upon apprehending the defendant near the scene of the crime to get into the police car and advises him to take his hands out of his pockets. Fourth and Fourteenth Amendments to the Constitution of the United States.

10. Constitutional Law § 33—

The State may require defendant, under valid arrest, to change his clothes and to take from him the clothing which he wore at the time of his arrest immediately after the commission of the alleged offense, and

introduce such clothing in evidence, the clothing being competent for the purpose of identification.

11. Criminal Law § 87—

Defendant's motion to consolidate the indictment upon which he was being tried with another indictment pending against him, is addressed to the discretion of the trial court, and the denial of the motion will not be disturbed.

12. Criminal Law § 26—

The fact that an indictment for burglary in the first degree specifies that the felonies defendant intended to commit at the time of breaking were larceny and rape, does not warrant the deletion from the indictment of the charge of intent to commit rape, even though another indictment is pending against defendant charging the crime of rape, the question of double jeopardy not arising in the trial under the first indictment.

13. Criminal Law §§ 70, 81—

Where defendant offers no evidence and the State introduces no evidence of any statement made by defendant, the exclusion of cross-examination by defendant of a State witness relative to a statement made by defendant to the witness cannot be competent for the purpose of corroboration of defendant or impeachment of any witness for the State, but must be for the purpose of eliciting a self-serving declaration by defendant, incompetent as hearsay, and the court's ruling sustaining objection to the cross-examination cannot be held an expression of opinion concerning defendant's credibility.

14. Criminal Law § 124—

Motion for a mistrial on the ground of prejudicial publicity in a newspaper, *held* properly denied when the evidence tends to show that no juror read or heard of such publicity.

APPEAL by defendant from *McKinnon, J.*, at the 28 November 1966 Criminal Session of DURHAM.

The defendant was tried under an indictment, proper in form, charging him with first degree burglary. It charges that he broke and entered a dwelling house actually occupied at or about 1 a.m. with the felonious intent to steal goods therein, and the felonious intent to commit rape upon the woman occupant thereof. He was found guilty of second degree burglary and sentenced to confinement in the State Prison for not less than 18 and not more than 25 years. In addition to numerous assignments of error directed to portions of the judge's charge to the jury, to rulings upon the admission of evidence and other rulings in the progress of the trial, the defendant contends that there was error in the denial of his motion for judgment of nonsuit.

The defendant offered no evidence. That introduced by the State, if true, shows:

On the evening of 4 August 1966, Mr. and Mrs. Patton had an-

other couple as dinner guests in their home. The party broke up at about 11 p.m., Mr. and Mrs. Patton then taking the guests to their own home, leaving the Patton home unoccupied until their return at 11:30 p.m. or shortly thereafter. Upon their return, Mr. Patton locked the front door and went immediately to bed and to sleep without determining whether the back door was or was not locked. Mrs. Patton went into the kitchen, observed the outside door was closed, though she did not determine whether it was locked, went to bed in a room adjoining that occupied by her husband, having turned out all lights elsewhere in the house, read for a while, then switched off the light and went to sleep shortly after 12:30 a.m. August 5. Neither of them went into a third bedroom of the house after their return from taking their guests home.

Mrs. Patton awakened and observed through the doorway into the darkened hall a still darker object moving toward her from the direction of the room in which Mr. Patton was sleeping. "Afterwards," she said, "a man swiftly came into my room, leaped upon my bed, leaped upon me, and went into the sexual act." After a brief interval she shoved him off the bed and called out to her husband, who immediately turned on the light in his room and ran into the hall. The intruder fled from the house through the kitchen door. Mr. Patton, in pursuit, saw the kitchen door then standing open and the kitchen light on. The door was not damaged. Mr. Patton ran back to the front door, unlocked and opened it, turned on the outside light and saw a barefooted white man, not a blond, wearing rough work clothes, run down the driveway to the street.

Neither Mr. nor Mrs. Patton was able positively to identify the defendant as the man in their home. Neither had ever seen him before. He had no permission to be there. In her contact with the intruder in the dark bedroom, Mrs. Patton did not see the intruder's face but, on cross examination, testified that she could then tell that he was wearing clothing "that felt like canvas or denim," and had in the pocket thereof some heavy object.

The police were called immediately and the first officers arrived in front of the Patton home at 1:19 a.m. A red and white Rambler station wagon, later found to be registered in the name of the wife of the defendant, was parked on the street. They saw a man moving on the right side of it as if trying to hide. When one of the officers got out of the police car, this man fled and was pursued unsuccessfully by the officer, who saw his face and recognized him as the defendant. He was dressed in dark clothing and was barefooted.

The first officers to enter the Patton house found some keys lying on the floor, just inside the front door. The defendant stipulated at the trial that these were his keys. With one of them, the officers,

in the absence of the defendant, started the Rambler station wagon. The officers also found on the floor on one side of Mrs. Patton's bed a closed pocket knife, which did not belong to Mr. Patton, and, on the other side of the bed, a can of beer which was still cold and lay on its side. Three cans of beer were missing from the Patton refrigerator. The can upon the floor was the same brand and had upon it the same number, "AB-44." The knife and can of beer had been discovered on the floor by Mr. or Mrs. Patton before the officers arrived. The officers found no evidence of a struggle in the bedroom and no sign of damage to the kitchen door, either the wooden or the screen door.

When Mr. Patton retired at 11:30 p.m., he placed his wallet, containing two or three five dollar bills and three one dollar bills, on a chest in his room. At 8 a.m. the next morning the wallet was still there but empty. When the defendant was apprehended, his wallet contained, among other bills, three five dollars bills and three one dollar bills.

At approximately 3 a.m. or 3:30 a.m., two other police officers, driving along the second street over from that on which the Patton residence is located, observed the defendant leaning against a brick wall behind a bush a few feet off the street and between two houses. He was wearing coveralls and was barefooted. One of the officers approached him and "told him to go on to the car." Upon arrival at the car, the defendant put his hands in his pockets, whereupon the officer "advised him to get his hands out of his pockets." The officer then searched him. He found in the defendant's pockets two cold cans of beer of the same brand and with the same marking as the cans in the Patton refrigerator, and also a bottle containing two white pills subsequently identified as Amphetamine, a central nervous system stimulant, the effect of which is to keep one awake. The beer and the pills were introduced in evidence over objection.

On *voir dire*, this officer testified that he was looking for a man "wearing coveralls and barefooted," having been informed of the commission of the offenses at the Patton residence. He was not certain that the defendant was the man they were looking for and, consequently, did not tell the defendant he was under arrest or advise the defendant of his constitutional rights. He had no warrant. He asked the defendant, "Did he mind" going over to the Patton house. The defendant was taken by this officer to the Patton residence and turned over to the officers there, who promptly placed him under formal arrest and advised him of his right to remain silent, which he did.

On *voir dire*, another officer testified that at approximately 7

a.m. at the police station, he took from the defendant the clothing which the defendant was wearing at the time of his arrest, his wife having brought to the police station a change of clothing for him pursuant to a telephone call to her by the officers. Before the clothing was taken from the defendant, his wife and he were permitted to confer alone at length. He was then under arrest and accused of the crimes of burglary and rape, but no warrant had been issued. The defendant was then informed of his right to have an attorney present during his interrogation and his right to use the telephone for that purpose. He was also told that if he was not able to employ an attorney the State would supply one for him during the interrogation, that he could remain silent and that any statement he made could be used against him. No statement made by the defendant was offered in evidence. The defendant's wife testified on *voir dire* that she called the attorney who represented him at the trial and upon this appeal. The attorney instructed her to tell the defendant not to answer any questions until he arrived, which advice she transmitted to the defendant. Thereafter, the officers requested him to remove the clothing and deliver it to them, which he did. He was not told that he had a right to keep his clothes.

Over objection, the State was permitted to offer in evidence the shirt so taken from the defendant and a hair found thereon. An agent of the Federal Bureau of Investigation testified that he compared the hair with specimens of the hair of Mrs. Patton and, in his opinion, the hair found on the defendant's shirt "possessed the same microscopic characteristics as many of the brown hairs" so taken from the head of Mrs. Patton. The hair found upon the shirt had tissue adhering to it which, in the opinion of the witness, indicated that the hair had been removed from the scalp by force. The remaining articles of clothing so taken from the defendant were identified as exhibits but were not offered in evidence. A police officer testified that the report of the Federal Bureau of Investigation with reference to these articles was negative.

Attorney General Bruton, Staff Attorney Partin and Staff Attorney White for the State.

Arthur Vann for defendant appellant.

LAKE, J. The motion for judgment of nonsuit was properly overruled. The evidence is ample to support a finding of each element of the crime of burglary, these being the breaking and entering in the nighttime of the dwelling house or sleeping apartment of another with the intent to commit therein a felony, which felony must

be specified in the bill of indictment. *State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880; *State v. Whit,* 49 N.C. 349.

To show a breaking it is not required that the State offer evidence of damage to a door or window, it being sufficient to show a mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, *State v. McAfee,* 247 N.C. 98, 100 S.E. 2d 249, or the opening of a locked door with a key. *State v. Knight,* 261 N.C. 17, 134 S.E. 2d 101.

The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house. *State v. Reid,* 230 N.C. 561, 53 S.E. 2d 849. However, the fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary. It is only evidence from which such intent at the time of the breaking and entering may be found. Conversely, actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary. *State v. Reid, supra; State v. Hooper,* 227 N.C. 633, 44 S.E. 2d 42; *State v. McDaniel,* 60 N.C. 245. The offense of burglary is the breaking and entering with the requisite intent. It is complete when the building is entered or it does not occur. A breaking and an entry without the intent to commit a felony in the building is not converted into burglary by the subsequent commission therein of a felony subsequently conceived. *State v. Allen,* 186 N.C. 302, 119 S.E. 504.

The indictment in the present case charges that the breaking and entering was with the intent to commit both the felony of larceny and the felony of rape within the Patton dwelling house. Proof of the intent to do either of these felonious acts within the house is sufficient to show this element of the crime of burglary. The evidence is ample to support the finding that the intruder committed larceny of money and beer from the Patton residence and, while therein, assaulted Mrs. Patton with the intent to commit the crime of rape. In the absence of contrary evidence, this is sufficient to support a finding that at the time of the breaking and entering, the intruder had the intent to commit one or both of these felonies within the dwelling. *State v. Boon,* 35 N.C. 244.

The defendant has stipulated that the keys found upon the floor of the Patton home immediately after the intruder had fled therefrom were his. This alone is sufficient to support a finding that the defendant was the intruder. In order to establish that the breaking and entry occurred in the nighttime, it is not essential that the actual entry be observed by a witness, it being sufficient, in the absence

of evidence to the contrary, that his presence in the building was first discovered during the hours of darkness. See *State v. McKnight*, 111 N.C. 690, 16 S.E. 319. It is inconceivable that the entry in this instance occurred prior to the dinner party in this relatively small residence.

If the burglary occurred — *i.e.*, the breaking and entry occurred — while the dwelling house was actually occupied, that is, while some person other than the intruder was in the house, the crime is burglary in the first degree. If the house was then unoccupied, however momentarily, and whether known to the intruder or not, the offense is burglary in the second degree. Otherwise, the elements of the two offenses are identical. G.S. 14-5. This Court has held that where all the evidence is to the effect that the building was actually occupied at the time of the breaking and entry, the court is not authorized to instruct the jury that it may return a verdict of burglary in the second degree. *State v. McAfee, supra; State v. Morris*, 215 N.C. 552, 2 S.E. 2d 554; *State v. Ratcliff*, 199 N.C. 9, 153 S.E. 605. G.S. 15-171 formerly authorized such instruction but was repealed by Session Laws of 1953, c. 100.

In the present case, the evidence is that the house was unoccupied for approximately half an hour immediately before Mr. and Mrs. Patton returned to it and retired for the night without going into the third bedroom of the house. Upon this evidence, there was no error in instructing the jury that if it did not find from the evidence, beyond a reasonable doubt, that the house was occupied at the time of the breaking and entering, it should find the defendant not guilty of burglary in the first degree, but it should return a verdict of burglary in the second degree if it did so find each of the elements thereof — breaking and entering the Patton dwelling house in the nighttime with the intent, at the time thereof, to commit therein one or both of the felonies specified in the indictment. The court so instructed the jury and the jury so found.

There was no error in admitting in evidence the two cans of beer and the Amphetamine tablets found in the defendant's pockets. The police officer who searched the defendant had been informed of the felony committed at the Patton residence and that a barefooted white man, wearing coveralls, was suspected to have been the perpetrator of it. He was looking for such a man. At about 3 a.m., he found the defendant, who answered the description, hiding behind a bush two blocks from the scene of the crime. Under these circumstances, it was lawful for him to arrest the defendant without a warrant. G.S. 15-41(2); *State v. Grier*, 268 N.C. 296, 150 S.E. 2d 443; *State v. Grant*, 248 N.C. 341, 103 S.E. 2d 339; *State v. Fowler*, 172

N.C. 905, 90 S.E. 408; Strong, N. C. Index 2d, Arrest and Bail, § 3. Police officers may search the person of a prisoner lawfully arrested as an incident to such arrest. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544. The officer may lawfully take from the prisoner any property which he has about him which is connected with the crime charged or which may be required as evidence. *State v. Ragland,* 227 N.C. 162, 41 S.E. 2d 285; *State v. Graham,* 74 N.C. 646. If otherwise competent, such article may be introduced in evidence by the State.

A formal declaration of arrest by the officer is not a prerequisite to the making of an arrest. 5 Am. Jur. 2d, Arrest, § 1. The officer's testimony that the defendant was or was not under arrest at a given time is not conclusive. In *Henry v. United States,* 361 U.S. 98, 80 S. Ct. 168, 4 L. ed. 2d, 134, it was said that an arrest was complete when federal officers, without a warrant, stopped an automobile, "interrupted" the two men therein and "restricted their liberty of movement." Here, the defendant was "told" by the officer who accosted him in his hiding place to get into the police car, and was "advised" by the officer to take his hands out of his pockets. The search of his person followed these communications.

In any event, the officer who made the search immediately transported the defendant to the scene of the crime, two blocks away, and there the defendant was formally told that he was under arrest. In *State v. Bell, supra,* we sustained as "incidental to the arrest" a search of an automobile made prior to the formal statement of arrest on the ground that "the search and seizure were so closely related in time and circumstance to the arrest as to make the search and seizure reasonable." The Courts of Appeal for the Sixth and Seventh Circuits have held that a search immediately preceding the formal statement of arrest does not violate the Fourteenth Amendment to the Constitution of the United States, now said by the Supreme Court of the United States to include the provisions of the Fourth. *United States v. Lucas,* 360 F. 2d 937; *Holt v. Simpson,* 340 F. 2d 853. We so hold under the circumstances of the present case. In *United States v. Rabinowitz,* 339 U.S. 56, 70 S. Ct. 430, 94 L. ed. 653, the Court said, "Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him."

There was no violation of the defendant's rights in requiring him, while in custody under a valid arrest upon the charge in this case, to change his clothing and in taking from him the clothing which he wore at the time of his arrest immediately after the alleged offense. There was no error in permitting the State to introduce in evidence the shirt so taken from the defendant and the hair found thereon.

State v. Ross, 269 N.C. 739, 153 S.E. 2d 469; *State v. Ragland, supra; State v. Graham, supra;* 5 Am. Jur. 2d, Arrest, § 73, 47 Am. Jur., Searches and Seizures, § 53; 6 C.J.S., Arrest, § 18.

The defendant's motion that the indictment in this case be consolidated for trial with an indictment said to be pending against him for the offense of rape on this occasion was directed to the discretion of the trial court. *State v. Combs*, 200 N.C. 671, 158 S.E. 252. There was no error in its denial.

The denial of this motion for consolidation does not afford any basis for granting the defendant's motion to strike from the indictment for burglary the allegation that the breaking and entering was with the intent to commit rape. We are not here concerned with the indictment for rape. This allegation was proper in the present indictment for burglary whether or not the intended offense of rape was actually committed.

There was no error in sustaining objections to questions propounded by defendant's counsel on cross examination of a witness for the State, these questions being designed to elicit from the witness statements made to him by the defendant. The record does not show what the witness would have said had he been permitted to answer. The State offered no evidence of any statement by the defendant. The defendant offered no evidence whatever. The proposed cross examination could not, therefore, have been competent for the purpose of corroboration of the defendant or impeachment of any witness for the State. Self serving declarations by the defendant offered for any other purpose would obviously be incompetent as hearsay evidence. The court's ruling upon these objections could not possibly be deemed expressions of opinion concerning the defendant's credibility as he contends in his brief.

The defendant's motion for a mistrial, made while the jury was deliberating upon its verdict, for the reason that the morning newspaper contained a story referring to another charge pending against this defendant in Wake County was properly denied. The defendant's counsel quite properly called this newspaper story to the attention of the presiding judge, stating, at the same time, that he had no basis whatever for believing that any juror had seen the newspaper containing the story. The jury had been locked up each night during the trial under the custody of an officer. The court examined this officer, and his testimony was such as to indicate that there was virtually no possibility that any copy of the newspaper had been seen by any member of the jury. At the time the first juror was selected, and repeatedly throughout the trial, the presiding judge clearly and explicitly instructed the jury that they were not to read

any newspaper accounts, or listen to television or radio comments concerning the case or otherwise permit any discussion of it with them by any other person. There is nothing to suggest that these instructions were not complied with by the jurors.

No useful purpose would be served by discussing the remaining assignments of error in detail. We have considered them carefully and find no merit in any of them. The charge of the court to the jury was full, accurate and impartial. It met the requirements of G.S. 1-180.

No error.

HOMER M. SHARPE, ADMINISTRATOR OF THE ESTATE OF BRENDA ADELINE SHARPE, PLAINTIFF, v. DR. V. WATSON PUGH, DEFENDANT.

(Filed 20 June, 1967.)

1. Pleadings § 1—

Upon application for extension of time to file complaint the statement as to the "nature and purpose" of the action is sufficient if it apprizes defendant of the basis of plaintiff's claim so that defendant is not taken by surprise.

2. Same; Abatement and Revival § 10—

The statement in an application for extension of time to file complaint that the nature and purpose of the action was to recover damages for wrongful death of plaintiff's intestate resulting from defendant's negligence in the care and treatment of intestate, *held* sufficient to entitle plaintiff to allege both an action for wrongful death and an action for pain and suffering endured by intestate from the time of injury until death, since defendant could not have been taken by surprise by the assertion of the separate claim for pain and suffering.

3. Appeal and Error § 3—

Where plaintiff alleges a cause of action for wrongful death and a cause of action to recover damages for the pain and suffering endured by his intestate from the time of injury to the date of death, an allowance of a motion to strike all the allegations stating the cause of action for pain and suffering amounts to a demurrer dismissing that cause of action, and the order is immediately appealable. G.S. 1-277.

4. Same—

In an action for wrongful death for negligence of defendant physician in prescribing a dangerous drug for a purpose for which it was not recommended by its manufacturer, and in failing to warn intestate's parents of the dangerous character of the drug before administering it, the striking of the allegations relating to failure of defendant physician to warn intestate's parents involves only one specification of negligence and does not

amount to a striking of a cause of action in its entirety. and is not immediately appealable. Rule of Practice in the Supreme Court No. 4(a).

5. Same; Appeal and Error § 1—

Where appeal is taken from an order striking an entire cause of action, the appeal brings up the entire case for review, and appellant should bring forward for consideration his exceptions then appearing in the record relating to the striking of other portions of the complaint, even though the order striking such other portions of the complaint is not immediately appealable.

6. Physicians and Surgeons § 11—

It is negligence for a physician to prescribe, as a remedy for an illness of a three year old child, a drug which is neither necessary nor suitable for such illness and which the physician knows or should know to be dangerous, without advising the child's parents of the possibility or probability of injurious effects from the use thereof, and in an action for wrongful death of the child from a fatal side effect of the drug, allegations that the physician failed to warn the parents of the dangerous character of the drug are improperly stricken.

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

APPEAL by plaintiff from *Brock, Special Judge,* November 1966 Assigned Non-Jury Civil Session of WAKE.

This action was instituted May 6, 1966, on which date a copy of the summons and of an order extending the time for filing complaint until May 26, 1966, were served on defendant.

Plaintiff filed his complaint on August 31, 1966. (Note: The record shows no explanation of or objection to the delay in filing complaint.) His allegations are set forth in Paragraphs I through XVIII. A brief summary thereof is set forth below.

Plaintiff is the administrator of Brenda Adeline Sharpe, who died on May 9, 1964. Defendant, a duly licensed physician, is engaged in the practice of medicine as a pediatrician in Wake County, North Carolina.

Brenda was defendant's patient. He saw and treated her on numerous occasions between April 14, 1961, the date of her birth, and January 17, 1964. He prescribed chloromycetin for Brenda: (1) On June 18, 1963, for "a minor virus infection of the throat"; (2) on October 30, 1963, "for her tonsillitis"; and (3) on January 6, 1964, for a "virus infection." On January 7, 1964, notwithstanding Brenda had developed "red spots" or petechia from her waist to her feet, defendant advised that Brenda continue to take the chloromycetin as previously directed.

Defendant knew, or in the exercise of due care should have known, that chloromycetin is a dangerous drug which on occasion produces serious and harmful side effects, including aplastic anemia,

and is not recommended by its manufacturer for the purposes for which it was prescribed by defendant for Brenda.

Brenda took chloromycetin as prescribed and directed by defendant. She developed aplastic anemia from taking the repeated doses of chloromycetin "prescribed" and "administered" by defendant, and died as a result of her aplastic anemia. Plaintiff alleges that Brenda's death was proximately caused by negligence of defendant in the respects set forth in Paragraph XVI, subsections (a), (b), (c), (d) and (e).

Paragraph XVII of the complaint is as follows: "That as a result of the negligence of the defendant as set forth above, the plaintiff's intestate developed aplastic anemia; that prior to her death on May 9, 1964, plaintiff's intestate was hospitalized on five occasions and was required to undergo bone marrow aspirations and transfusions; that during the period from January 17, 1964, to May 9, 1964, the plaintiff's intestate underwent severe pain and suffering by reason of which plaintiff has been damaged in the sum of $5,000.00."

Plaintiff prayed that he recover (1) the sum of $5,000.00 as damages for Brenda's pain and suffering from January 17, 1964, until her death on May 9, 1964, and (2) the sum of $94,620.00 as damages for wrongful death, and (3) the costs of the action.

On September 27, 1966, defendant moved that the court strike from the complaint portions thereof referred to below.

In the first portion of said motion, defendant moved to strike (1) a portion of Paragraph VII; (2) a portion of Paragraph IX; and (3) all of subsection (e) of Paragraph XVI. All of the allegations to which this portion of defendant's motion is directed relate to the same subject. They will be set forth in the opinion.

In the second portion of said motion, defendant moved to strike all of Paragraph XVII, quoted above, and the portion of the prayer for relief in which plaintiff prays that he recover $5,000.00 as damages on account of Brenda's pain and suffering from January 17, 1964, until her death.

Judge Brock allowed defendant's said motion in its entirety; and on November 18, 1966, entered an order striking from the complaint the portions thereof to which defendant's said motion was directed. Plaintiff excepted and appealed.

Boyce, Lake & Burns for plaintiff appellant.

Manning, Fulton & Skinner and Maupin, Taylor & Ellis for defendant appellee.

BOBBITT, J. We consider first whether the court erred in striking Paragraph XVII, quoted in the statement of facts, and the por-

tion of the prayer relating to recovery of damages for pain and suffering.

Simultaneously with the issuance of summons, plaintiff applied for and obtained an extension of time for filing his complaint, as authorized by G.S. 1-121. His application stated that "the nature and purpose" of his action was "(t)o recover damages from the defendant for the wrongful death of the plaintiff's intestate, which wrongful death was caused by the negligence of the defendant in the care and treatment of plaintiff's intestate." It stated further that additional time was necessary to enable plaintiff "to interview and examine various medical experts to determine the exact condition of the plaintiff's intestate and the nature of the treatment that the plaintiff's intestate received prior to her death."

When he filed his complaint, plaintiff incorporated therein, in addition to allegations appropriate in a complaint in a wrongful death action, allegations pertinent to an action to recover damages on account of the pain and suffering of his intestate from January 17, 1964, until her death. Defendant set forth as grounds for his motion that plaintiff's said application stated the action was to recover damages for the *wrongful death* of his intestate; that pain and suffering are not elements of damage in an action for wrongful death; and that the reading to the jury of the allegations relating to pain and suffering would be prejudicial to defendant.

If, as alleged, Brenda was injured and later died as a result of defendant's actionable negligence, her administrator has two causes of action against defendant, namely, (1) a cause of action to recover, as assets of Brenda's estate, damages on account of her pain and suffering; and (2) a cause of action to recover, for the benefit of her next of kin, damages on account of the pecuniary loss resulting from her death. *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105; *Hinson v. Dawson*, 241 N.C. 714, 86 S.E. 2d 585; 50 A.L.R. 2d 333; *In re Peacock*, 261 N.C. 749, 136 S.E. 2d 91. While the basis for each is the same wrongful act, the causes of action are separate and distinct. The parties are the same. However, each action must be determined on separate issues. *Hinson v. Dawson, supra; In re Peacock, supra.* "When separate causes of action are united in the same complaint they must be separately stated." 3 Strong, N. C. Index, Pleadings § 3. If not separately stated, it would seem that the complaint would be demurrable for misjoinder of causes of action. *Monroe v. Dietenhoffer*, 264 N.C. 538, 541, 142 S.E. 2d 135, 137; 1 McIntosh, N. C. Pract. & Proc. § 1188 (2d ed., 1964 Supp.) Defendant does not demur for misjoinder of causes of action. The basis of his objection is that the statement in plaintiff's application for ex-

tension of time to file his complaint as to "the nature and purpose" of his action *restricted* and *limited* plaintiff to the filing of a complaint to recover damages for the alleged wrongful death of his intestate. When due consideration is given the fact that the alleged actionable negligence of defendant constitutes the basis of each of the two causes of action set forth in the complaint, defendant's contention is untenable.

"The intent of the statute (G.S. 1-121) was to require the plaintiff to alert the defendant by giving preliminary notice of the nature of the claim and the purpose of the suit, and that the ultimate factual averments would follow in a complaint later to be filed." *Roberts v. Bottling Co.*, 256 N.C. 434, 124 S.E. 2d 105. The statement as to "the nature and purpose" of the action set forth in the application for extension of time to file complaint would seem sufficient to alert defendant that plaintiff's action was to recover damages on account of actionable negligence resulting in Brenda's injury and death. We perceive no reasonable ground to believe that defendant was taken by surprise because Brenda's administrator asserted a separate claim for personal injuries and a separate claim for wrongful death.

It is noted that plaintiff's cause of action for personal injuries is based solely on Brenda's pain and suffering from January 17, 1964, until her death; and that all of this period is within three years of the date on which the complaint was filed, to wit, August 31, 1966. G.S. 1-52(5); *Stamey v. Membership Corp.*, 249 N.C. 90, 105 S.E. 2d 282.

The conclusion reached is that the motion to strike Paragraph XVII of the complaint was in effect a demurrer to plaintiff's alleged cause of action to recover damages on account of personal injuries sustained by his intestate; and that the court's order in effect sustained the demurrer and dismissed *that* action. Under these circumstances, plaintiff was entitled as a matter of right to an immediate appeal. G.S. 1-277; *Mercer v. Hilliard*, 249 N.C. 725, 107 S.E. 2d 554. For the reasons stated, the court erred in striking Paragraph XVII and the portion of the prayer related to recovery of damages for pain and suffering; and this portion of the court's order is reversed.

The other portion of the court's order involves different and unrelated questions.

The portion of Paragraph VII to which defendant's motion is directed refers to the incident of June 18, 1963, and is as follows: "(T)hat at said time the plaintiff's intestate was a child two years and two months old and the parents of said child were unskilled in

medical matters and unfamiliar with drugs, their uses, and their properties, and particularly with chloromycetin; that at said time the defendant failed to warn the plaintiff's intestate or her parents, as it was his duty to do, that taking said drug was dangerous or that it might produce dangerous side effects, including aplastic anemia." The portion of Paragraph IX to which defendant's motion is directed refers to the incident of October 30, 1963, and contains substantially the same allegations as those in the portion of Paragraph VII quoted above. In Paragraph XVI, subsection (e), plaintiff alleged that defendant "negligently failed to warn the parents of plaintiff's intestate that the drug, chloromycetin, was dangerous and that such drug might cause plaintiff's intestate to develop aplastic anemia and to get such parents' consent before administering said drug to plaintiff's intestate."

Plaintiff contends an appeal lies immediately to the portion of the court's order striking from the complaint the portions thereof referred to in the preceding paragraph of this opinion. To support this contention he cites *Insurance Co. v. Bottling Co.*, 268 N.C. 503, 151 S.E. 2d 14. The rule for which this decision stands is stated, with supporting citations, in 1 Strong, N. C. Index 2d, Appeal and Error § 6, pp. 119-120, as follows: "(W)hen an order is entered allowing a motion to strike *in its entirety* a further answer or defense, or an order is entered allowing a motion to strike *an entire cause of action* set up in a pleading, the order amounts to the granting of a demurrer, and is immediately appealable." (Our italics.) This rule has no application to the present factual situation. Plaintiff's statement of his causes of action against defendant for personal injuries and for wrongful death are not dependent upon whether the portions of the complaint now under consideration are stricken therefrom. Independent of these allegations, plaintiff has stated such causes of action. The portions stricken involve only one of several alleged specifications of negligence. Under our Rule 4(a), Rules of Practice in the Supreme Court, 254 N.C. 785, plaintiff was not entitled to an immediate appeal as a matter of right from the order striking these allegations but was entitled to immediate review only upon allowance of a petition for writ of *certiorari*.

Even so, since plaintiff was entitled to appeal as a matter of right from the portion of the order which in effect sustained a demurrer to the alleged cause of action for personal injuries, that is, pain and suffering, the entire case is before us; and under these circumstances it was incumbent upon plaintiff to bring forward and for the Court to consider all of plaintiff's exceptions then appearing in the record. *Jenkins & Co. v. Lewis*, 259 N.C. 86, 130 S.E. 2d 49.

Defendant asserts as the ground for his motion that he "was under no legal duty to explain to the parents of plaintiff's intestate the uses and properties of the drug which the defendant, in the exercise of his professional judgment, prescribed for plaintiff's intestate, and he was under no legal duty to warn plaintiff's intestate or her parents that the taking of chloromycetin, or any other drug prescribed for plaintiff's intestate, was dangerous, or that it might produce dangerous side effects, including aplastic anemia."

Facets of the question as to a surgeon's duty to advise a patient of the dangers involved in a proposed operation have been discussed in *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762, and in *Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617. Also, see *Kennedy v. Parrott,* 243 N.C. 355, 90 S.E. 2d 754, 56 A.L.R. 2d 686. Reference is made to Annotations, "Consent as condition of right to perform surgical operation," in 76 A.L.R. 562, and in 139 A.L.R. 1370; and to Annotation, "Malpractice: physician's duty to inform patient of nature and hazards of disease or treatment," in 79 A.L.R. 2d 1028. The decisions discussed in these annotations involve a variety of factual situations. Also, see Karchmer, *"Informed Consent,"* 31 Mo. L. Rev. 29 (1966).

In *Bonner v. Moran,* 126 F. 2d 121, 139 A.L.R. 1366, Chief Justice Groner, speaking for the Court of Appeals for the District of Columbia, says: "(T)he general rule is that the consent of the parent is necessary for an operation on a child. *Zoski v. Gaines,* 271 Mich. 1, 260 N.W. 99; *Moss v. Rishworth,* Tex. Com. App., 222 S.W. 225; *Rogers v. Sells,* 178 Okl. 103, 61 P. 2d 1018; *Browning v. Hoffman,* 90 W. Va. 568, 111 S.E. 492; *Commonwealth v. Nickerson,* 5 Allen, Mass. 518; *Franklyn v. Peabody,* 249 Mich. 363, 228 N.W. 681." Also, see Restatement (Second) of Torts § 59, Comment a, Illustration 1.

According to plaintiff's allegations: Brenda was approximately three years of age when she died. It may be inferred that her parents arranged for her treatment by defendant. Obviously, any necessary disclosures and warnings concerning the taking of chloromycetin should have been given to her parents rather than to Brenda.

It is not contended that the complaint fails to allege facts sufficient to constitute a cause of action. Defendant contends the allegations in the designated portions of Paragraphs VII, IX and subsection (e) of Paragraph XVI should be stricken because they are irrelevant and prejudicial.

It is unnecessary to decision on this appeal, and we deem it unwise, to attempt to define the extent and limits of the legal duty of a physician to make known to a child's parents possible or probable

injurious or adverse effects from the use of a prescribed drug. For the present, it is sufficient to say, and we so decide, that it would be negligence if defendant prescribed, as a remedy for illnesses for which it was neither necessary nor suited, a drug which he knew or should have known was dangerous, without advising and warning Brenda's parents of the possible or probable injurious effects from the use thereof.

Under plaintiff's allegations, defendant was negligent in his treatment of Brenda by prescribing and administering chloromycetin, and such negligence proximately caused Brenda's death. Even so, accepting as true the facts alleged by plaintiff concerning chloromycetin, defendant was also negligent in failing to advise or warn Brenda's parents with reference thereto; and it may be reasonably inferred from plaintiff's allegations that, if the facts concerning chloromycetin are as alleged by plaintiff, Brenda's parents would not have consented to or permitted the use of chloromycetin in defendant's treatment of her. Under these circumstances, we cannot say as a matter of law that defendant's alleged negligence in this respect was not a proximate cause of Brenda's injuries and death. The conclusion reached is that the court erred in striking from the complaint the said designated portions of Paragraphs VII, IX and subsection (e) of Paragraph XVI. Whether plaintiff's evidence will support his allegations is another matter.

For the reasons stated, the judgment of the court below is reversed.

Reversed.

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

WILBUR BREECE AND BOBBY BREECE, SURVIVING CO-EXECUTORS OF THE ESTATE OF OSCAR P. BREECE, v. MARY J. BREECE, MARY LEE BREECE TART, BETTY LINVILLE BREECE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF OSCAR P. BREECE, JR.; OSCAR P. BREECE, III, MINOR, ARTHUR LINVILLE BREECE, MINOR, AND EDWARD VANCE BREECE, MINOR.

(Filed 20 June, 1967.)

1. Wills § 63—

The doctrine of election is in derogation of the property right of the true owner, and therefore a beneficiary will not be put to his election unless it clearly appears from the terms of the will that testator intended to put

him to an election, and the doctrine does not apply to testator's devise of property belonging to the beneficiary under the mistaken belief of testator that the property was his own.

2. Same—

Testator devised to named beneficiaries property owned by himself and wife by the entirety, and also devised to his wife a piece of property which she owned in fee simple, and devised other property owned by him to his wife. It appeared from the will in its entirety that testator regarded all of the property disposed of in the will as his own and that he had no intent to put his wife to an election. *Held:* The doctrine of election does not apply and the land held by the wife in fee and the land devolving to her by survivorship remains hers notwithstanding her acceptance of other property of testator passing to her under the will.

APPEAL by respondents Betty Linville Breece, individually, and as Administratrix of the Estate of Oscar P. Breece, Jr.; Oscar P. Breece, III, a minor, Arthur Linville Breece, a minor, and Edward Vance Breece, a minor, all three minors appearing by their guardian *ad litem,* J. Duane Gilliam, from *Bailey, J.,* 10 October 1966 Civil Session of CUMBERLAND. Docketed and argued as Case No. 707, Fall Term 1966, and docketed as Case No. 693, Spring Term 1967.

This is a civil action brought by petitioners, Wilbur Breece and Bobby Breece, surviving co-executors of the estate of Oscar P. Breece for a declaratory judgment pursuant to the provisions of G.S. 1-253 *et seq.,* to declare rights under the last will and testament of Oscar P. Breece, deceased, and for instruction in respect to the administration of his estate.

Pursuant to the provisions of G.S. 1-262, counsel for petitioners and counsel for respondents in writing waived a trial by jury, and consented that the proceedings be heard by the presiding judge of the Superior Court of Cumberland County. Judge Bailey heard the matter upon the verified pleadings, a written agreed statement of facts, an examination of certified deeds and records, an examination of appraisals and other evidence, including additional admissions of counsel, and an examination of inheritance and other tax returns, and made findings of fact. We summarize, except when quoted, the material findings of fact necessary for a decision of this proceeding, and they are as follows, the numbering of the paragraphs being ours:

(1) Oscar P. Breece died 21 November 1962, leaving a last will and testament executed on 2 November 1959, duly executed and signed, and duly probated on 30 November 1962 in the office of the clerk of the Superior Court in Cumberland County. This last will and testament is set forth in Judge Bailey's findings of fact. Letters of administration were issued 30 November 1962 to Wilbur Breece,

Bobby Breece, and Oscar P. Breece, Jr. No caveat has been filed to his last will and testament, and the statutory period within which a caveat could be filed has expired. The widow of Oscar P. Breece has not dissented from his last will and testament, and the statutory period in which she could dissent has expired.

(2) During the administration of the estate, Oscar P. Breece, Jr., died intestate on 23 March 1965, and Wilbur Breece and Bobby Breece are the living co-executors of the last will and testament of Oscar P. Breece.

(3) The heirs and devisees referred to in the last will and testament of Oscar P. Breece and the only persons interested in his estate are Mary J. Breece, his widow; Wilbur Breece, a brother; Bobby Breece, a son of the testator; Mary Lee Breece Tart, a daughter of the testator; Betty Linville Breece, widow of Oscar P. Breece, Jr., a son of the testator (She is also administratrix of the estate of Oscar P. Breece, Jr.); Arthur Linville Breece, a minor, Edward Vance Breece, a minor, and Oscar P. Breece, III, a minor, all sons born of the marriage between Betty Linville Breece and her deceased husband, Oscar P. Breece, Jr. All the parties above named are properly before the court, the minor respondents being represented by their guardian *ad litem*, J. Duane Gilliam.

(4) By his last will and testament, Oscar P. Breece devised real property in substance as follows, except when quoted:

ITEM SECOND. To his sons, Oscar P. Breece, Jr., and Bobby Breece, and to his brother, Wilbur Breece, "all of my right, title and interest in Rogers and Breece Funeral Home, including accounts receivable, rolling stock, fixtures and equipment." Testator specifically charged the devisees with the duty of paying out of this devise all debts owing by the said funeral home. This devise includes a vacant lot that forms a part of Rogers and Breece Funeral Home. These tracts of land and the buildings thereon were owned by Oscar P. Breece and wife, Mary J. Breece, as an estate by the entireties, and had an aggregate appraised value of $60,000 at the time of the testator's death.

ITEM FOURTH. To Mary J. Breece, his wife, to have and to hold for the term of her natural life, and at her death to his two sons and to his daughter, in fee simple, "all other property of which I shall die seized and possessed or to which I shall be entitled," the same at this time consisting of two lots of realty on Norwood Street in the city of Fayetteville, four lots of realty on Russell Street in the city of Fayetteville, vacant property on the west side of "C" Street in the city of Fayetteville, and farm lands in Gray's Creek Township. One house and lot at 1104 Norwood Street in the city of Fayetteville was owned by the testator in fee simple, and at his death had

a value of $9,500; one house and lot at 1102 Norwood Street was owned by testator and his wife, as an estate by the entireties, and had a value at his death of $8,500. The four houses and lots on Russell Street were owned by testator in fee simple, and had an aggregate value of $14,000 at his death. The vacant lot on "C" Street in the city of Fayetteville was owned by testator in fee simple, and at his death had a value of $600. The farm lands in Gray's Creek Township were owned by testator and his wife, as tenants by the entirety, and had an aggregate value at testator's death of $12,000. There was a vacant lot on Belmont Circle in the city of Fayetteville owned by testator and his wife as tenants by the entirety, and had a value at testator's death of $2,000.

ITEM FIFTH. To his beloved wife, Mary J. Breece, the house and lot in the city of Fayetteville in which they lived, together with the vacant property forming a part thereof, in fee simple. He also bequeathed to his wife all household and kitchen furniture and furnishings in the home. The house and lot, together with the household and kitchen furniture and furnishings were owned by Mary J. Breece, widow of the testator, in fee simple. The value of this property is not known.

ITEM SIXTH. To his beloved wife, Mary J. Breece; to his daughter, Mary Lee Breece Tart; to his two sons, Oscar P. Breece, Jr., and Bobby Breece, as tenants in common, share and share alike, "all other property, real, personal or mixed, of which I shall die seized or possessed."

(5) At the time of testator's death the buildings and lots on which Rogers and Breece Funeral Home is located, together with the vacant lot forming a part thereof, and the low-rent property on Russell Street were subject to a mortgage in favor of Durham Life Insurance Company, Raleigh, North Carolina, in the sum of $26,422.38, with required monthly payments of $555. By duly recorded deed dated 11 October 1965, Mary J. Breece conveyed to Wilbur Breece, Bobby Breece, and Oscar P. Breece, Jr., all of her right, title, and interest in this funeral home, together with the vacant lot that forms a part thereof, and in consideration of this deed the grantees assumed the indebtedness under the mortgage to Durham Life Insurance Company, and released therefrom the mortgage lien on the Russell Street property in the city of Fayetteville.

(6) During his lifetime Oscar P. Breece had a keen sense of proprietorship over the business which he owned in part, over all the lands owned by him in fee simple, over all the lands owned by him and his wife as tenants by the entirety, and over all lands owned by his wife in fee simple. During his lifetime the testator obtained

life insurance on his life with the proceeds payable to the funeral home, that during his lifetime he transferred ownership of these policies to Rogers and Breece, Inc., with the corporation paying the premiums thereon, and that a short time before his death he personally borrowed on said policies as if they remained his own without corporate approval.

(7) "That the co-executors are now called on to pay extensive state and federal estate and inheritance taxes on the estate of the deceased and to effectually terminate their administration of the said estate. That the amount of such estate and inheritance taxes is substantially affected by the questions raised in this proceeding. That if the said Mary J. Breece, widow of the deceased, was called upon to make an election between property, the ownership to which passed as an operation of law under the rule affecting estates by the entireties and if she did, in truth and in fact, make such an election by failing to dissent to the Last Will and Testament and by collecting the rents and profits derived from the Russell Street properties, which paid to her approximately $40.00 per month net, then she has lost the benefit of a substantial portion of her marital deductions for tax purposes and there is not sufficient funds in the estate with which to pay required estate and inheritance tax assessments and the imposition of such will necessitate a sale of at least some of the real estate devised under the terms of the Last Will and Testament."

Based upon his findings of fact, Judge Bailey entered judgment adjudging and decreeing that by the last will and testament of Oscar P. Breece, deceased, his widow, Mary J. Breece was not put to an election with respect to the two tracts of land located in Cross Creek Township, Cumberland County, the same consisting of the buildings and lands on which Rogers and Breece Funeral Home was operated, together with the vacant lots that form a part thereof; to farm lands in Gray's Creek Township, Cumberland County; to one vacant lot on Belmont Circle in the city of Fayetteville; and to one house and lot located at 1102 Norwood Street in the city of Fayetteville, "and that the said Mary J. Breece, widow, as surviving tenant by the entirety at the time of the death of the deceased, Oscar P. Breece, became the owner in fee of the following lands:

> "(1) Two tracts of land located in Cross Creek Township, Cumberland County, North Carolina, described in deeds recorded Book 441, page 364, Cumberland County Registry, and referred to in the Last Will and Testament as 'the buildings and lands on which Rogers and Breece Funeral Home is operated, together with the vacant lots that form a part thereof.'

"(2) Farm lands in Grays Creek Township, Cumberland County, North Carolina, as described in deed recorded Book 441, page 366, Cumberland County Registry, and referred to in the Last Will and Testament as 'my farm lands in Grays Creek Township.'

"(3) One vacant lot on Belmont Circle in the City of Fayetteville, North Carolina, and described in deed recorded Book 398, page 177, Cumberland County Registry.

"(4) One house and lot located 1102 Norwood Street, City of Fayetteville, and described in deed recorded Book 409, page 176, Cumberland County Registry."

The court further adjudged and decreed that under the last will and testament of Oscar P. Breece, deceased, Mary J. Breece was devised a limited life estate in and to one vacant lot located on "C" Street in the city of Fayetteville, and a limited life estate in and to one house and lot located at 1104 Norwood Street in the city of Fayetteville.

From this judgment, appellants appeal.

J. Duane Gilliam for respondent appellants.

James R. Nance for petitioner appellees.

Sol G. Cherry for respondent appellees Mary J. Breece and Mary Lee Breece Tart.

PARKER, C.J. Appellants have three assignments of error as follows:

"1. That the court erred in its finding of fact that Oscar P. Breece, testator, was under the mistaken idea that he owned all of the property in which he held any interest and that he had the right to will and devise the same as he saw fit.

"2. That the court erred in its finding of fact that the testator did not intend that his widow, Mary J. Breece, be put to an election that would require her to forfeit her fee simple ownership arising upon and as an incident to lands owned as an estate by the entireties in order to obtain the other benefits afforded her by the Last Will and Testament.

"3. That the court erred in its conclusion of law that upon the facts found Mary J. Breece, widow, was not put to an election with respect to lands owned by Oscar P. Breece and Mary J. Breece as an estate by the entirety and the acceptance of a life estate in other lands, including income producing property on Russell Street in the City of Fayetteville and that she, as

surviving tenant by the entirety at the time of the death of the testator, became the owner in fee of all lands owned as an estate by the entirety and the owner of a limited life estate in and to the lands owned by the testator in fee simple."

Appellants do not challenge any pure findings of fact by Judge Bailey. Nearly all of the facts were stipulated and agreed to in writing by counsel for all parties.

The sole question for us to determine is whether or not the doctrine of election applies to the facts in this case.

The doctrine of election has been stated correctly so many times in our cases, and particularly in very recent years by Bobbitt, J., for the Court in *Burch v. Sutton*, 266 N.C. 333, 145 S.E. 2d 849 (1965); Sharp, J., for the Court in *Bank v. Barbee*, 260 N.C. 106, 131 S.E. 2d 666 (1963); and Ervin, J., for the Court in *Lovett v. Stone*, 239 N.C. 206, 79 S.E. 2d 479 (1953); that it would be superogatory to state it again here, and to attempt to state it again, like the useless labor of trying to pile Ossa on Pelion, might lead to confusion instead of clarity.

Bobbitt, J., said for the Court in *Burch v. Sutton, supra:*

"The doctrine of equitable election is in derogation of the property right of the true owner. Hence, the intention to put a beneficiary to an election must appear plainly from the terms of the will. *Lamb v. Lamb*, 226 N.C. 662, 40 S.E. 2d 29; *Bank v. Misenheimer*, 211 N.C. 519, 191 S.E. 14; *Rich v. Morisey*, 149 N.C. 37, 62 S.E. 762; *Walston v. College*, 258 N.C. 130, 128 S.E. 2d 134. 'An election is required only when *the will* confronts a beneficiary with a choice between two benefits which are *inconsistent with each other*.' *Honeycutt v. Bank*, 242 N.C. 734, 89 S.E. 2d 598. An election is required only if the will discloses it was the testator's manifest purpose to put the beneficiary to an election. *Bank v. Barbee*, 260 N.C. 106, 110, 131 S.E. 2d 666.

"In *Lamb v. Lamb, supra*, in accordance with prior decisions, this Court said: '(I)f, upon a fair and reasonable construction of the will, the testator, in a purported disposal of the beneficiary's property, has mistaken it to be his own, the law will not imply the necessity of election.' This statement is quoted with approval in *Bank v. Barbee, supra*, in which pertinent prior decisions are cited."

Sharp, J., said for the Court in *Bank v. Barbee, supra:*

"The doctrine of election has been stated and restated many times by this Court and, in the restating, it has been tempered

somewhat. *Melchor v. Burger,* 21 N.C. 634; *Isler v. Isler,* 88 N.C. 581; *Tripp v. Nobles,* [136 N.C. 99, 48 S.E. 675]; *Hoggard v. Jordan, supra,* [140 N.C. 610, 53 S.E. 220]. The following statement of the doctrine in *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479, has the full sanction of our decisions today:

"'Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases *where there is a clear intention of the person from whom he derives one that he should not enjoy both,* the principle being that one shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if legal and well founded, which would defeat or in any way prevent the full effect and operation of every part of the will.' (Italics ours.)"

See also *Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806; *Taylor v. Taylor,* 243 N.C. 726, 92 S.E. 2d 136.

"The cases have always held that there was a presumption that a testator meant only to dispose of what was his own and that all doubts would be resolved 'so that the true owner, even though he should derive other benefits under the will, will not be driven to make an election.' However, if the will discloses a manifest purpose to require an election, then it is immaterial whether he should recognize it as belonging to another, or whether he should believe that he had the title and right to dispose of it. *Isler v. Isler, supra; Horton v. Lee,* 99 N.C. 227, 5 S.E. 404; *Elmore v. Byrd, supra* [180 N.C. 120, 104 S.E. 162]. This is the law today. *Lovett v. Stone, supra; Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183."

"An estate by entirety is based on the fiction of the unity of persons resulting from marriage, so that the husband and wife constitute a legal entity separate and distinct from them as individuals, with the result that together they own the whole, with right of survivorship by virtue of the original conveyance." 3 Strong's N. C. Index, Husband and Wife, § 15.

Oscar P. Breece devises in Item Second of his last will and testament "all of my right, title and interest in Rogers and Breece Funeral Home, including accounts receivable, rolling stock, fixtures and equipment," and including a vacant lot that forms a part of Rogers and Breece Funeral Home, to his sons, Oscar P. Breece, Jr., Bobby Breece, and to his brother, Wilbur Breece. These tracts of land and the buildings thereon were owned by Oscar P. Breece and wife, Mary

J. Breece, as tenants by the entireties. Obviously, upon a fair and reasonable construction of his will, Oscar P. Breece, in his purported disposition of this property of Rogers and Breece Funeral Home, acted under the mistaken belief that he was the sole owner thereof.

Oscar P. Breece devises in Item Fourth of his last will and testament "all other property of which I shall die seized and possessed or to which I shall be entitled, the same at this time consisting of property in Norwood Street in the City of Fayetteville, designated at 1102 and 1104; also property on Russell Street in the City of Fayetteville, designated as 532, 534, 536, and 538; also vacant property on the west side of 'C' Street in said city and my farm lands in Gray's Creek Township, to have and to hold for the term of her natural life and at her death to my sons, Oscar Breece, Jr., and Bobby Breece, and to my beloved daughter, Mary Lee Breece Tart, as tenants in common in fee simple forever." Oscar P. Breece at the time of his death owned in fee simple a house and lot at 1104 Norwood Street, Fayetteville, North Carolina. The house and lot at 1102 Norwood Street, Fayetteville, North Carolina, was held by Oscar P. Breece and wife, Mary J. Breece, as tenants by the entireties. At the time of his death Oscar P. Breece owned in fee simple four houses and lots on Russell Street, Fayetteville, North Carolina. A vacant lot on "C" Street, Fayetteville, North Carolina, was owned in fee simple by Oscar P. Breece. The farm lands in Gray's Creek Township were owned by testator and his wife, Mary J. Breece, as tenants by the entireties. There was a vacant lot on Belmont Circle in the city of Fayetteville owned by Oscar P. Breece and wife, Mary J. Breece, as tenants by the entirety. Obviously, upon a fair and reasonable construction of his will, Oscar P. Breece, in his purported disposition of this property, acted under the mistaken belief that he was the sole owner of all these tracts of land referred to in Item Fourth of his will.

Oscar P. Breece devises in Item Fifth of his will to his beloved wife, Mary J. Breece, the house and lot in the city of Fayetteville in which they lived, together with the vacant property forming a part thereof, in fee simple. He also bequeathed to his wife in this item of his will all household and kitchen furniture and furnishings in the house. This house and lot, together with the household and kitchen furniture and furnishings were owned by Mary J. Breece, his wife, in fee simple. It is manifest, upon a fair and reasonable construction of his will, that Oscar P. Breece, in his purported disposition of this property to his wife, acted under the mistaken belief, as so many husbands do, that he was the sole owner thereof, and that what belonged to his wife belonged to him.

In *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29, this Court, in accordance with prior decisions, said: "(I)f, upon a fair and reasonable construction of the will, the testator, in a purported disposal of the beneficiary's property, has mistaken it to be his own, the law will not imply the necessity of election." This statement is quoted with approval in *Burch v. Sutton, supra,* and in *Bank v. Barbee, supra.*

Respondent appellants cite and stress *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183. As stated in substance in *Burch v. Sutton, supra,* on account of factual differences, and in the light of our most recent decisions, *Trust Co. v. Burrus* does not control with reference to the factual situation under consideration in the instant case.

Oscar P. Breece's last will and testament, which is the only basis on which the doctrine of equitable election may be invoked, contains no provision that manifests an intent that an election was required by his beloved widow, Mary J. Breece. It is significant that his widow and his daughter, Mary Lee Breece Tart, respondents, did not appeal, and they, by their counsel, have signed petitioners' brief asking that Judge Bailey's judgment be affirmed. Judge Bailey's judgment was correct, and is affirmed, and all of respondent appellants' assignments of error are overruled.

Affirmed.

JOHN T. MOODY v. HARRY KERSEY, INDIVIDUALLY, AND PIEDMONT STEEL ERECTING CO., A CORPORATION.

(Filed 20 June, 1967.)

1. Negligence § 1—

Negligence is the failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owes the plaintiff under the circumstances, which failure proximately causes injury which could have been reasonably foreseen.

2. Pleadings § 28—

A plaintiff must make out his case as alleged in the complaint.

3. Master and Servant § 32— Evidence of negligence of steel erecting company resulting in injury to employee of construction company held for jury.

The evidence tended to show that the operator of a crane, pursuant to his employment by a steel erecting company, was lifting a heavy chute so that its top could be fastened to the top of the elevator shaft of the structure and its lower end to the steel framework some 30 feet below. The

evidence further tended to show that the crane operator was following the signals of a signalman who was standing at the top of the elevator shaft, that the chute was maneuvered so that the signalman could and did fasten one end to the top of the elevator shaft by one bolt, that the signalman was inexperienced in the work to the knowledge of the crane operator, that the signalman gave the signal to lower the chute, that when the chute was lowered its weight pulled through the one bolt and fell, as should have been foreseen, causing injury to plaintiff, an employee of the construction company who was waiting to fasten the bottom of the chute to the framework. The crane operator testified that he would not have lowered the chute had he known that only one bolt had been inserted and that he did not inquire of the signalman how many bolts had been inserted before he undertook to lower the chute. *Held:* The evidence is sufficient to be submitted to the jury on the question of the negligence of the operator of the crane in relying on the judgment of an inexperienced workman and in failing to inquire or investigate as to the manner in which the chute had been bolted at the top.

4. Negligence § 26—

Nonsuit for contributory negligence is proper only when the evidence, considered in the light most favorable to plaintiff and resolving all conflicts therein in his favor, establishes this defense as the sole reasonable inference.

5. Negligence § 4—

A person in control of machinery in a hazardous operation is under duty to exercise a degree of care commensurate with the dangerous character of the operation.

6. Master and Servant § 29—

An employee will not be held guilty of contributory negligence as a matter of law merely because he accepts hazardous employment in an established trade.

7. Master and Servant §§ 34, 84— Crane operator held employee of steel erecting company and not construction company.

Defendant leased a crane with operator to a construction company, the crane operator being in sole charge of the manner in which materials and parts should be elevated for the performance of the construction work, and the construction company giving only instructions as to the position to which the materials and parts should be carried in the performance of the work. *Held:* The crane operator was an employee of the crane company and was not a special employee or agent of the construction company, and therefore the Workmen's Compensation Act does not preclude recovery by an employee of the construction company for injury resulting from the negligence operation of the crane.

APPEAL by plaintiff from *Latham, S.J.*, 7 November 1966 Civil Session of GUILFORD (Greensboro Division).

Civil action by plaintiff to recover for personal injuries suffered when a heavy metal chute suspended from a crane operated by the individual defendant, an employee and officer of the corporate defendant, fell a short distance and bounced onto plaintiff's foot.

On 16 July 1963, North State Pyrophyllite Company (hereinafter referred to as North State), was constructing a new batching plant upon its premises near Greensboro. The plans called for a building on top of which would be installed three large storage tanks, an elevator tower or shaft, mixing bins, and a metal Y-shaped chute connecting the elevator shaft and the mixing bins. North State had contracted with defendant Piedmont Steel Erecting Company (hereinafter referred to as Piedmont) for Piedmont to do certain steel construction work involving the placing of certain pieces of steel by use of Piedmont's crane.

On 16 July 1963 a metal chute approximately thirty feet in length and weighing 2000 to 2500 pounds had been assembled on the ground near the building. Piedmont was to use its crane to lift the chute into position so that it could be fastened at one end to the top of the elevator shaft and at the lower end to a steel framework some thirty feet immediately below the top of the elevator shaft. Defendant Kersey was to operate the crane.

That morning two employees of Piedmont, who usually acted as signalmen for Kersey, came to work in an intoxicated condition. Kersey sent them home and decided to abandon the operation for that day. However, one Ray Jefferson, an employee of North State and the immediate supervisor of plaintiff, volunteered to act as Kersey's signalman. Jefferson was inexperienced as a signalman, but plaintiff's evidence shows Jefferson had acted as signalman for Kersey at least once some three years prior to the accident.

Agreeing to Jefferson's offer to act as signalman, Kersey rode Jefferson on the crane cable to a platform on top of the elevator shaft sixty feet above the ground. Plaintiff, an employee of North State, and two employees of the corporate defendant were located approximately thirty feet below Jefferson on the framework. Kersey was dependent upon Jefferson's signals in the operation of the crane, as Kersey could only see the area around the top of the elevator shaft. The rest of the operational area was obscured from Kersey's view by the building and two large tanks. The chute was attached to the crane cable and, pursuant to signals given by Jefferson, Kersey operated the crane so as to life the chute to the place where it was to be attached. Plaintiff and the two employees of Piedmont were attempting to position the lower part of the chute, and Jefferson fastened the top of the chute to the elevator shaft by inserting one bolt. There is some conflict concerning a conversation that then ensued between Jefferson and Kersey as to the bolting of the top of the chute, which will be more fully discussed in the opinion. Following the conversation, Jefferson gave a signal to lower the chute and Kersey began to slacken the cable so as to lower the bottom end of

the chute slightly. The weight of the chute caused it to tear away from the bolt and fall a few feet, striking plaintiff's right foot, causing personal injuries.

Plaintiff alleged that defendants were negligent in that:

"(a) He carelessly and negligently operated his crane in such a manner that he 'slacked off' the cable too rapidly and caused said chute to tear away from the bolt holding it when he knew, or should have known by the exercise of reasonable care, that the one bolt would not be able to hold the chute if the weight of same were exerted against the bolt;

"(b) He was careless and negligent in relying on the signals of Ray Jefferson, who was an inexperienced signalman, and particularly so on account of the very hazardous undertaking that he was engaged in;

"(c) That . . . Kersey . . . negligently failed to make any personal investigation of the chute, the bolt holding the same, or view the work area and the position of the plaintiff and the other men in the vicinity, before he undertook to lower the chute;

"(d) . . . (T)he crane being then and there operated by the defendant Kersey, which said crane was owned by the defendant Piedmont Steel Erecting Co., was in a bad state of repair and faulty operational condition, which the defendant Kersey had knowledge thereof;

"(e) That the defendant Kersey was further careless and negligent in that he failed to warn the plaintiff and the other men standing in the zone of danger to withdraw temporarily from the area until he had slackened up on the cable and lowered the chute;

"(f) That on said occasion, the defendant Kersey did not have the crane he was operating under proper control, and he failed to exercise the due care required of him, in order that he would not harm and injure the plaintiff."

At the close of plaintiff's evidence, the trial court allowed defendants' motion for judgment of nonsuit. Plaintiff appealed.

Benjamin D. Haines for plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis for defendant appellees.

BRANCH, J. The sole question presented by this appeal is: Did the trial court err in entering the judgment of nonsuit at the close of plaintiff's evidence?

Defendants contend there is not sufficient evidence of actionable negligence to permit the issue to be submitted to a jury.

We find no evidence in the record that will allow the reasonable inference that the signals given by Jefferson were the proximate cause of plaintiff's injury. The signals given by him allowed defendant Kersey, without difficulty, to raise the chute from the ground and place it in position to be properly secured. All the evidence shows that Jefferson gave comprehensible signals and that there was no mishap as a result of misunderstanding of signals given by Jefferson to Kersey.

> "In an action for recovery of damages for injury resulting from actionable negligence the plaintiff must show: (1) That there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed; and (2) That such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Mitchell v. Melts, post,* 793. See, also, *Stephens v. Lumber Co.,* 191 N.C. 23, 131 S.E. 314." *Luttrell v. Mineral Co.,* 220 N.C. 782, 18 S.E. 2d 412.

Further, plaintiff offered no evidence to sustain his allegations that defendant Kersey did not have the crane under proper control, or that the crane was in a bad state of repair and in faulty operational condition. Nor was there any evidence that Kersey "slacked off" the cable too rapidly, thereby causing the chute to tear away from the bolt holding it.

> "A plaintiff must make out his case *secundum allegata. Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898. There can be no recovery except on the case made by his pleadings. *Collas v. Regan,* 240 N.C. 472, 82 S.E. 2d 215. Proof without allegation is no better than allegation without proof. *Messick v. Tunage,* 240 N.C. 625, 83 S.E. 2d 654. When there is a material variance between allegation and proof, motion for judgment of nonsuit will be allowed. *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470." *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786.

Thus plaintiff's case must rest on whether there is sufficient evidence to go to a jury on plaintiff's allegations that defendant Kersey

was negligent in failing to make any personal investigation of the chute or the bolt holding the same, or that defendant negligently "slacked off" the cable when he knew, or should have known, that the one bolt would not hold the chute. Clearly, the condition of the chute before it left the ground in no way contributed to plaintiff's injury. Plaintiff's contention that defendant should have made a personal investigation of the chute or the bolt holding the same, or that defendant Kersey should have known there was only one bolt holding the chute, must be limited to information received from plaintiff's fellow employee, Jefferson. Defendant Kersey was operating the crane, and in order to have made a personal investigation he would have been forced to abandon the controls of the crane, climb the boom of the crane, and jump from the boom to the platform, or he would have had to lay the boom on the platform and climb to the platform, which would have resulted in displacing the chute from the desired position. To follow either of such courses would not be the choice of a reasonably prudent man. "Negligence is the failure to exercise that degree of care for others' safety which a reasonably prudent man under like circumstances would exercise." Strong's N. C. Index, Vol. 3, Negligence, Sec. 1 (Supp.). *Sparks v. Phipps*, 255 N.C. 657, 122 S.E. 2d 496.

Defendant Kersey, by adverse examination offered by plaintiff, stated: "I don't *remember* Ray Jefferson advising me that there was only one bolt holding the chute. He said he had the top bolted and I asked him would it help any if we lowered it a little bit. . . . and he said yes. I said, 'You give me a signal.' He gave me a regular hand signal for slacking the load down a little bit. . . . I did not make any inquiry of Mr. Jefferson as to how many bolts were holding the chute before I undertook to lower it. The reason was he said that he had the top bolted. . . . If I had known at that time that only one bolt was holding this chute, I would not have undertaken to lower the chute. I thought Jefferson had all the bolts across the top." (Italics ours.)

In this connection John T. Moody, the plaintiff, testified: "Immediately before the accident, I heard some conversation between Ray Jefferson and the defendant Harry Kersey. The only thing I heard them say was that one bolt was in the chute. I am talking about Mr. Jefferson. I heard him say that it was only one bolt. I did not hear Mr. Kersey make any response to that statement. Immediately after I heard Mr. Jefferson make that statement, that was when they lowered — I did observe the chute being lowered immediately before it fell; . . ."

Ray Jefferson, assistant superintendent in charge of maintenance

for North State Pyrophyllite Company, testified: "I have not had previous experience as a signalman in steel erection. A few times I had worked with Mr. Kersey on other jobs prior to this one in putting up chutes. I have never been employed as a signalman for a crane operator. . . . It is very difficult to recall exactly what I said before I gave the hand signal to Mr. Kersey. I know that I hollered, 'I have got it bolted,' when I got the bolt in."

Upon a motion for judgment of nonsuit the evidence introduced by plaintiff is to be interpreted in the light most favorable to him, all conflicts therein are to be resolved in his favor, and all reasonable inferences therefrom which are favorable to him are to be drawn. *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536.

We recognize the principle that a person is not bound to anticipate negligent acts or omissions on the part of others, but in the absence of anything which gives, or should give, notice to the contrary, he is entitled to assume that every other person will perform his duty and that he will not be exposed to danger which can come to him only by violation of duty by such other person. *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733.

In the instant case defendant Kersey was in control of machinery being used in a hazardous operation, and he was obliged to exercise a degree of care commensurate with the dangerous character of the operation. Strong's N. C. Index, Vol. 3, Negligence, Sec. 4, p. 445. When his regular signalman became unavailable, he elected to proceed with Jefferson, a person who had acted in this capacity, at most, on one other occasion. Shortly before plaintiff's injury, defendant Kersey was talking to Jefferson. He could hear Jefferson, and Jefferson could hear him. Although Kersey states that he would not have lowered the chute had he known there was only one bolt, it may be found he relied on the judgment of an inexperienced workman and failed to make any inquiry or investigation as to the manner in which the chute was bolted. Further, defendant states that he did not *remember* Jefferson advising him that there was only one bolt holding the chute. There was evidence from plaintiff, who was approximately thirty feet away, that he heard Jefferson say "that one bolt was in the chute" shortly before he was injured. Kersey's testimony tends to confirm that shortly before plaintiff was injured he *could* hear Jefferson and that statements were made relative to bolting the chute at that time. This evidence allows a reasonable inference that defendant knew, or by the exercise of reasonable care should have known, that there was only one bolt in the chute, and that he could have reasonably foreseen that the bolt would pull through the metal when he "slacked off," so that the weight of the

chute came onto the bolt. Further, that he could have reasonably foreseen that some injurious result was probable under the circumstances. Thus, we hold there was sufficient evidence of negligence to survive the motion of nonsuit.

Plaintiff cannot be held guilty of contributory negligence as a matter of law. His mere presence on the job is not sufficient to infer negligence.

"Men may properly and lawfully do work that is essentially dangerous in its nature, and a person engaged in the performance of such work may know that it is dangerous, and yet not be guilty of contributory negligence in the performance thereof, unless he voluntarily and unnecessarily exposes himself to the danger." 38 Am. Jur., Negligence, § 182, p. 860. Plaintiff was engaged in new duties and was attempting to position the lower end of the chute. This operation demanded his undivided attention. The fact that the person who was doing the signalling and securing the chute above him was his immediate superior is compatible with the assumption that he would not be exposed to a danger which would come from a violation of a duty by such other person. *Weavil v. Myers, supra; Lewis v. Barnhill, supra.* The only possible notice of danger came from Jefferson, his immediate superior, who stated that he had fastened one bolt. Whether this was sufficient to give notice of a negligent act by Jefferson is a question for the jury.

> "(M)otion for nonsuit may not be allowed on the ground of contributory negligence unless plaintiff's own evidence establishes such negligence so clearly that no other conclusion can reasonably be drawn therefrom." *Lewis v. Barnhill, supra.*

Finally, defendants contend that Kersey was the special employee or agent of plaintiff's employer, North State Pyrophyllite Company, and therefore was under North Carolina Workmen's Compensation Act. In the case of *Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610, Bobbitt, J., speaking for the Court, said:

> " '2. The crucial test in determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it.* (Citations.)
>
> " '3. A servant is the employe of the person who has the *right* of controlling the manner of his performance of the work, irrespective of whether he actually *exercises* that control or not. (citations)

"'4. Where one is engaged in the business of renting out trucks, automobiles, cranes, or any other machine, and furnishes a driver or operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, and, unless that presumption is overcome by evidence that the borrowing employer *in fact* assumes control of the employe's *manner of performing the work*, the servant remains in the service of his original employer. (citations)'"

Here, Kersey was employed by Piedmont Steel Erecting Company, a corporation, and was operating a crane which belonged to the corporation. The company was paid an hourly rate. The record does not reveal there was any other person on the job as a crane operator. When Kersey's signalmen arrived in an intoxicated condition, it was clearly Kersey's decision as to whether the crane would be operated that day. The only instructions given by North State or its employees to Kersey was where the chute was to be carried so as to be in position for final erection. How he moved the chute into position was left entirely to his skill, ability, and judgment. The signals given by Jefferson were not orders but merely information necessary for proper operation of the crane, since Kersey could not visually position the chute. The fact that Kersey was an officer of the corporation would not prevent the corporation from furnishing other operators on this particular job. Thus, there is not sufficient evidence to overcome the factual presumption that the operator remained in the employ of his original master, Piedmont Steel Erecting Company. Nor is there sufficient evidence to show that North State, or its employees, assumed control over Kersey's manner of operating the crane so as to make Kersey a special employee or agent of North State. *Weaver v. Bennett, supra; Lewis v. Barnhill, supra; McWilliams v. Parham,* 269 N.C. 162, 152 S.E. 2d 117.

For reasons stated, there was error in granting defendants' motion for nonsuit.

Reversed.

STATE OF NORTH CAROLINA v. R. H. McLAWHORN.

(Filed 20 June, 1967.)

1. Homicide § 20—

Testimony of two witnesses for the State that they saw defendant fire a pistol and that immediately thereafter deceased fell, mortally wounded, exclaiming that he had been hit, is clearly sufficient to make out a case for the jury.

2. Criminal Law § 84—

It is competent for the State to introduce testimony that its witness had previously made substantially the same statement as he had given in his testimony at the trial for the purpose of corroborating the witness. The fact that the statement made to corroborate the witness was not made in the presence of defendant and that the witness had not first testified that he had talked with the corroborating witness is immaterial.

3. Homicide § 27— Defendant's evidence held not to raise questions of provocation or self-defense.

The State's evidence tended to show a fight between a sailor and five Marines at the entrance to a motel, that defendant, in charge of running the motel, told the combatants to "break it up," that four of the Marines were pulling the fifth Marine away and had gotten to the gate, when the fifth Marine broke away and started back, that defendant was seen to fire a pistol, and immediately thereafter the fifth Marine claimed he had been hit. Defendant's testimony was that he did not fire the shot which caused the death. *Held:* The State's evidence does not raise the questions of legal provocation or self-defense, and therefore it was not error for the court to fail to charge upon either of these matters.

4. Same—

Where the State's evidence tends to show that defendant intentionally shot deceased with a deadly weapon, inflicting mortal injury, and defendant depends solely on his contention that he did not fire the shot which caused the death, the question of an accidental killing is not presented, and the court did not commit error in failing to charge upon defendant's contention of an accidental killing, the court having charged the jury that the burden was on the State to prove that defendant intentionally shot deceased in order to sustain conviction.

5. Homicide § 7—

The evidence tended to show that the proprietor of a motel ordered five Marines to leave the premises after a fight with a sailor, that, pursuant to the order, four of the Marines had pulled the fifth Marine to the gate when the fifth Marine broke away and started back, unarmed, that the proprietor of the motel shot him after he had gone three or four feet, notwithstanding there was no reason to believe his companions would not be able to control him. *Held:* The evidence does not raise the question of provocation sufficient to warrant the proprietor in slaying the trespasser.

6. Homicide § 10—

The right to kill in defense of another cannot exceed such other's right to kill in his own defense, including the requirement of reasonable apprehension of death or great bodily harm.

7. Criminal Law § 107—

Where none of defendant's evidence located him at a place from which it would have been impossible for him to have committed the crime, the evidence does not raise the question of alibi, and it is not error for the court to fail to charge thereon.

APPEAL by defendant from *Peel, J.*, 31 October 1966 Session of LENOIR.

Defendant, indicted for murder in the first degree for killing Harry H. Brown on 26 August 1966, was tried for murder in the second degree by a jury selected from a panel summoned from Wayne County.

The evidence for the State tended to establish these facts: About midnight on 26 August 1966, five Marines from Camp Lejeune (Freeman, Quinlivan, Kolonick, Brown, and Compton), each of whom had previously consumed five or six cans of beer, went to the Cadillac Motel, located on Highway 70 outside of Kinston. "Three boys went in the back"; the other two remained in the front office and talked with Mr. Griffin, the clerk. After thirty minutes the three rejoined the two in the office, and all decided to leave. As they walked toward their car, a sailor (Ronald K. Richards) and his girl drove up. The sailor went into the office, leaving the girl in the car. The Marines immediately walked to the car and one of them said to the girl, "Give me a kiss, honey." The sailor came out of the office, and they turned to go, "laughing because of the sailor and girl being there." When the sailor demanded to know why they were laughing, the five started toward him. He reached into the car, got an unloaded pistol, and pointed it at them. This maneuver stopped the Marines in their tracks for 15-20 seconds, but, when the sailor did nothing with the pistol, one of them made the statement that it was not loaded. The five started at him again. As they came at him, the sailor tossed the pistol to the front seat of his car, beside the girl. Brown, the Marine who was later shot, reached him first. The sailor struck Brown, and a wrestling match ensued with the other four Marines "in a bunch around Brown and the sailor." Griffin and defendant McLawhorn rushed out of the office, and Griffin yelled, "Break it up." Brown's companions then tried to pull him away from the sailor. When he resisted their efforts, defendant went back into the motel and came out with a small, shiny revolver. When the Marines saw the pistol, they "really started pulling on Brown to go back." Five to ten seconds later, they had gotten Brown about 40 feet from the sailor's car and were pushing him out of the entrance gate, when he got away from them — three or four feet. They heard a small "crack" and saw Brown double up, clutching his abdomen. He said he was hit. At that time, defendant ran around the building. As the Marines examined Brown for a wound, defendant came up, and one said to him, "You shot my buddy." Defendant's reply was, "If I wanted to shoot him, I would." His companions then took Brown to the Naval Hospital at Lejeune. A small caliber bullet, which had entered his body on the left side and had traveled "cross-wise and up," was removed from the opposite side of his abdomen. He died within 24 hours as a result of the bullet wound.

Three of the Marines testified. Two, Freeman and Quinlivan, said that they did not see the shot fired. The third, Kolonick, testified: "I was looking at McLawhorn when I heard the crack. I saw the pistol in his hand at that time. That is where the shot came from." The fourth, Compton, had he been present at the trial, would have testified that he could not see who did the shooting.

Defendant testified that he did not shoot Brown. He said he was standing in the door of the motel when the Marines pushed the sailor over the hood of his car. He saw the sailor get loose and get his gun out and point it at the Marines. When he heard him pull the lever back, he stepped out of the door into the yard and told them that if they did not break it up and leave, he would call the sheriff or the military police. He said, "(S)o I turned around to go back in the office and was going to the phone . . . up in the front of the house, and before I could get up there, I heard . . . a shot. Well, I had just stepped out of the office and started to the front of the house to use the phone." On cross-examination, he said, "I was in the office when the shooting happened. I missed seeing the shooting." Defendant's testimony further tended to show: He did not own a pistol, and no one at the motel owned one. It is about 60 feet from the office of the motel to the driveway. Griffin left the motel the day that defendant was pointed out as the one who had done the shooting, and defendant has not been able to find him since. On cross-examination, defendant admitted that he had been convicted of "narcotics," aiding and abetting in breaking and entering, speeding, and forgery.

Defendant called the sailor, Richards, as an adverse witness. On direct examination, he testified that, on the morning after the shooting, he had told the deputy sheriff and military police that defendant was not the one with the gun; that it was Griffin who shot Brown. On cross-examination by the solicitor, his testimony tended to show: At the time he made the statement that Griffin had done the shooting, he himself was accused of it, because "they" thought a larger caliber bullet had entered Brown than the one which was removed, and he didn't care whom he accused. His pistol, which had been taken from him, had not been loaded. All his bullets were in the trunk of the car. He was angry with Brown, because he thought he was the one who had tried to get into the car with his fiancee, and he struck Brown, who never struck him. It was Griffin who had attempted to break up the fight between him and the Marines. It was after he had put his pistol back into his automobile that defendant came out of the motel with a pistol and said to the Marines: "He may not have enough nerve to shoot you, but I do." Defendant then told them to leave the premises. They had gone about

60 feet with Brown when he advanced in front of him (Richards), and defendant fired the shot. Defendant then went to the rear of the Richards car and somebody said, "You shot me." Defendant's reply was, "If I had wanted to shoot you, I would have aimed at you." Griffin then said, "Everything is O. K.; that was just a blank; pull your car over here." Richards then went into the motel for the night. He has since married the girl who was with him.

Deputy Sheriff Dawson testified that Richards had told him Griffin had done the shooting and that Freeman said defendant was not the one who fired the shot.

From a conviction of murder in the second degree and a sentence of imprisonment for not less than 15 nor more than 18 years, defendant appealed.

T. W. Bruton, Attorney General; Ralph Moody, Deputy Attorney General, for the State.

C. E. Gerrans for defendant.

SHARP, J. The evidence reveals that only one shot was fired at the time deceased received the bullet wound which caused his death. The State, having adduced testimony from two witnesses that they saw defendant fire a pistol and that immediately thereafter Brown fell, exclaiming that he had been hit, clearly made out a case for the jury. *State v. Smith,* 268 N.C. 659, 151 S.E. 2d 596; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482. Defendant's assignment of error based upon the denial of his motion for nonsuit is overruled.

Over defendant's objection, and for the purpose of corroborating the witnesses Kolonick, Freeman, and Quinlivan, the court permitted the last witness for the State, a Marine sergeant with the Criminal Investigation Department, to testify that Kolonick told him on the morning after the shooting that he had seen defendant fire the gun, and that the other two said they had seen defendant with it in his hand. Defendant assigns the admission of these statements as error, for that (1) they were not made in defendant's presence, and (2) the three witnesses had not first testified that they had spoken with the witness Bennett. This assignment of error is overruled upon the authority of *State v. Brown,* 249 N.C. 271, 106 S.E. 2d 232, wherein Winborne, C.J., said: "(I)t is competent to corroborate a witness by showing that he has previously made the same statement as to the transaction as that given by him in his testimony, and that it is not necessary to ask the witness to whom such former state-

ment, offered in corroboration, was made." *Id.* at 274, 106 S.E. 2d at 235.

The court charged the jury that if the State had satisfied them beyond a reasonable doubt from the evidence that defendant had intentionally shot Brown with a pistol, thereby inflicting a wound which caused his death, the presumption would arise that the killing was unlawful and that it was done with malice, and that the burden then devolved upon defendant to satisfy the jury "of such facts and circumstances, that is, the legal provocation that will rob the crime of malice and thus reduce it to manslaughter." *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39; *State v. Utley,* 223 N.C. 39, 25 S.E. 2d 195.

The judge thereafter gave the following contentions in behalf of defendant: (1) that defendant did not fire the shot which caused Brown's death; and (2) that if the jury should find that he did fire the shot, the shooting was without malice because he fired at a trespasser who had been ordered to leave but showed "signs that he was not leaving." In giving the final mandate, the court instructed the jury that if they found beyond a reasonable doubt that defendant intentionally shot Brown with a pistol and inflicted a wound which caused his death, nothing else appearing, defendant would be guilty of murder in the second degree, and that would be their verdict unless defendant had shown to their satisfaction "that he was not acting with malice but *upon legal provocation, as the court has defined that term to mean to you.*" (Emphasis added.) If defendant had carried his burden, the jurors were instructed to acquit him of murder in the second degree and to consider whether he was guilty of manslaughter.

At no time in his charge did the judge define legal provocation. Defendant assigns this omission and the failure of the court to tell the jury what were the "facts and circumstances, that is, the legal provocation arising on the evidence, that would reduce the crime from second degree murder to manslaughter or that would excuse it altogether." He further assigns as error the failure of the court to charge upon accident, self-defense, and alibi.

Defendant offered no evidence of legal provocation, self-defense, or accident. His defense was that he did not fire the shot which caused Brown's death; that at the time of the shooting he had just stepped out of the office and started to the front of the house to use the phone *or* that he was in the office 40-60 feet away from the group in the yard. (He testified both ways.) Therefore, if any testimony required the trial judge to charge upon the legal provocation which would rebut the presumption of malice arising from an intentional

killing with a deadly weapon, it must be found in the State's evidence. A defendant is entitled to whatever advantage the State's evidence may afford him. *State v. Downey, supra; State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402.

The State's evidence contains no suggestion that defendant shot Brown accidentally. There is evidence that immediately after the shot was fired *Griffin* said, "Everything is O. K., that was just a blank." There was, however, no evidence that a pistol loaded with blanks was kept in the motel office for the purpose of frightening away trespassers. Nor was there any suggestion in the testimony that *defendant* thought the pistol contained blanks instead of live ammunition. Indeed, defendant testified that there was *no* pistol at the motel. The sailor, he said, could have shot Brown. The court did not err in failing to charge that defendant contended the killing was accidental. A defendant's assertion of accident is, of course, not an affirmative defense but merely a denial that he has committed an intentional killing. *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337. In this case, the court instructed the jury explicitly that, in order to convict defendant, the State was required to prove that he had *intentionally* shot Brown.

If one kills another with a deadly weapon by reason of provocation "such as would naturally and reasonably arouse the passions of an ordinary man beyond his power of control," this sudden passion will rebut the presumption of malice, 26 Am. Jur., Homicide § 22 (1940), and reduce murder in the second degree to manslaughter. *State v. Watson,* 222 N.C. 672, 24 S.E. 2d 540; *State v. Merrick,* 172 N.C. 870, 90 S.E. 257; *State v. Merrick,* 171 N.C. 788, 88 S.E. 501.

There was, however, no testimony offered by the State tending to show that defendant shot Brown in a sudden heat of passion caused by provocation which would cause an ordinary man to act so rashly on impulse and without due reflection. Neither Brown nor anyone else had made an assault upon defendant. *State v. Hightower,* 226 N.C. 62, 36 S.E. 2d 649; *State v. Mosley,* 213 N.C. 304, 195 S.E. 830. Not one of the Marines had attempted to invade the motel; so no question arises as to his right to defend his habitation or place of business. *State v. Miller,* 267 N.C. 409, 148 S.E. 2d 279. Four of the Marines were attempting to leave the motel premises with the fifth, as defendant had ordered them to do. We may assume that defendant became incensed because Brown was resisting his companions in their effort to take him out of the motel yard; still, under the circumstances here disclosed, the law does not deem Brown's trespass provocation sufficient to cause a man of ordinary firmness and aver-

age disposition to shoot him in a transport of passion he was unable to control.

> "A mere trespass or entry upon one's premises other than his dwelling, not amounting to a felony, is not considered sufficient provocation to warrant the owner's using a deadly weapon in its defense, or sufficient provocation to arouse the degree of passion requisite to reduce from murder to manslaughter his crime in slaying the intruder, notwithstanding the killing may have been necessary to prevent the trespass." 26 Am. Jur., Homicide § 27 (1940); see *State v. Morgan,* 25 N.C. 186.

If defendant intentionally shot Brown and caused his death, he could excuse the homicide altogether and secure his acquittal only by satisfying the jury that he lawfully killed him in self-defense. *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892.

Undoubtedly, the proprietor of an inn, motel, or similar establishment has a right to repel an unprovoked assault upon one of his guests, provided he uses no more force than is reasonably necessary to protect the guest. "He could not kill the assailant of his patron merely because the patron had been assaulted." *Steele v. State,* 194 Ark. 497, 108 S.W. 2d 474. Moreover, one may lawfully do in another's defense only what the other might lawfully do in his own defense. *State v. Ritter,* 239 N.C. 89, 79 S.E. 2d 164; *State v. Cox,* 153 N.C. 638, 69 S.E. 419. In this case it was the sailor who, by his own admission, started the fight. Conceding that he had cause to be angry, he nonetheless voluntarily, that is, aggressively, willingly, and without legal provocation, entered into a fight with Brown. The sailor, therefore, could not have invoked the doctrine of self-defense without first withdrawing from the fight and giving notice to his adversary that he had done so. *State v. Church,* 229 N.C. 718, 51 S.E. 2d 345; *State v. Davis,* 225 N.C. 117, 33 S.E. 2d 623. However, were we to concede, *arguendo,* that defendant had the right to interfere in the fight on the side of the sailor, Brown's four companions were doing their best to withdraw Brown from the fight and to leave the premises. The evidence discloses no reason to believe that they and the sailor could not have controlled the resisting Brown. Furthermore, the sailor had discarded his unloaded pistol, and none of the Marines had displayed any deadly weapon. The State's evidence, therefore, discloses no circumstances which might reasonably have caused defendant to believe that it was necessary for him to shoot Brown to save the sailor or anybody else from death or great bodily harm. Nor does it disclose that defendant gave Brown or the others any warning of his intention to shoot if they did not leave.

In the instant transcript, there is no evidence either of self-defense or of legal provocation which would rebut the presumption of malice if the jury found that defendant intentionally shot Brown and thereby caused his death. Thus, the court's failure to define legal provocation was not error. The court's reference to legal provocation and the statement of contentions in defendant's behalf with reference thereto was favorable rather than prejudicial to him. The judge would have been correct had he told the jury that if they were satisfied beyond a reasonable doubt that defendant intentionally fired the shot which caused Brown's death, "the entire evidence disclosed no mitigating, excusing, or justifying circumstances" which would reduce the homicide from murder in the second degree to manslaughter, or which would excuse it altogether upon the ground of self-defense. *State v. Gregory*, 203 N.C. 528, 166 S.E. 387.

Upon this record, if defendant fired the shot which killed Brown, he is guilty of murder in the second degree. If he is not the man who pulled the trigger, he is not guilty of any crime. The judge, in his charge, told the jury quite plainly that "defendant contends throughout that he did not shoot the pistol at all." He also charged them that if the State failed to satisfy them beyond a reasonable doubt that defendant intentionally killed deceased with a deadly weapon, it would be their duty to return a verdict of not guilty. Defendant was on the premises at the time Brown was shot and, by his own testimony, not over 60 feet from him at the time. If he was in the motel office, he could have fired the shot from the door — he said he was standing in the door when he saw the fight begin — and there is not the slightest evidence to negate the possibility that he could have fired the shot if he "had just stepped out of the office and started to the front of the house to use the phone." Defendant's contention that the judge erred in failing to charge on alibi is, therefore, also without merit. To entitle a defendant to a charge on alibi there must be evidence that at the time the crime was committed he was at a particular place which would make it *impossible for him* to have committed the crime. *State v. Green*, 268 N.C. 690, 151 S.E. 2d 606. Defendant was present in the immediate area when Brown was felled by a shot. The only question in the case was whether he was the man who fired the pistol. He said he was not the man. Other witnesses said he was. The jury resolved the issue of fact against defendant, and in the trial we find

No error.

CITY OF DURHAM, PETITIONER, v. EASTERN REALTY COMPANY, RONALD A. BRUNSON AND WIFE, YOALDER K. BRUNSON, RESPONDENTS.

(Filed 20 June, 1967.)

1. Eminent Domain § 11—

Where property subject to a leasehold estate is condemned and appeal from the appraisal of the commissioners is taken to the Superior Court, it is discretionary with the Superior Court whether to permit a separate trial to ascertain the compensation due lessees, and the action of the court in refusing to permit separate trials to ascertain the amount due the owners and the amount due the lessees will not be disturbed in the absence of a showing of abuse.

2. Eminent Domain § 14—

Where land subject to a leasehold estate is condemned, lessees are not entitled to recover their damage without regard to the owner's recovery, but it is proper for the jury to fix the total value of the property and then ascertain what part of such total value should be awarded the lessees for the condemnation of their leasehold estate, although the fact that the property is rented advantageously, or, on the other hand is unrented, is a factor to be considered in the determination of its fair market value.

3. Trial § 37—

The fact that the court necessarily takes more time in stating the contentions of one party than in stating the contentions of the other is not alone ground for complaint.

4. Appeal and Error § 20—

A defendant may not complain on appeal of an error favorable to himself, or matter prejudicial solely to a co-defendant.

5. Appeal and Error § 42—

A statement in the charge which could not have possibly misled the jury will not be held for prejudicial error.

6. Eminent Domain § 14—

A charge that the amount lessees were entitled to recover for the condemnation of their leasehold estate would be the difference between the fair market value of the lease for the remainder of the term and the amount of rent stipulated in the lease, *held* not prejudicial error.

7. Appeal and Error § 41—

Exception to the admission of certain testimony cannot be sustained when the same witness has theretofore testified to substantially the same effect without objection.

8. Appeal and Error § 1—

The verdict of the jury upon conflicting evidence is conclusive in the absence of error of law in the trial.

APPEAL by Respondents Brunson from *Latham, S.J.*, Special December 1966 Civil Term, DURHAM County Superior Court.

Pursuant to the authority of Chapter 40 of the General Statutes, the City of Durham instituted these condemnation proceedings on 15 April 1966. The City seeks to acquire for an expressway property owned by Eastern Realty Company (the owner) and leased to Ronald A. Brunson and wife, Yoalder K. Brunson (the lessees). It consists of a large brick building in which the lessees operate an appliance store; the lot upon which it is located has approximately 136 feet frontage on Chapel Hill Street in the City of Durham with a depth of about 155 feet.

In November 1961 the property was leased by the owners to the lessees for a period expiring 31 December 1971. At that time the lessees expended a substantial sum in improving the property, as did the owners. The lessees have complied with the terms of the lease by payment of the rent.

The City requested the appointment of commissioners to appraise the property; upon their report the clerk signed judgment affirming it, and from it the owners and the lessees appealed to the superior court.

When the case was called for trial, the lessees sought a separate trial upon the theory that there was a conflict of interest between them and the owner. It was their position that since the lease had some five years to run that it had a major financial value, not limited to the value of the freehold, and that they were entitled to an award in accordance with this theory. The motion was denied, and the lessees excepted.

The City offered the testimony of two real estate men who were experienced appraisers. One gave it as his opinion that the market value of the property was some $93,000, which included an estimate of $4,200 as the fair market value of the lessees' interest. The other witness offered by the City gave it as his opinion that the fair market value of the property was $94,000.

The owner's evidence tended to show through four witnesses that the reasonable market value of the property was $134,000, $125,000, $146,000 and $135,000, respectively. The same witnesses placed an average estimated value of the lessees' interest in the property at about $4,200.

The lessee testified that the fair market value of the unexpired term of their lease was $125,440. Another witness for the lessees, Frank Erwin, gave it as his opinion that the value of the lessees' interest was $95,820. Still another witness placed a value of $94,930.

The lessees offered evidence tending to show that when they leased the property in 1961 that some $20,000 was spent on improving and modernizing it, that their sales have steadily increased each

year and now total more than a half million dollars a year, and that to obtain property of equal advantages, they would have to pay approximately $25,000 a year as compared with the present rental of $7,500 a year.

At the conclusion of the evidence the lessees tendered the following issues and excepted when the court rejected them:

"1. What amount is the Eastern Realty Company entitled to recover of the petitioner, City of Durham?

"Answer: .....

"2. What amount are the respondents, Ronald Brunson and wife, Yoalder K. Brunson, entitled to recover of the petitioner, City of Durham?

"Answer: .....

The following issues and answers comprise the verdict:

"1. What total sum are the respondents, Eastern Realty Company and Ronald A. Brunson and wife, Yoalder K. Brunson, entitled to recover of the petitioner, City of Durham, for the taking of the property described in the petition?

"Answer: $112,500.00.

"2. What part, if any, of the above total sum awarded are the respondents, Ronald A. Brunson and wife, Yoalder K. Brunson, entitled to recover?

"Answer: $8,000.00.

Judgment was signed in accordance with the verdict, at which time both respondents gave notice of appeal, but only the lessees perfected their appeal.

Bryant, Lipton, Bryant & Battle by James B. Maxwell, F. Gordon Battle and Victor S. Bryant, Attorneys for Respondent Appellants Brunson.

Claude V. Jones and S. F. Gantt, Attorneys for Petitioner Appellee, City of Durham.

Spears, Spears & Barnes by Marshall T. Spears; Haywood, Denny & Miller by Egbert L. Haywood, Attorneys for Respondent Eastern Realty Company, Appellee.

PLESS, J. In considering this case, it must be remembered that only the respondents Brunson (the lessees) have perfected their appeal. The City and the owners are apparently content with the verdict.

The lessees except to the failure of the Court to permit a separate

trial as to their claims. This was entirely discretionary; and the lessees citing no authority in support of their position, and no abuse being shown, the exception is overruled.

> "Under these circumstances, whether the issues relating to the damages, if any, sustained by (the tenants), should be determined by the same jury upon the same evidence in a single trial, or deferred for trial by another jury upon other evidence, was determinable by the court in the exercise of its discretion." *Barnes v. Highway Commission,* 257 N.C. 507, 521, 126 S.E. 2d 732.

The battle ground upon which the serious issues are fought is upon the position of the lessees that their alleged damage should be determined without regard to the owner's recovery; that the City should pay the owners and, in addition, should pay them, the lessees. While they find some authority for their contentions in other states, our Court has consistently held otherwise.

> " 'The rule is generally recognized (though not invariably followed) that, where there are several interests or estates in a parcel of real estate taken by eminent domain, a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damage to, the property as a whole, and then to apportion the same among the several owners according to their respective interests or estates, rather than to take each interest or estate as a unit and fix the value thereof, or damage thereto, separately.' 18 Am. Jur., Eminent Domain § 239; Nichols on Eminent Domain, Third Edition, Volume 4, § 12.36(1); Lewis on Eminent Domain, Third Edition, Volume II, § 716; Annotations, 69 A.L.R. 1263 and 166 A.L.R. 1211." (Quoted from *Barnes v. Highway Comm., supra.*)
>
> "It is a fundamental principle, governing condemnation proceedings, where several interests are involved, such as estates for life, . . . or leaseholds, or in reversion . . . all should be combined in determining the value of the fee, after which the total value of the fee can be subdivided in satisfaction of the values fixed upon the various interests involved." *Carlock v. U. S.,* 53 Fed. 2d 926.
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> "It is well established that a tenant for years under a written lease is an owner of property in the constitutional sense, and is entitled to share in the compensation when all or a part of the property leased is taken by eminent domain during the term of the lease, . . ." 27 Am. Jur., 2d, Eminent Domain, § 250

In accordance with above authorities, we hold that when an entire piece of property is acquired by condemners, the sovereign must pay the reasonable market value for it. It is not required to pay an additional amount to a lessee, life tenant, or others having an interest, contingent, vested, or otherwise. While an advantageous lease is a proper factor to be considered — just as the fact that the property is not rented, or is unrentable, would be — in determining its fair market value, the condemner's total liability is fixed when the fair market value of the property, considering all proper factors, has been established.

What then happens to the rights of the lessee? The answer is clear. Since the rent he would pay, with the probability of greater rents in the future, are considered in determining the value of the property, it follows that the owner gets higher compensation because of them. As a consequence, the owner is required to account to his lessee for the value of his lease.

The lessees also claim that the Court, by its instructions and statement of contentions, so limited them that they did not receive a fair amount of the proceeds awarded to the owner to compensate them for their loss. It is true that they offered evidence which would have permitted a much larger award to them than the jury gave them; on the other hand, the owner's evidence was that the lessee's damage was about half of their award, which adds up to a jury question and, in the absence of error, affords no relief to the lessees here.

The Court's statement of the owner's contentions requires some two or three pages of the case on appeal; those of the lessees require only one. But it is not required that the statement of the contentions be of equal length. 4 Strong's N. C. Index, Trial, § 37, *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196. Also, the owners made no request for any additional statements of their contentions, as is required. *Sherrill v. Hood,* 208 N.C. 472, 181 S.E. 330.

The lessees further complain of the Court's instructions as to the factors to be considered in determining the compensation due the owner. However, we are of the opinion that the Court's charge was favorable to the lessees in that he said "and in so doing (determining the fair market value of the property) you will not reduce such value by any amount calculated to reflect any opinion you might have as to any provisions of the lease to Brunson which *adversely* affects such value. If you find the Brunson lease or any of its provisions *favorably* influence the fair market value of the respondent Realty Company's property, you will consider such factors, along

with the other evidence in the case, in arriving and in determining the fair market value of the property." (Emphasis added.)

The lessees except to the failure of the Court to adopt the issues tendered by them and to the adoption of the issues presented to the jury. Upon the theory of trial, which in our opinion was the correct one, we think the adopted issues fairly present the questions at issue, and these exceptions are overruled.

The lessees further excepted to this part of the charge: "The business located on the land may be considered only insofar as it enhances or detracts from the fair market value of the land." However, the lessees cite no authority in support of their contention, and since this instruction was given to the jury in connection with the first issue, any error contained in it would be against the owner, who has not appealed.

The lessees complain that while the first issue deals with the recovery of Eastern Realty Company and Ronald A. Brunson and wife, that in his charge on it, the Court spoke of "Eastern Realty Company's property" without referring to the interest of the lessees. Since the Court had gone fully into the interest of the lessees at other portions of the charge, we consider this phrase without significance, and as a convenient or shorthand method of referring to the property in question. After all, it was Eastern Realty Company's property, even though rented to the lessees.

In discussing the second issue, which dealt with the lessees' claim, the Court said: "(Y)our answer to this issue will be such amount, if any, as you find to be the difference between the fair market value of the Brunson lease from January of '67 to January of '72, and the amount that the Brunsons are bound to pay under such lease." The Court had previously stated "the measure of compensation for a leasehold interest taken under eminent domain is the difference between the fair rental value of the leased premises for the unexpired term of the lease and the rent reserved in the lease," and no exception was taken to this part of the charge. The Court had then summarized the evidence for the lessees which tended to show that the lease was favorable to them and that the rental required was substantially less than its value. This exception is overruled.

There are other exceptions to the charge and to the admission of evidence, but careful consideration of all of them reveals no substantial merit.

The lessees take several exceptions to the testimony of Mr. Joseph A. Robb who testified for the petitioner as an expert realtor. He testified that he had been in the real estate business for more

than twenty years and had done appraising for many banks and commissions. Some ten pages of the case on appeal comprise his testimony. He gave it as his opinion that the market value of the lessor's interest was $88,800 and that the lessees' interest was worth $4,200, making a total of $93,000 for the property under consideration. The lessees excepted to the admission by the Court of his statement that he had computed the value of the lessor's interest, the lessees' interest and that "the sum of the two have to equal the whole." However, the latter statement was in response to the question "Will you tell us how you arrived at that figure (that the lessees' interest was worth $4,200)?" There was no objection to the question, and since the values given as shown above were several times stated by him without objection, the exceptions are not sustained.

We can understand the disappointment of the lessees in receiving such comparatively small compensation for an advantageous lease with five years to run, in which they were doing a half million dollar yearly business. Also, in the first half of their ten-year lease, they had expended much more than their award in remodeling and in improving the premises and had almost doubled their volume of business. All these factors were fully presented in the evidence and summarized in the charge. The fact that the jury accepted the owner's claims in preference, in a trial free from substantial error, is not a proper basis for a new trial.

No error.

ARTHUR WARREN McCRILLIS, PLAINTIFF, v. A & W ENTERPRISES, INC., A CORPORATION, AND ROOT BEER DRIVE-INS, INC., A CORPORATION, DEFENDANTS.

(Filed 20 June, 1967.)

1. Trial § 21—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, resolving all conflicts and inconsistencies in his favor and giving him the benefit of all reasonable inferences therefrom.

2. Same—

On motion to nonsuit, defendant's evidence which tends to establish an affirmative defense or which is contradictory to that offered by plaintiff must be disregarded.

3. Master and Servant § 10—

Plaintiff's evidence tending to show a contract of employment for a specified term at a specified salary, binding on one of defendant corporations by ratification and on the other by its adoption of the agreement, and that plaintiff was wrongfully discharged prior to the end of the term, *is held* sufficient to overrule nonsuit in plaintiff's action for damages for breach of the contract of employment, defendants' evidence in contradiction not being considered on motion to nonsuit.

4. Corporations § 10—

Evidence tending to show that individuals formed a holding corporation which purchased all of the capital stock of an operating corporation shortly after such individuals had made a contract of employment on behalf of the operating corporation, and that after such acquisition of stock by the holding corporation the new board of directors of the operating corporation, with full knowledge of the contract of employment, accepted services rendered under the contract and by resolution of its new board of directors fixed the salary of the employee, is sufficient to support a finding that the operating corporation ratified the agreement so as to be bound thereby.

5. Trial § 26; Pleadings § 28—

A material variance between allegation and proof warrants nonsuit for failure of plaintiff to prove the cause alleged, but whether a variance is material must be determined upon the facts of each particular case, and a variance which could not have misled defendant to his prejudice will not be deemed material. G.S. 1-168, G.S. 1-169.

6. Same—

Allegation that a contract of employment was for a period of six years, with evidence that the contract was for a period of five years modified by mutual consent so as to begin one year after the beginning of the employment, is not a material variance.

7. Corporations § 10—

While a corporation may not ratify an agreement made in its name prior to its incorporation, if, after incorporation, it accepts the benefits of the agreement through action of its board of directors with full knowledge of the terms of the agreement, the corporation may be held to have adopted such contract so as to be bound thereby.

8. Principal and Agent § 6—

The fact that a person dealing with an agent knows at the time that the agent does not have authority to bind the principal in the matter does not preclude ratification of the agreement by the principal.

APPEAL by plaintiff from *McConnell, J.*, at the 21 November 1966 Session of GUILFORD.

The plaintiff sues for damages for breach of contract of employment. At the close of all of the evidence, the motion by the defendants for judgment of nonsuit was allowed.

The complaint alleges that, on or about 1 April 1964, the plain-

tiff was employed by the defendants as general manager in North Carolina for a minimum period of six years at a fixed salary of $14,198 per year, plus certain expenses, plus an incentive bonus, plus the right to acquire up to 10% of the outstanding stock of the defendant corporations. It is alleged that the plaintiff faithfully performed his duties under such contract, that the defendants broke the contract by terminating the plaintiff's employment and that the plaintiff was damaged thereby.

The plaintiff, himself, testified to the following effect:

In and prior to March 1964, he was employed by A & W Development Corporation (then owner of all the outstanding shares of stock of Root Beer Drive-Ins, Inc.) as general manager of Root Beer Drive-Ins, Inc. In February 1964, Herbert Lord, who shortly thereafter became Chairman of the Board of each of the defendant corporations, and David Chapoton, who likewise became President of each of them, came to North Carolina and inspected the drive-in establishments and the records pertaining thereto, being accompanied on such inspection tour by the plaintiff. At that time, they discussed with the plaintiff the possibility of his continuing to manage these business establishments as employee of the two defendant corporations. They returned to North Carolina in March 1964 and renewed their negotiations with the plaintiff. Lord then explained to the plaintiff that A & W Enterprises, Inc., was going to purchase Root Beer Drive-Ins, Inc., and own it as a holding corporation. The plaintiff accepted the proposal made to him by them that he be employed by the defendant corporations as general manager of the operations of these drive-in establishments, effective 1 April 1964.

Lord promised the plaintiff an option to buy 2% of the stock of Root Beer Drive-Ins, Inc., each year over a period of five years, a salary of $1,183.00 per month for the five year period, plus certain expenses, plus a bonus which would be not less than $4,000 each year and which could rise to a maximum of $6,000, the variation depending upon increases in the gross volume of business. The plaintiff was to render service as general manager of Root Beer Drive-Ins, Inc., receiving his directions from Chapoton and Lord as president and chairman, respectively, of the corporation. The option price of the stock so to be purchased by the plaintiff was fixed at $1,500 per year.

The proposed acquisition of the shares of stock of Root Beer Drive-Ins, Inc., was consummated, and the plaintiff went to work under the new management on 1 April 1964. Lord told the plaintiff that he would have his personal attorney put the stock option agreement in writing but no such written agreement was ever delivered to the plaintiff in spite of frequent inquiries by him.

The plaintiff discharged the duties of his employment until September 1965, when Chapoton arrived in North Carolina on Saturday, borrowed $100.00 from the plaintiff on Sunday, and fired him on Monday, advising him that his services were no longer required by the defendant corporations and he was being dismissed as of 1 October. The plaintiff did not resign his employment. He was paid his salary to 1 October 1965, plus one month severance pay and two weeks accumulated vacation pay. He was also given a letter of recommendation, stating in somewhat vague and general terms that the plaintiff had performed his duties skillfully and that the termination of his employment was due to a consolidation of positions to reduce costs.

In late November 1964, following inquiries by the plaintiff concerning his failure to receive the written stock option agreement, Chapoton came to North Carolina and requested the plaintiff to defer the start of the stock option arrangement and the bonus arrangement until the beginning of a new fiscal year on 1 April 1965, so that the arrangement would run for five years from that date, which would have been six years from the date the plaintiff's employment began. The plaintiff consented to the change.

The plaintiff was never permitted to acquire the stock and was never paid the agreed bonus of $4,000 per year. Though he endeavored to obtain other suitable employment he had not been able to do so at the time of trial.

While employed by the defendant the plaintiff was made a vice president and director of Root Beer Drive-Ins, Inc. The first meeting of the new Board, consisting of Lord, Chapoton, the plaintiff, and two others, both of whom knew of the agreement between the plaintiff, Lord and Chapoton, was held on 1 April 1964. The minutes of that meeting state:

> "The next item of business to come before the meeting was the question of salary in compensation for Mr. Warren McCrillis, who was elected vice-president and general manager of the corporation. After some discussion among members of the Board of Directors, it was unanimously agreed that said Warren McCrillis shall be compensated at the rate of $1,183.00 per month, payable on the first day of the month following his completion of service for the previous month."

The plaintiff recalls no discussion in any meeting of the Board of his "complete salary package with Root Beer Drive-Ins, Inc."

Herbert Lord, called by the plaintiff as an adverse witness, testified to the following effect:

He was Chairman of the Board of each of the defendant corporations. A & W Enterprises, Inc., and Lord purchased Root Beer Drive-Ins, Inc. (*i. e.,* its outstanding stock) on or about 1 April 1964.

The plaintiff was not dismissed from the company "as such." At the meeting of the Board of Directors of Root Beer Drive-Ins, Inc., on 24 August 1965, the plaintiff tendered his resignation, which was accepted. The plaintiff accepted the terms of separation. The minutes of that meeting accurately reflect what occurred. They state:

> "The next item of business to come before the meeting was a statement by Mr. Warren McCrillis, vice president of the corporation, that he was going to resign as *vice president and director* of the corporation * * * His resignation was accepted with the understanding that the details of the same would be discussed and concluded at further meetings of the Board." (Emphasis added.)

At a meeting of the Board on 8 October 1965, not attended by the plaintiff, the resignation of Mr. McCrillis, "as vice president and a director of the corporation," was accepted as of 1 October 1965, and it was voted that he be paid one month severance pay plus two weeks vacation pay.

There were no plans to discharge the plaintiff. He resigned because the Board had planned to ask him to assume additional duties in view of financial difficulties experienced by the business.

A & W Enterprises, Inc., had not been incorporated at the time of the negotiations between Lord and the plaintiff in March 1964. The purpose of Lord's trip to North Carolina at that time was to examine the operating units of Root Beer Drive-Ins, Inc., with the purpose of purchasing them. These plans were discussed with the plaintiff.

There was no proposal of an employment contract with a definite term of years. There was no agreement for a guaranteed bonus arrangement. There was no contract to give the plaintiff a stock purchase option. This was discussed but no agreement was reached.

The purchase contract between A & W Development Company, the former owner of the stock, and Lord and Chapoton provided that no "additional shares" of stock of Root Beer Drive-Ins, Inc., could be issued, and no shares of treasury stock of the company could be sold, without the express written consent of a director to be designated by the seller of the stock so long as certain obligations to the seller remained unpaid. This agreement also provided that Lord and Chapoton would form a corporation to hold the shares

purchased by them. It was signed on behalf of Root Beer Drive-Ins, Inc., by the plaintiff as vice president.

The defendants' evidence consisted of the minutes of the above mentioned meetings of the Board of Directors of Root Beer Drive-Ins, Inc., and testimony by various officers and employees of the defendant corporations to the effect that the plaintiff was dissatisfied with his employment and resigned.

Cahoon & Swisher for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by James G. Exum, Jr., for defendant appellees.

LAKE, J. In considering a motion for judgment of nonsuit, we must interpret the evidence in the light most favorable to the plaintiff, resolve contradictions or inconsistencies in his testimony in his favor, give him the benefit of all reasonable inferences therefrom which are favorable to him, and disregard the evidence of the defendant which is contradictory to that offered by the plaintiff or which tends to establish an affirmative defense. *Aaser v. Charlotte,* 265 N.C. 494, 144 S.E. 2d 610; *Griffin v. Indemnity Co.,* 265 N.C. 443, 144 S.E. 2d 201; *Moss v. Tate,* 264 N.C. 544, 142 S.E. 2d 161; *Coleman v. Colonial Stores, Inc.,* 259 N.C. 241, 130 S.E. 2d 338; *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330. The credibility of the evidence is for the jury.

When so considered, the evidence offered by the plaintiff is sufficient to support, though not to require, a finding that Lord and Chapoton agreed with the plaintiff, on behalf of the two defendants, that if he would work as general manager of the operations of Root Beer Drive-Ins, Inc., after the contemplated acquisition by them of all of its outstanding shares and the contemplated formation of A & W Enterprises, Inc., the two corporate defendants would retain him in such employment for a period of five years at the specified salary, with the specified bonus opportunities and the specified stock option. The evidence is also sufficient to support, though not to require, a finding that after the acquisition of such stock the new Board of Directors of Root Beer Drive-Ins, Inc., with full knowledge of the agreement so negotiated, ratified it, both by the express resolution of the Board and by the acceptance of the plaintiff's services. The evidence is also sufficient to support, but not to require, a finding that the plaintiff performed the services required of him under the contract and was wrongfully discharged to his damage.

We do not deem the variance between the allegation in the complaint that the contract was for a period of six years and the evi-

dence of a contract for employment for five years, later modified by mutual consent so as to begin one year after the new management assumed control, to be a material variance. Where there is a variance between allegation and proof, amounting to the allegation of one cause of action and proof of another, a nonsuit is proper. In such case there has been a failure by the plaintiff to prove the cause of action alleged in his complaint. G.S. 1-169; *Hall v. Poteat,* 257 N.C. 458, 125 S.E. 2d 924; *Talley v. Granite Quarries Co.,* 174 N.C. 445, 93 S.E. 995; *Wright v. Insurance Co.,* 138 N.C. 488, 51 S.E. 55. However, where the variation between allegation and proof is such that the adverse party could not have been misled thereby to his prejudice, it will not be deemed a material variance. G.S. 1-168; *Dennis v. Albemarle,* 242 N.C. 263, 87 S.E. 2d 561, rehear. dism., 243 N.C. 221, 90 S.E. 2d 532. Whether the variance is material so as to justify nonsuit must be resolved in the light of the facts of each case. *Hall v. Poteat, supra.*

Obviously, at the time the plaintiff's negotiations with Lord and Chapoton culminated in the contract upon which he sues, neither Lord nor Chapoton was the agent of either of the defendant corporations. A & W Enterprises, Inc., had not been formed and neither of them had then acquired stock in or become an officer of, or otherwise connected with, Root Beer Drive-Ins, Inc. It appears from the plaintiff's evidence that he was then aware of this circumstance. However, the reasonable inference to be drawn from the plaintiff's evidence is that the agreement was for employment of the plaintiff by the two corporations, not by Lord and Chapoton, and purported to be entered into on behalf of the corporations. One, upon whose behalf a contract is made without his authority, may ratify such contract even though the promisee, at the time of the making of the contract, knew the person with whom he was dealing had no authority to bind the promisor. Restatement of Agency, 2d ed., §§ 85, comment e, and 92, comment f; 3 Am. Jur. 2d, Agency, § 171.

The resolution of the Board of Directors of Root Beer Drive-Ins, Inc., at the meeting on 1 April 1964 did not specify the period for which the plaintiff's employment was to continue and did not refer to the bonus arrangement or the stock option. Nevertheless, the plaintiff's evidence is to the effect that each director present at the meeting knew the details of the agreement which he had reached with Lord and Chapoton. Under these circumstances, the adoption of such resolution and the acceptance of the plaintiff's services by Root Beer Drive-Ins, Inc., would constitute a ratification by it of the entire contract so made on its behalf by Lord and Chapoton. They, in the meantime, had become its officers and directors.

A contract made on behalf of a corporation to be formed cannot be ratified by the corporation since it was not in existence, and therefore could not have authorized the contract, when it was entered into. *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N.W. 216; 18 Am. Jur. 2d, Corporations, § 120. It may, however, be adopted by the corporation after it comes into existence. Such adoption may result from its acceptance of benefits of the contract with knowledge of its provisions. *Morgan v. Bon Bon Co., Inc.*, 222 N.Y. 22, 118 N.E. 205, *Huron Printing & Bindery Co. v. Kittleson*, 4 S.D. 520, 57 N.W. 233; *Jones v. Smith* (Tex. Civ. App.), 87 S.W. 210; 18 Am. Jur. 2d, Corporations, § 119; Annot., 17 A.L.R. 452, 477, 500.

The plaintiff's evidence, if true, is sufficient to show that A & W Enterprises, Inc., came into existence at or shortly before the time the plaintiff was to commence his services and did commence them. From its inception, it was the holding company which owned all the stock of Root Beer Drive-Ins, Inc. Lord was the chairman of its board of directors and Chapoton its president. Through the services of the plaintiff to its wholly owned subsidiary, it received the benefit it was intended to receive under the contract. Having so received the benefit of the contract, with full knowledge of its terms, it must be deemed to have adopted the contract and cannot escape its burdens.

Consequently, it was error to grant the motion for nonsuit as to either of the defendants. The credibility of the plaintiff's evidence as to the terms of the contract and the determination of whether he was wrongfully discharged or voluntarily resigned are matters to be determined by the jury in the light of the evidence to be presented at the new trial of the matter.

Reversed.

STATE OF NORTH CAROLINA v. WILSON ELLIS COOKE.

(Filed 20 June, 1967.)

1. Automobiles § 72—

Testimony tending to show that defendant was intoxicated 15 to 20 minutes after an accident occurring while defendant was driving on a public highway, is sufficient to overrule motion for nonsuit in a prosecution for driving while intoxicated.

2. Same; Criminal Law § 55—

A Breathalyzer test of defendant made by a person meeting the qualifications of the statute and making the test in the manner required by the statute, is competent in a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, but for the test to cast any light on defendant's condition at the time of the offense it must have been timely made and the defendant must not have consumed alcohol between the occurrence in question and the time of the test, since the Breathalyzer can measure the amount of alcohol in a person's bloodstream only as of the time the test is given. G.S. 20-138, G.S. 20-139.1.

3. Same; Criminal Law § 32—

The provision of G.S. 20-139.1 that a competent Breathalyzer test showing .1 per cent or more by weight of alcohol in a person's blood should raise the "presumption" that such person was under the influence of intoxicating liquor does not create a conclusive presumption or compel the jury to find the fact of intoxication, in the absence of evidence that such person was not intoxicated, but merely creates a permissible inference or a *prima facie* case authorizing the jury to find the fact of intoxication.

4. Same; Automobiles § 74— Presumption created by G.S. 20-139.1 merely authorizes, but does not compel, an affirmative finding.

Defendant's testimony was to the effect that he had drunk a small quantity of intoxicating liquor shortly before the accident in question and that between the time of the accident and the making of a Breathalyzer test he drank a quantity of intoxicating liquor. The State introduced in evidence the result of a Breathalyzer test made within an hour of the collision showing a concentration of .2 per cent of alcohol in defendant's bloodstream. *Held:* An instruction as to the presumption created by the statute, without charging the jury that such presumption does not preclude them from finding that defendant was not intoxicated, and without applying the law to defendant's evidence by instructing the jury that if they found that defendant had drunk a quantity of intoxicants after the collision the Breathalyzer test would create no presumption that he was under the influence of intoxicants at the time of the collision, is prejudicial error. G.S. 1-180.

APPEAL by defendant from *Froneberger, J.*, 31 January 1966 Mixed Session of CATAWBA, docketed in the Supreme Court as Case No. 329 and argued at the Fall Term 1966.

Defendant, a long-distance truck driver, was tried and convicted in the Municipal Court of the City of Hickory upon a warrant which charged that, on 10 November 1965, he unlawfully operated a motor vehicle upon a public street of Hickory while under the influence of intoxicating liquor, a violation of G.S. 20-138. Upon conviction, defendant appealed to the Superior Court, where he was tried *de novo*.

Evidence for the State tended to show: Between 8:30 and 8:45 p.m., J. C. Little was traveling west on First Avenue; defendant was driving his automobile east. It was raining. As the two cars approached the Snack Bar, a restaurant located on the north side of

the street, defendant — without giving any signal of his intention to do so — suddenly turned to his left, across the path of the Little automobile. The cars collided in Little's lane of traffic. Little remained in his automobile, and defendant came over to talk to him. When defendant asked Little if he did not observe his signal, Little said defendant had given no signal. Defendant replied that he had signaled and that he had "a couple of witnesses." Upon receiving this information, Little got out to find the witnesses but was unable to do so. Little noticed nothing abnormal about defendant and detected no odor of alcohol on his breath. Both he and defendant remained at the scene until Officer Gadfield arrived 10-15 minutes after the accident. During that period of waiting, he did not see defendant drink any intoxicants.

When Officer Gadfield arrived, he talked to the two drivers, and, after observing defendant "a little bit," he arrested him for public drunkenness and searched him. In his pocket he found a partially eaten onion. Defendant told him that he had been drinking whiskey and beer. When another patrol car came by, the officer sent defendant to jail. At the jail, O. M. McGuire, who has been licensed by the State Board of Health since 11 March 1965 to operate a Breathalyzer and whom the court found to be "an expert in the use and operation of the instrument known as a Breathalyzer," first observed defendant at 9:08 p.m. In his opinion, defendant was "highly under the influence." After testing the machine, which he found to be in good working order, McGuire gave defendant the Breathalyzer test at 9:25 p.m. He testified, without objection, as follows:

> "The test result on the blood alcohol of the defendant was .20 per cent. . . . (The time required for alcohol to show up on the Breathalyzer) would depend on the contents of the man's stomach. . . . There is no way for the Breathalyzer to tell when this man drank any alcoholic beverages to cause his blood content to contain alcohol. This machine tells how much is in the blood at the time he is tested. If a person had an empty stomach he would have some alcohol in his blood soon. . . . Every individual will get some in his bloodstream in 30 to 90 minutes."

The testimony of defendant, the only witness for the defense, tended to show: At 4:00 p.m. on the day before the accident, defendant and his relief driver left Boston, Massachusetts, to drive to Charlotte, North Carolina, where they arrived at 6:30 p.m. on 10 November 1965. Defendant immediately left in his automobile for his home in Hickory. There, his first stop was Johnson's Service Sta-

tion, where "a Federal man, an ATU Agent," gave him a drink of whiskey — about one inch in a Dixie cup. He had not eaten since that morning; so he then went to his home to eat. Finding his wife away, he left for the Snack Bar to get a sandwich. At the time of the accident, there was nothing wrong with him. Thereafter, however, he did have something to drink, and he was under the influence when he arrived at the jail. Defendant testified:

> "(A)fter the accident I got into the car (which pulled up there) with two men. . . . While I was in their car I had two drinks of vodka. . . . One of the men gave me the onion the officer talked about. I ate some of the onion. . . . I do not know the two men who gave me the drink. . . . I never saw them again."

The jury's verdict was "guilty as charged." From the judgment imposed, defendant appeals.

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

A. Terry Wood for defendant.

SHARP, J. The State's evidence tending to show defendant's intoxication within 15-20 minutes after the accident was plenary to overrule the motion for nonsuit unaided by the results of the Breathalyzer test. *State v. Collins,* 247 N.C. 244, 100 S.E. 2d 489; *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263; *State v. Dawson,* 228 N.C. 85, 44 S.E. 2d 527; *cf. State v. Kelly,* 227 N.C. 62, 40 S.E. 2d 454.

The result of a Breathalyzer test, when the qualifications of the person making the test and the manner of making it meet the requirements of G.S. 20-139.1, is competent evidence in a criminal prosecution under G.S. 20-138. *State v. Cummings,* 267 N.C. 300, 148 S.E. 2d 97; *State v. Powell,* 264 N.C. 73, 140 S.E. 2d 705. For a full explanation of the manner in which the Breathalyzer operates, see Watts, Some Observations on Police-Administered Tests for Intoxication, 45 N. C. L. Rev. 35, 64-68, 86-91. Watts describes the Breathalyzer as "an instrument of great sophistication." *Id.* at 65. (According to the instruction manual accompanying the machine, "halitosis, onions, garlic, etc." do not cause it to err!)

Defendant has not challenged the admissibility of the result of the Breathalyzer test which was administered to him within an hour of the collision which brought about his arrest. He assigns as error, however, that the judge failed to give the jury adequate instructions on the presumption created by G.S. 20-139.1 in that he omitted to

tell the jury (1) that the presumption was rebuttable and (2) that the condition of the defendant at the time of the test must be correlated with his condition at the time he was operating the motor vehicle on the public highway in order for the test to be relevant. This is defendant's Assignment of Error No. 6.

In portions pertinent to this case, G.S. 20-139.1 provides:

> "§ 20-139.1 Results of chemical analysis admissible in evidence; presumptions. — (a) In any criminal action arising out of acts alleged to have been committed by any person while driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's breath shall be admissible in evidence *and shall give rise to the following presumptions:*
>
> "If there was at that time 0.10 per cent or more by weight of alcohol in the person's blood, *it shall be presumed that the person was under the influence of intoxicating liquor.*
>
> "Per cent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.
>
> "The foregoing provisions of subsection (a) of this section shall not be construed as limiting the introduction of any other competent evidence, including other types of chemical analyses, bearing upon the question whether the person was under the influence of intoxicating liquors.
>
> * * *
>
> "(c) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any test administered at the direction of a law enforcement officer." (Emphasis added.)

After telling the jury that the Breathalyzer is an instrument which mechanically and chemically analyzes the quantity of alcohol which a person has in his bloodstream by measuring the alcoholic content of his breath, the court instructed the jury as follows:

> "The officer testified, as I recall, that the defendant's test showed that he had an alcoholic content in his bloodstream by the Breathalyzer test as .20. The State has offered into evidence the statute under which these tests are given, and the statute reads if there was at the time 0.10 per cent or more by weight of alcohol in the person's blood, it shall be presumed that the person is under the influence of intoxicating beverages."

The foregoing constitutes the judge's only explanation of the statute to the jury. His only other reference to the Breathalyzer test appears as a statement of the State's contentions: "You ought to believe the test given to him; the condition of the defendant immediately after the accident upon the arrival of the officers, and that the State contending that it has borne the burden of proof beyond a reasonable doubt."

This Court has not heretofore been called upon to construe the effect of the presumption created by G.S. 20-139.1. The word *presumption,* as lucidly pointed out by Stansbury, N. C. Evidence § 215 (2d Ed., 1963), has been used in different senses, but always upon the premise that when a certain basic fact is established another (presumed) fact is assumed or inferred. The following situations illustrate the varying uses of the word *presumption:* (1) If evidence to disprove the presumed fact will not be heard, we have a rule of substantive law, sometimes loosely called "a conclusive presumption"; (2) If the basic fact authorizes, but does not compel, the jury to find the assumed facts, we have a permissible inference or *prima facie* evidence; (3) If the basic fact compels the jury to find the assumed fact unless and until sufficient evidence of its nonexistence has been introduced, we have a true presumption, and, in the absence of sufficient proof to overcome it, the jury must find according to the presumption. See the cases cited in the footnotes to § 215, *Ibid.*

Obviously, in G.S. 20-139.1, the General Assembly did not intend to create a so-called conclusive presumption, since it specifically provided that "any other competent evidence, including other types of chemical analyses," bearing upon the issue of defendant's intoxication may be introduced. Nor do we think that the legislature intended to shift the burden of proof to a defendant whose Breathalyzer test shows a blood alcohol level of 0.10 per cent or more to prove that he was not under the influence of intoxicating liquor at the time charged. When the legislature has intended to shift the burden of proof to a defendant, it has said so specifically. For instance, G.S. 14-239, after making it a crime for any sheriff, deputy sheriff, coroner, constable, or jailer negligently or wilfully to permit a convict or a prisoner charged with crime to escape from his custody, provides: "It shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he used all legal means to prevent the same, and acted with proper care and diligence. . . ." G.S. 90-109 provides that in any prosecution under the Narcotic Drug Act it shall not be necessary for the State to negate any exception, excuse, proviso, or exemption contained in

Article 5 and that "the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant." G.S. 90-113.4 contains an identical provision with reference to prosecution under Article 5A, which deals with barbiturate and stimulant drugs. G.S. 106-266.21 makes it unlawful for any distributor, producer, or retailer to sell milk below cost for the purpose of injury or destroying competition, declares the sale of milk below cost to be *prima facie* evidence of a violation of the statute, and puts "the burden of rebutting the *prima facie* case" on the person charged. See *Milk Comm. v. Stores,* 270 N.C. 323, 154 S.E. 2d 548.

We hold that in G.S. 20-139.1, the General Assembly used the word *presumption* in the sense of a permissive inference, or *prima facie* evidence. A Breathalyzer test (otherwise relevant and competent) which shows 0.10 per cent or more by weight of alcohol in a defendant's blood will carry the State's case to the jury for its determination of whether defendant was under the influence of intoxicating liquor at the time charged. Despite the results of the test, the jury is still at liberty to acquit defendant if they find that his guilt is not proven beyond a reasonable doubt, and the court should have explained this to the jury. On the force and effect of the "presumption" created by G.S. 20-139.1, the judge should have charged the jury in accordance with the opinion in *State v. Bryant,* 245 N.C. 645, 97 S.E. 2d 264, wherein Rodman, J., collected and analyzed the cases dealing with *"prima facie* or presumptive evidence" created by statute.

A New Jersey statute (N. J. Stat. Ann. 39:4-50.1) authorizes the clinical analysis of body substances to determine the amount of alcohol in a motor-vehicle operator's blood. It also, in language identical with that of G.S. 20-139.1, creates "presumptions" with reference to varying percentages of alcohol in the blood. The Supreme Court of New Jersey in *State v. Johnson,* 42 N.J. 146, 199 A. 2d 809, held that the words *it shall be presumed* were equivalent to *prima facie* proof. The Supreme Court of Kansas, construing a similar statute, reached the same conclusion in *State v. Bailey,* 184 Kan. 704, 339 P. 2d 45.

Defendant concedes that he was under the influence of intoxicants at the time he took the Breathalyzer test. His defense is that he consumed the liquors which produced his intoxication after the collision. The State's evidence tended to show that defendant drank nothing after the accident. The Attorney General, in his brief, argues that defendant's testimony that, while he was awaiting the arrival of the police immediately after the collision, he accepted from two strangers two drinks of vodka and an onion, which he used as a

chaser, "taxes credibility to its limit." Be that as it may, it was defendant's evidence, and he was entitled to have the judge apply the law to it.

Obviously, the Breathalyzer can measure only the amount of alcohol which is in a person's blood *at the time* the test is given. Therefore, the presumption or inference which G.S. 20-139.1 raises when the test shows 0.10 per cent or more of blood alcohol relates only to *the time of the test.* Since it is the degree of intoxication at the time of the occurrence in question which is relevant, it is undoubtedly true that the sooner after the event the test is made, the more accurate will be the estimate of blood-alcohol concentration at the time of the act in issue. *State v. Fornier,* 103 N.H. 152, 167 A. 2d 56; Donigan, Chemical Tests and the Law, 45 (2d Ed., 1966). For the test to cast any light on a defendant's condition at the time of the alleged crime, the test must have been timely made. *State v. Webb,* 265 N.C. 546, 144 S.E. 2d 619.

"It is a matter of common knowledge that a person does not become drunk or materially under the influence of intoxicating liquor immediately after drinking an immoderate quantity of it. Slightly under the influence of intoxicating liquor precedes the grosser forms of intoxication." *State v. Hairr,* 244 N.C. 506, 510, 94 S.E. 2d 472, 475. The rate at which alcohol is absorbed into the bloodstream depends upon the contents of the stomach at the time the intoxicant is imbibed. According to Donigan, *supra* at 44, 282-83, if the stomach is empty, total absorption occurs 40-70 minutes after the final drink. If much food is in the stomach, it may take two, or even three, hours. The rate at which alcohol is eliminated from the system has also been scientifically determined, and — by the process of extrapolation — from the estimated blood alcohol at a certain time an expert can calculate the estimated blood alcohol at an earlier time. Donigan, *supra* at 45, 46; *Wimsatt v. State,* 236 Ind. 286, 139 N.E. 2d 903; *State v. Baron,* 98 N.H. 298, 99 A. 2d 912; *Toms v. State,* 95 Okla. Crim. 60, 239 P. 2d 812. In this case, Mr. McGuire did not attempt by the process of extrapolation to say when defendant had last consumed alcohol, but he did say that every individual will have some alcohol in his blood within 30-90 minutes after taking it into his stomach.

Assuming the truth of the State's evidence, the result of the Breathalyzer test was highly incriminating. Where defendant had consumed no alcohol during the interval between the accident and the test, a breath test for alcohol made three hours after the collision was held to have probative value in *Stacy & Rusher v. State,* 228 Ark. 260, 306 S.W. 2d 852. In *Davis v. State,* 165 Tex. Crim. 622,

310 S.W. 2d 73, it was held that a test given more than an hour after the accident was relevant.

Assuming the truth of defendant's evidence, the "one-inch" drink which the "Federal man" gave him at the filling station did not affect him appreciably; the drinks which did were those the two strangers gave him within the 10-15-minute interval between the collision and the officer's arrival. It was, therefore, incumbent upon the court to charge the jury that the Breathalyzer test has probative value only insofar as it sheds light on defendant's condition at the time of the alleged crime, and that, if they found that defendant drank the intoxicants *after* the collision, the Breathalyzer test would create no presumption that he was under the influence of intoxicants at the time of the collision, and the test would be totally irrelevant to the inquiry. Instead, the court merely told the jury that the State contended that it "ought to believe the test given to him."

The court's charge did not meet the mandatory requirements of G.S. 1-180. Assignment of Error No. 6 is sustained.

New trial.

STATE OF NORTH CAROLINA v. WILLIAM P. JENT, JR.

(Filed 20 June, 1967.)

1. Automobiles § 72—

The State's evidence held amply sufficient to be submitted to the jury upon the charge that defendant operated a motor vehicle on a public highway while under the influence of intoxicating liquor, even without testimony of the results of a Breathalyzer test given defendant.

2. Same; Automobiles § 74; Criminal Law §§ 32, 55—

The provisions of G.S. 20-139.1 that a competent Breathalyzer test showing a concentration of .1 per cent or more by weight of alcohol in a person's bloodstream should create a presumption that a person was under the influence of intoxicating liquor, merely authorize, but do not compel, a jury to find that the person in question was intoxicated, and it is error for the court to charge the jury that the presumption created by the statute places the burden upon defendant to rebut the presumption. G.S. 1-180.

APPEAL by defendant from *McConnell, J.*, 8 August 1966 Session of FORSYTH, docketed in the Supreme Court as Case No. 416 and argued at the Fall Term 1966.

Defendant was first convicted in the Municipal Court of the City

of Winston-Salem upon a warrant charging that, on 24 April 1966, he operated a motor vehicle on a public highway (Corporation Parkway) while under the influence of intoxicating liquor. From the sentence imposed, he appealed to the Superior Court, where he was tried *de novo.*

Evidence for the State tended to show: About 6:45 a.m., on 24 April 1966, defendant was operating his automobile northwardly on Peters Creek Parkway, approaching its intersection with Corporation Parkway. At the same time, D. O. Swaim was approaching this intersection, driving his vehicle eastwardly on Corporation. The two cars collided in the intersection at a time when the traffic control signal was green for Corporation and red for Peters Creek. Police Officer Martin, who was in the vicinity and heard tires squealing, saw the collision. Defendant was still sitting in his car when Martin went over to investigate. He detected the odor of alcohol and asked defendant if he had been drinking. Defendant said he had and that he probably had been drinking "too much." In answer to Martin's request for an explanation of "too much," defendant said, "Well, I was drinking last night. I just had too much." Later at the police station, defendant said he had been drinking Old Crow, 100 proof, off and on during the night, but he did not know how much he had had.

At the scene of the accident, Swaim got within 2-3 feet of defendant. He did not detect any odor of alcohol on defendant's breath but did observe that defendant was slow in finding his license. After he passed over it two or three times, the officer finally pointed it out to him. On the way to the police car, defendant swayed and staggered. In Officer Martin's opinion, defendant's mental and physical faculties were appreciably impaired. At the station, he was given the walking and turning test, during which he swayed and was hesitant both in walking and in turning. At 7:20 a.m., W. D. Parks, a sergeant with the Winston-Salem police, after running a check test and ascertaining that the machine was operating properly, gave defendant a Breathalyzer test (which defendant volunteered to take). Parks is licensed by the State Board of Health to operate the Breathalyzer, and his training and experience were more than sufficient to qualify him as an expert in its use. The test which he administered showed that defendant had a blood-alcohol concentration of 0.20 per cent.

Defendant's evidence tended to show: He had spent the night preceding his arrest with a friend and his family at a cabin on High Rock Lake. During the evening, he had three or four mixed drinks in an 8-ounce tea glass. The mixture was Old Crow, 100 proof, Seven-Up, and ice. While drinking, defendant had some nicknacks — pea-

nuts and chips; otherwise, he had had nothing to eat since 12:00 noon. He had his last drink about 2:30 a.m. He went to bed between 2:30 and 3:00 a.m., and he left the cabin about 6:00 a.m. to drive the 33 miles to Winston-Salem. Defendant had had nothing to drink or eat between 2:30 a.m. and the time of the accident. As he approached the intersection of Corporation and Peters Creek parkways, the light changed on him. He applied his brakes and slid on the wet pavement. Mr. Swaim could not see him in time to stop, because defendant was in the middle lane, and other cars were waiting to turn left. Defendant volunteered for the Breathalyzer test because it had been at least four hours since he had had a drink, and he did not feel that the test "would turn out bad." He was shocked at the report and refused to sign it. Defendant's host and another overnight guest at the cabin testified that, in their opinion, defendant was not under the influence of alcohol when he left the cabin that morning at 6:00.

The jury's verdict was guilty as charged, and from the sentence imposed, defendant appealed.

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

Yeager, Matthews & Clayton for defendant.

SHARP, J. Defendant's assignments of error which comply with the rules of this Court raise only the question of nonsuit and the correctness of certain portions of the judge's charge. *In re Will of Adams,* 268 N.C. 565, 151 S.E. 2d 59.

The State's evidence — with and without the result of the Breathalyzer test — was more than sufficient to take to the jury the issue of defendant's guilt of the crime charged. The motions for nonsuit were properly overruled.

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

> "As I have heretofore stated in other cases this week, 20-139.1 provides that where a person is charged with operating a motor vehicle under the influence and the test is given, that it raises the following presumption: 'If there was at that time .10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor.'
>
> "Now, that is a presumption. It is a rebuttable presumption; that is, it may be rebutted by other evidence; it is not conclusive and, therefore, the defendant contends that if there was

such presumption that he has overcome it by other evidence. But the presumption created by the statute by the test is to be considered by you along with all the other evidence in passing upon the defendant's guilt or innocence."

The foregoing constitutes the court's entire explanation of the application of G.S. 20-139.1 to the evidence. It fails to meet the requirements of G.S. 1-180 and, in effect, places the burden upon defendant to rebut the statutory presumption arising from the results of his Breathalyzer test. This was error. In *State v. Cooke, ante,* 644, 155 S.E. 2d 165, decided simultaneously with this case, we have held that in G.S. 20-139.1, the General Assembly used the word *presumption* in the sense of a permissive inference or *prima facie* evidence, and that the trial judge should so instruct the jury. This appeal is controlled by *State v. Cooke, supra.* For the error in the charge there must be a

New trial.

STATE v. JAMES CLIFFORD ROBERTS.

(Filed 20 June, 1967.)

1. Assault and Battery § 4—

Criminal assault is governed by the common law rules in this State, and G.S. 14-33 merely provides different punishments for various types of assault.

2. Same—

A criminal assault may be accomplished either by an overt act or by a show of violence which causes the person assailed reasonably to apprehend immediate bodily harm or injury so that he engages in a course of conduct which he would not otherwise have followed.

3. Assault and Battery §§ 7, 14—

Testimony of a witness that she saw defendant, a male over 18 years of age, talking to a four year old child and her companion, that she then saw the female child in defendant's arms, that defendant put the child down after the witness had hollered at him twice to do so, without any evidence that defendant made any movement to leave with the child, do any thing indicative of force or violence, or that the child was threatened, or that defendant molested or improperly held the child, *held* insufficient to be submitted to the jury on a charge of assault upon a female by a man or boy over 18 years of age.

4. Assault and Battery § 4—

A criminal intent not expressed by an overt act or an intentional attempt to do violence or injury to the person of another cannot constitute

an assault, since a person may not be convicted of a criminal offense solely for what may have been in his mind.

5. Criminal Law § 101—

Notwithstanding that the evidence must be considered in the light most favorable to the State on motion to nonsuit, there must be legal evidence of defendant's guilt of each essential element of the offense charged, amounting to more than a suspicion or conjecture, in order to overrule nonsuit.

APPEAL by defendant from *Copeland, S.J.*, September 1966 Criminal Session of DURHAM.

Defendant was charged in a bill of indictment with assault upon one Debbie Pickett, a female, with intent to commit rape. He entered a plea of not guilty.

The State presented evidence substantially as follows:

Mrs. Mary Stanford testified that she lived on Higby Street in Durham, and that her yard backed up to the I-85 By-pass. Mr. and Mrs. Harry Pickett lived next door, and their yards adjoined with a wire fence running along the back of both lots. On 6 May 1966 she was taking care of a neighbor's little boy and had sent him next door to play in the Pickett's back yard with Debbie Pickett, aged four. When she went out to call the little boy around lunch time, she saw the defendant "talking to the children, down at the lower end of the Pickett yard, the end that faces toward the bank of the By-pass. Debbie and the little boy that I was keeping were talking to James Roberts. I saw James Roberts take Debbie Pickett up in his arms and was talking to her. I could not understand what he was saying, but he took her up in his arms over the fence and was talking to her. I ran out into my back yard where I could get a better view and then he talked to her, and I hollered and told him to put her back across the fence. He didn't hardly look at me. He was looking at Debbie and was talking to her. He was holding her up in his arms. After I hollered at him another time and told him to put the child back across the fence, he put her across the fence and then came to my back yard." On cross-examination Mrs. Stanford testified that she did not see the defendant actually pick Debbie up. "I did not notice the manner in which he picked the child up: when I looked, he had Debbie up in his arms, and that was when I ran into my back yard where I could get a better view. I did not see the actual picking up; when I looked back he had her in his arms. I didn's see him reach across the fence. He just kept holding her in his arms. He didn't make any movement away from me, or any movement that I could see. He was talking to her."

Mrs. Stanford further testified that she asked defendant his name,

and he told her. She then asked him what he was doing, and he told her it was none of her business and to go to h . . ., and then left.

R. G. Morris, a detective for the Durham Police Department, testified that he investigated the matter before the court, and that he arrested defendant on 10 May 1966. Upon defendant's objection to testimony by the officer as to statements made by defendant after his arrest, the jury was excused and the trial court conducted a *voir dire* to determine the competency of the evidence. Upon findings of fact made, the trial court concluded that the testimony was competent, and the jury returned. Officer Morris then testified that defendant related to him his activities of that day, which led him to be along the side of the By-pass near the Pickett's yard. "He stated that as he started down the bank of Ellerbee Creek, that he heard this child's voice; that when he heard this child's voice, the sound of the child's voice made this terrific urge come on him. . . . He did not say anything to me that he had done to the child other than hold her in his arms. When I asked him what he was doing picking this little child up or what he intended to do, he told me he didn't know. . . . I asked him why he went over there and picked up this little girl. He stated that the voice of the child gave him this uncontrollable urge. (At this point defendant objected to the testimony and the objection was overruled.) He never did go into explaining this as to what the urge was. He stated that with her, with Debbie, he had this sex problem, but that he thought he was controlling it." (At this point defendant's objection and motion to strike were allowed. Defendant excepted to the failure of the court to instruct the jury not to consider the stricken portion of his testimony.) Officer Morris further testified that defendant had told him he was eighteen years old and his birth date was 13 January 1948.

At the close of the State's evidence defendant moved for judgment of nonsuit. The motion was allowed as to the charge of assault with intent to commit rape and denied as to the lesser included offense of assault on a female, he being a male over the age of eighteen years. Defendant offered no evidence and renewed his motion for judgment of nonsuit. The motion was denied. The jury returned a verdict of guilty of assault on a female, he being a male over the age of eighteen years. Judgment was entered on the verdict. Defendant appealed.

Attorney General Bruton, Deputy Attorney General Lewis, Assistant Attorney General Rosser, and Trial Attorney Webb for the State.

Alwood B. Warren for defendant.

BRANCH, J. Defendant contends the court erred in refusing to grant his motion for nonsuit as to assault on a female.

There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules. G.S. 14-33 does not create a new offense as to assaults on a female, but only provides for different punishments for various types of assault. *State v. Lefler,* 202 N.C. 700, 163 S.E. 873; *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1; G.S. 4-1.

This Court generally defines the common law offense of assault as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." 1 Strong's N. C. Index, Assault and Battery, § 4, p. 182; *State v. Davis,* 23 N.C. 125; *State v. Daniel,* 136 N.C. 571, 48 S.E. 544; *State v. Gay,* 224 N.C. 141, 29 S.E. 2d 458; *State v. McIver,* 231 N.C. 313, 56 S.E. 2d 604.

This common law rule places emphasis on the intent or state of mind of the person accused. The decisions of the Court have, in effect, brought forth another rule known as the "show of violence rule," which places the emphasis on the reasonable apprehension of the person assailed. The "show of violence rule" consists of a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. This rule has been extended to many cases of assault on a female. Thus, there are two rules under which a person may be prosecuted for assault in North Carolina. See 36 N. C. L. Rev., Show of Violence Rule in North Carolina, p. 198.

Although assault has been defined by this Court many times, the extreme difficulty of applying the facts to the law was recognized in the case of *State v. Hampton,* 63 N.C. 13, when the Court stated: "It would seem that there ought to be no difficulty in determining whether any given state of facts amounts to an assault. But the behavior of men towards each other varies by such mere shades, that it is sometimes very difficult to characterize properly their acts and declarations." Eighty-eight years later, the Court, speaking through Parker, J. (now C.J.) in the case of *State v. Allen,* 245 N.C. 185, 95 S.E. 2d 526, said: "The rules of law in respect to assaults are plain, but their application to the facts is sometimes fraught with difficulty. Each case must depend upon its own peculiar circumstances."

In answering the question presented, we must, of necessity, review the pertinent cases on assault.

In the case of *State v. Hampton, supra,* prosecutor was going down steps from a courtroom and defendant, being within striking distance, clenched his right hand and said: "I have a good mind to hit you," thereby causing prosecutor to take another stairway and direction. The Court held this to be an assault.

State v. Shipman, 81 N.C. 513, holds that where a defendant, using threatening language against prosecutor, advanced on him with knife in hand and prosecutor withdrew with the statement, "I shall have to go away," the defendant was properly convicted of an assault. See also *State v. McAfee,* 107 N.C. 812, 12 S.E. 435; *State v. Newton,* 251 N.C. 151, 110 S.E. 2d 810.

The case of *State v. Williams,* 186 N.C. 627, 120 S.E. 224, presents evidence that a 23-year old man on several occasions made indecent proposals to a 15-year old girl on public streets, causing her to flee in a direction other than her destination, and causing fear and anxiety on her part. The Court held this to be an assault.

The Court in the Per Curiam opinion of *State v. Silver,* 227 N.C. 352, 42 S.E. 2d 208, held that in a prosecution for assault on a female, where the evidence tended to show that defendant had asked prosecutrix an improper question, unaccompanied by any show of violence, threat, or any display of force, defendant's motion for nonsuit should have been granted.

In the case of *State v. Johnson,* 264 N.C. 598, 142 S.E. 2d 151, defendant's wife, after separation, came home to get some personal belongings. There was an argument and defendant came toward his wife with open knife in his hand. She told defendant to let her out and he immediately unlocked the door and complied. She threw lye on him and left. Holding the evidence insufficient to be submitted to the jury, the Court stated:

> " 'In order to constitute a criminal assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a man of reasonable firmness in fear of immediate bodily harm.' 1 Strong: N. C. Index, Assault and Battery, § 4, p. 182 (Supp., p. 60)."

In *State v. Ingram,* 237 N.C. 197, 74 S.E. 2d 532, the evidence tended to show that defendant drove his automobile along a public highway and "leered" at prosecutrix who was walking some distance away on a dirt road. She heard defendant's car stop as she was pass-

ing through a wooded area, and she ran about 215 feet until she was out of the woods. She then saw defendant walking fast about 70 feet away. Defendant stopped, and she continued to her destination. The Court held the evidence was insufficient to be submitted to the jury on the question of assault on a female, stating:

> "So that it seems well settled that in order to constitute the criminal offense of assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another. . . .
>
> "The display of force or menace of violence must be such as to cause the reasonable apprehension of immediate bodily harm. *Dahlin v. Fraser*, 206 Minn. 476." . . .
>
> "There was here no overt act, no threat of violence, no offer or attempt to injure."

Again considering assault on a female, in *State v. Gough*, 257 N.C. 348, 126 S.E. 2d 118, there was evidence that defendant, by false representations, induced two young girls to go with him in his automobile. He stopped the automobile in a wooded area in the nighttime, telling them if they would be nice to him and cooperate with him, they would not get hurt, and he would pay them nice. Whereupon, the girls jumped from the automobile and ran to a farm house where they asked for and received help. Holding there was sufficient evidence of kidnapping, but that there was not sufficient evidence to submit the question of the lesser offense of assault on a female to the jury, the Court said:

> "There is no evidence here of threatening words or violence menaced, nor is there any overt act or an attempt, with force and violence, to do physical injury to Elaine Saunders. This Court said in *S. v. Ingram*, 237 N.C. 197, 74 S.E. 2d 532:
>
> 'So that it seems well settled that in order to constitute the criminal offense of assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another.' "

The evidence in the instant case shows that witness saw defendant talking to the two children. She then saw the child in defendant's arms. Defendant made no movement to leave, nor did he offer any overt movement indicative of force or violence. Upon being twice told by the witness to put the child down, he placed her in the yard. There was no evidence that the child was frightened or suffered

any fear or apprehension as a result of the acts of defendant, or that defendant molested or improperly held the child. It may have been that the sound of the child's voice created an abnormal sexual desire in the apparently disturbed mind of the defendant. On the other hand, he may have had the natural instinct that many moral men have to affectionately hold a child. It is, however, clear there was no threat of violence and no offer or attempt to injure. "We cannot convict him of a criminal offense solely for what may have been in his mind. Human law does not reach that far." *State v. Ingram, supra.* Evidence of a desire is not sufficient. There must be evidence of an intentional attempt to do violence or injury to the person of another. *State v. Davis,* 23 N.C. 125.

Considering the evidences most favorable to the State and giving the State the benefit of every reasonable intendment and inference to be drawn therefrom, as we must upon considering motion for nonsuit, *State v. Corl,* 250 N.C. 252, 108 S.E. 2d 608, but being mindful that to convict a person of a criminal offense there must be legal evidence of the commission of the offense charged, something more than is sufficient to raise a suspicion or conjecture, *State v. Prince,* 182 N.C. 788, 108 S.E. 330, we hold that the trial court erred in denying defendant's motion for judgment of nonsuit.

Reversed.

BERNADINE WILES, D/B/A CENTERVIEW TAXI, v. RALPH P. MULLINAX, JR., AND MULLINAX INSURANCE AGENCY, INC.

(Filed 20 June, 1967.)

1. Insurance § 8—

Where insurance agents are sued for breach of duty to use reasonable diligence to obtain insurance coverage in accordance with contractual obligations and breach of duty to notify the proposed insured of its failure to obtain such coverage, the agents are entitled to defend on the ground that in fact they did procure insurance in effect at the time of the loss, and, upon evidence which would support such finding, to argue such contention to the jury and to read to the jury, in the course of the argument, the pertinent statute and a decision of the Supreme Court on the question. G.S. 84-14.

2. Judgments § 29—

Adjudication by the Industrial Commission that the employer was uninsured at the time of the employee's injury is not conclusive upon insurance agents who were not parties to the suit, even though one of them was a witness, and does not preclude such agents from asserting in a sub-

sequent suit against them by the employer that they had in fact obtained valid insurance in effect at the time of the accident.

3. Insurance § 8—

In a suit against insurance agents for their failure to provide insurance coverage and their failure to advise the proposed insured of such failure, a binder stipulating dates of coverage which do not include the date of the injury causing the loss is no defense, the question whether the dates as stipulated in the binder might be reformed for mistake not being presented.

4. Insurance § 3—

The insured may accept the benefits of a binder even though he had no knowledge that the insurance broker had issued the binder for his protection, and delivery of the binder to him is not essential.

5. Same—

The extension of credit to the insured for the premium does not destroy the effectiveness of a binder.

6. Same—

In order to be valid, a binder need not be a complete contract, since it is merely a memorandum of the most important terms of a preliminary contract of insurance, and where the contemplated policy is required by statute, the binder is deemed to incorporate all of the terms of the statutory policy, and no specific form or provision is necessary to constitute a valid memorandum.

7. Same; Insurance § 8; Master and Servant § 80— Valid binder for compensation insurance cannot be cancelled until after statutory notice.

In this action against insurance agents for breach of duty to exercise due diligence to provide compensation insurance coverage and for failure to notify the proposed insured of their failure to procure such insurance, testimony of a defendant agent that he had authority from insurer to issue a binder, and that some 26 days prior to the loss he forwarded to insurer a document constituting a binder covering a period of one year beginning some 11 days prior to the loss in question, is sufficient to support a finding that there was a valid binder in force on the date of the loss, notwithstanding advice by insurer to the agency nine days before the loss in question that the insurer would not accept the risk, since a valid binder for workmen's compensation insurance cannot be terminated except by giving to insured 30 days notice. G.S. 97-99.

APPEAL by defendants from *Riddle, S.J.*, at the November 1966 Session of CABARRUS.

This is an action for damages by reason of the alleged negligent failure of the defendants to procure for the plaintiff workmen's compensation insurance coverage and their negligent failure to notify her that they had not done so. The plaintiff alleges that, by reason of these negligent omissions, she was without such insurance coverage on 29 November 1958, that one of her employees then sustained

an injury by accident arising out of and in the course of his employment and resulting in his death, and that she was compelled, by the award of the North Carolina Industrial Commission, to pay compensation to the dependents and to employ counsel to defend her against their claim.

The defendants, in their answer, admit that as agents of the Pennsylvania Threshermen and Farmers' Mutual Casualty Insurance Company, hereinafter referred to as PT&F, they negotiated the issuance by it to the plaintiff of a standard workmen's compensation insurance policy for the period beginning 8 November 1955 and ending 8 November 1956, which policy was renewed in 1956 and again in 1957, the latter renewal policy expiring 8 November 1958, and that no renewal thereof was issued. They allege that they bound both Royal Indemnity Company and Dixie Fire and Casualty Company, hereinafter referred to as Royal and Dixie, respectively, to insure the plaintiff and, consequently, that she was so insured at the time of the accident.

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

"1. Did the defendants undertake to procure workmen's compensation insurance coverage for the plaintiff, as alleged in the complaint?

"ANSWER: Yes.

"2. Did the defendants negligently fail to procure such workmen's compensation insurance coverage, as alleged in the complaint?

"ANSWER: Yes.

"3. Did the defendants fail to timely notify the plaintiff of their failure to procure workmen's compensation insurance coverage, as alleged in the complaint?

"ANSWER: Yes.

"4. What amount of damages, if any, is the plaintiff entitled to recover of the defendants?

"ANSWER: $9,300."

From a judgment in accordance with the verdict, the defendants appeal. Their assignments of error, brought forward in their brief, are: (1) The court erred in excluding certain testimony offered by the defendants; (2) the court erred in refusing to allow the defendants' attorney to read to the jury certain passages from the statutes, and decisions relating to the effect of insurance binders and to argue that the plaintiff had been afforded coverage by such binders; and (3) the court erred in failing to charge with reference to the effect

of such a binder and concerning the defendants' evidence relating thereto.

The plaintiff's evidence was to the effect that: In 1958 and for several years prior thereto, she owned and operated a taxicab business in Kannapolis. All of her insurance coverage was placed through the defendants. When the individual defendant, stipulated to have been acting within the scope of his agency for the corporate defendant, solicited her workmen's compensation insurance business, he told her that he would take care of the matter of renewing the coverage as he had been doing with reference to other types of insurance. This he did year by year. The policy for the period ending 8 November 1958 was issued by PT&F. The plaintiff received from the defendant an invoice for the premium on that policy, which stated: "We have renewed the above policy because as you know you have an established account. This entitled you to automatic renewal." The plaintiff was never notified that PT&F would not renew the coverage. She did not know that she was without workmen's compensation insurance coverage until the defendants so informed her after the injury and death of her employee on 29 November 1958. The widow of the employee filed a claim with the North Carolina Industrial Commission which conducted a hearing, to which the plaintiff, Royal and Dixie were parties. The individual defendant appeared as a witness at that hearing but neither of the defendants was made a party. The Commission found as a fact and concluded that the plaintiff was uninsured, dismissed Royal and Dixie from the proceeding, and rendered an award in favor of the claimant against the plaintiff. The plaintiff paid the award and also paid her own attorney's fee.

The individual defendant testified: The defendants' agency contract with PT&F was terminated in July 1958. The plaintiff was not notified of this and was not notified of any effort made by the defendants to place her workmen's compensation insurance with any other company. The termination of the agency did not affect the policy previously issued by PT&F to the plaintiff, which expired 8 November 1958. In October 1958, the defendants forwarded to Royal a document which they contend was a binder. This document stated, among other things: "Item 2. Policy Period: From November 8, 1957 to November 8, 1958." The defendants received a reply from Royal dated 3 November 1958, stating that Royal was unwilling to provide the requested coverage. Thereupon, the defendants forwarded to Dixie a document which the defendants contend was a binder for this risk. That document, among other things, stated: "Item 2. The period during which the Policy shall remain in force, unless canceled

as in the Policy provided (herein called the Policy Period) shall be from 11/14/58 to 11/14/59." On 20 November 1958, nine days before the death of the plaintiff's employee, the defendants received from Dixie's general agent a letter stating, "We are sorry to advise that coverage will not be acceptable to the company." At no time, prior to the death of the employee, was the plaintiff informed of any of these documents or rejections or that the PT&F policy had expired without renewal.

The individual defendant testified further:

> "In the course of our business we actually write insurance policies, but we do not write Workmen's Compensation policies. In order to obtain Workmen's Compensation policies we bind the risk, advise the company of the binder and send the company the information for them to prepare the policy. The company sends us the policy. * * * As an agent I had authority to bind."

Hartsell, Hartsell & Mills and K. Michael Koontz for defendant appellants.

Williams, Willeford & Boger for plaintiff appellee.

LAKE, J. This case was before us upon a former appeal from a judgment of nonsuit which we reversed in 267 N.C. 392, 148 S.E. 2d 229. Upon the authority of *Elam v. Realty Co.*, 182 N.C. 599, 109 S.E. 632, and other cases cited, we then held that, where an insurance agent or broker undertakes to procure a policy of insurance for another, it is his duty to use reasonable diligence to obtain it and, within the amount of the proposed policy, he may be held liable for a loss sustained by the proposed insured due to his negligent failure to do so. We further stated that if, in spite of reasonable diligence, such agent or broker is unable to procure the desired insurance coverage, it is his duty to so notify the proposed insured in order that the latter may take the necessary steps to protect himself otherwise. Since the record then before us was sufficient to permit a jury to find a breach of such duties by the defendants, resulting in loss to the plaintiff, we reversed the judgment of nonsuit, stating, "Defendants' asserted defenses are not pertinent to this decision, which relates only to the question of the sufficiency of the evidence to survive the motion for nonsuit."

The case having been retried and the jury having returned a verdict in favor of the plaintiff, the sufficiency of the asserted defense is now brought before us by the defendants' contention that they

were not permitted by the trial judge to argue to the jury that they did, in fact, obtain for the plaintiff the desired insurance coverage.

At the close of all the evidence, in the absence of the jury, it was brought to the attention of the trial judge that the defendants' attorney intended to read to the jury, in the course of his argument, G.S. 97-99(a), which concerns cancellation of a policy of workmen's compensation insurance, together with passages from the decision of this Court in *Moore v. Electric Co.*, 264 N.C. 667, 142 S.E. 2d 659, in which this statute was held to apply to the cancellation of a binder for such insurance. The court ruled that the reading of these authorities to the jury would not be allowed. Thereupon, the defendants' attorney inquired of the court "as to whether the defendants' contentions that they had in fact obtained the insurance coverage by binders and that the evidence shows that the defendants had in fact procured the insurance by binders and that the plaintiff was insured at all times might be argued to the jury." The court ruled that such argument would be improper and not permitted. The defendants now assign these rulings as error.

The second issue submitted to the jury was, "Did the defendants negligently fail to procure such workmen's compensation insurance coverage, as alleged in the complaint?" Obviously, upon such issue, it was proper for the defendants to argue to the jury that they did procure the insurance and that it was in effect at the time of the injury to the plaintiff's employee, if there was any evidence from which the jury might so find. If the evidence would support such a finding, the defendants were entitled not only to argue their contention to the jury, but also to read to the jury, in the course of that argument, the pertinent statute and the decision of this Court upon the question. G.S. 84-14; *Wilcox v. Motors*, 269 N.C. 473, 153 S.E. 2d 76; *Brown v. Vestal*, 231 N.C. 56, 55 S.E. 2d 797; *Howard v. Telegraph Co.*, 170 N.C. 495, 87 S.E. 313.

The present record discloses that in the hearing by the Industrial Commission of the claim for compensation, filed by the widow of the deceased employee, the Commission found as a fact, and concluded as a matter of law, that at the time of the injury the present plaintiff had no workmen's compensation insurance coverage with either Royal or Dixie but was a non-insured. The Commission accordingly dismissed from the proceeding before it Royal and Dixie and awarded compensation to be paid by the present plaintiff. There was no appeal from the award of the Full Commission.

We need not determine whether, by reason of such award by the Industrial Commission, the question of the plaintiff's right against Royal or Dixie, or both of them, on the ground of the now alleged

binder or binders is *res judicata,* as between the plaintiff and those companies. For the present, it is sufficient to note that the defendants were not parties to that proceeding. That being true, the question of the effectiveness of either or both of the alleged binders on the date of the injury to the employee is not *res judicata* as to the present defendants, even though the individual defendant testified as a witness in the hearing before the Commission. *Bank v. Casualty Co.,* 268 N.C. 234, 150 S.E. 2d 396. To the general rule, that a judgment of a court is conclusive only as against the parties to the action and those in privity with them, there is an exception in favor of an employer whose alleged liability is, upon the principle of *respondeat superior,* derived through the alleged fault of an employee adjudged in a former action not to be at fault. See *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688, and cases there cited. This exception to the general rule has no application to the facts of this case.

We turn, therefore, to the question of whether there is, upon the present record, sufficient evidence to support a finding that, at the time of the injury to the plaintiff's employee, the plaintiff actually had workmen's compensation insurance in force. The individual defendant testified that he had authority to bind both Royal and Dixie and that he issued a binder for each. The credibility of this testimony was for the jury. The construction of the documents and their legal effect was for the court.

As to Royal, it is sufficient to note that the document which the defendants contend was a binder expressly provided for coverage from 8 November 1957 to 8 November 1958. Thus, by its terms, it would not constitute a binder in force at the time of the injury to the plaintiff's employee. Whether, upon a proper showing, it could be reformed for mistake is not a question now before us.

The document which the defendant contends bound Dixie upon this risk may not be disposed of in that manner. The individual defendant testified that he issued it as a binder and had authority from Dixie to do so. The record makes it clear that the plaintiff knew nothing whatever of the existence of this document until after her employee was injured, and after Dixie notified the defendants it rejected the risk, but this Court held in the first appeal in *Moore v. Electric Co.,* 259 N.C. 735, 131 S.E. 2d 356, that knowledge by the contemplated insured of the issuance of a binder is not a prerequisite to the validity of the binder. It having been issued for his benefit, he may elect to accept the benefits it confers. It follows that a delivery of the binder to him is not essential. The extension of credit to the insured for the premium does not destroy the effec-

tiveness of the binder. See *Lea v. Insurance Co.*, 168 N.C. 478, 84 S.E. 813; Couch on Insurance, 2d ed., § 14:29. It is not necessary in order to constitute a valid binder that the document be written in the form of a complete contract or that it set forth all of the terms. A binder is "merely a written memorandum of the most important terms of a preliminary contract of insurance." *Distributing Corp. v. Indemnity Co.*, 224 N.C. 370, 30 S.E. 2d 377. Where, as in the present instance, the policy contemplated is required by statute to be issued in a prescribed form, the binder is deemed to incorporate all of the terms of the statutory policy. *Moore v. Electric Co.*, first appeal, *supra*. No specific form or provision is necessary to constitute a memorandum, intended as a binder, a valid contract of insurance. As this Court said upon the second appeal in *Moore v. Electric Co.*, 264 N.C. 667, 142 S.E. 2d 659:

> "In insurance parlance, a 'binder' is insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until insurer gives notice of its election to terminate. The binder may be oral or written."

The document which the defendants contend bound Dixie upon this risk is, in form and content, sufficient to constitute such memorandum of a contract for temporary coverage. Thus, the evidence introduced by the defendants was sufficient, if found by the jury to be true, to support a finding that a valid binder was issued by Dixie. In the second appeal in *Moore v. Electric Co., supra*, this Court held that a valid binder for workmen's compensation insurance cannot be terminated except by the giving to the insured of the 30 days' notice required by G.S. 97-99 for cancellation of a formal policy. It is not contended in this case that such notice was given by Dixie.

Consequently, there was evidence from which the jury could have found that, at the time the plaintiff's employee was injured, there was in effect a contract of workmen's compensation insurance procured for the plaintiff by the defendant. It follows that the defendants should have been permitted to argue this point to the jury in support of their position on the second issue and to read to the jury pertinent portions of the governing authorities. It also follows that the jury should have been instructed by the court upon the principles of law applicable to this contention of the defendants, which was not done.

We find no error in the rulings of the trial court with reference to the admission of evidence, but for the errors above noted there must be still another trial of this action.

New trial.

CARL V. LEAKE, SR., v. QUEEN CITY COACH COMPANY.

(Filed 20 June, 1967.)

1. Carriers § 18—

A carrier is under duty to exercise the highest degree of care consistent with the practical operation of the business to provide for the safety of its passengers, and is under duty to protect a passenger from an assault by a fellow passenger when the carrier has knowledge, express or implied, of the danger of the assault; however only knowledge or notice to its employees may be imputed to the carrier, and the driver of a bus, whose attention is primarily demanded in operating the vehicle, can be charged with knowledge of acts of his passengers only when such acts are so unusual as to come to his attention under the exceptional circumstances.

2. Same— Evidence held insufficient to show that bus driver had reasonable ground to anticipate assault by one passenger on another.

The evidence favorable to plaintiff tended to show that the driver of a bus requested a loud-talking, boisterous, drunk passenger to quiet down, that the passenger promised to do so and, on his way back from the front of the bus, suddenly stuck a needle or pin into a fellow passenger's left hip, resulting in the injury in suit. There was no evidence that the bus driver had knowledge that the passenger had whiskey with him, that he had already had an altercation with another passenger, or that there had been any prior unpleasantness between the boisterous passenger and plaintiff passenger. *Held:* Nonsuit was proper, since the evidence fails to show that the bus driver had any reasonable ground for anticipating the assault on plaintiff passenger.

APPEAL by defendant from *Mallard, J.*, September Civil Session, 1966, ROBESON County Superior Court.

The plaintiff seeks to recover damages of the defendant for injuries he sustained while a passenger on the defendant's bus between the cities of Greensboro and Sanford. He alleges, and offers evidence tending to show, that on Sunday, 17 November 1962 he purchased a ticket from Reidsville to Lumberton. He boarded the defendant's bus at Greensboro, and shortly afterwards an unknown passenger (X) began conducting himself in a loud and boisterous manner, swearing and cursing, that the driver called X to the front of the bus and talked with him about his objectionable conduct. That as he, the plaintiff, was lying on his side, X jabbed a sharp instrument in him which caused pain and required treatment by a doctor who removed about one and one-half inches of the end of a pin or needle from the plaintiff's left hip. He alleges that the defendant is responsible in allowing X to remain on the bus knowing that he was intoxicated and thereby subjected the plaintiff to an unsafe condition on the bus, that he did not eject the drunk passenger from the bus and did not furnish reasonable medical care after he had been injured. The plaintiff testified that X had two pints of whiskey and

was pretty well intoxicated, that he got into an argument with two marines and struck at one of them, that the driver called him to come to him, that he was cursing, and as he started back to his seat he said, "No god damn negro ain't going to look at me after I had been treated like this . . . No damn negro is going to treat me like this"; and that upon leaving the driver and returning to his seat, he jabbed the plaintiff in the left hip with a needle about an inch and one-half long, causing him to bleed. The plaintiff reported his injury to the driver and asked that he be sent to a hospital at Sanford, but received no encouragement. Upon arriving at Lumberton, the plaintiff went to Dr. Robinson that night and then again on Monday. The pin, or needle, was removed from his hip in an operation performed by Dr. Lawrence. The plaintiff went back to see Dr. Lawrence two or three times later. He testified that he was a barber earning from $100 to $150 per week, that he was unable to work following his injuries and has never been able to resume his occupation.

On cross examination, the plaintiff testified that Mr. Norton, the driver of the bus, was a fine man, that he tried but couldn't keep order on the bus, that the person who stabbed him was pretty rowdy and didn't pay any attention to the driver, that he didn't quiet down at all, he was pretty reckless, and that he believed the driver was afraid of him. The man who stabbed him got off the bus in Sanford, and he knows nothing further about him.

Joseph Edward Norton testified for the defendant that he was driving the bus, that X boarded the bus in Greensboro and was talking a little loud. He was about five feet, six inches, real small, weighed about 120 pounds. At Siler City the driver called the person up to the front of the bus and asked him not to talk so loud, and he then went back to his seat. The driver did not observe any odor about him and did not see him with any packages. At Sanford X got off the bus, and about fifteen minutes later, Leake said, "You know that fellow who was talking too loud . . . When he comes back, will you talk to him; he stuck a pin in me." He said he was not bleeding, but it felt like a pin. The driver then offered to get a cab and take the plaintiff over to the hospital, or call a doctor. The plaintiff replied, "That will hold you up . . . we will go on." They went on to Fayetteville where the driver again asked Leake if he would like to go to a hospital, or call a doctor, which Leake declined. He testified that Leake did not at any time ask for medical assistance. That he didn't see X drink any whiskey, and didn't smell any, that he called the man up and asked him to lower his voice because some of the people liked to sleep, that X replied he would be

glad to, and he did not hear him any more. That it was his practice to immediately eject passengers when they were behaving in any manner dangerous to other passengers, and that all this passenger was doing was talking loud, and he saw no reason to have him ejected.

The following issues were submitted and answered by the jury:

"1. Was the plaintiff, Carl V. Leake, Sr., injured by the negligence of the defendant, Queen City Coach Company, as alleged in the complaint?

"ANSWER: Yes

"2. What amount, if any, is the plaintiff entitled to recover of the defendant for his personal injuries?

"ANSWER: $1,515.00"

Judgment for the plaintiff was signed upon the verdict, and the defendant excepted and appealed.

Johnson, McIntyre, Hedgpeth, Biggs and Campbell by Ingram P. Hedgpeth, Attorneys for defendant appellant.

William J. Townsend, Attorney for plaintiff appellee.

PLESS, J. The plaintiff relies upon the case of *Smith v. Cab Co.*, 227 N.C. 572, 42 S.E. 2d 657, to establish the alleged liability of the defendant in this case; but the facts in that case are noticeably different from those in the present litigation. In that case, the evidence was to the effect that the plaintiff entered the defendant's cab about 2:00 o'clock in the morning, that she was pulled out of it by a woman with whom she had had trouble earlier in the evening, that the plaintiff succeeded in getting back into the cab, and the driver was urged to drive off. This he failed to do, saying "I am going to see this well done." He did, however, let the cab roll down to a dark spot about a half a block away, with plaintiff's assailant and some of her friends still holding on to the cab and trying to fight her. Here the driver stopped the cab, got out, opened the back door, and departed, taking the switch keys. The girls were fighting her, but she could not start the cab as the driver had taken the keys. She was rescued and taken to a hospital where several stitches were taken to close a gash in her head. During the melee, plaintiff's money and goods were thrown out of the cab, scattered, and lost. In the opinion, it is said:

"Conceding that the driver of defendant's cab was under no obligation to protect plaintiff while she was on the sidewalk, or to defend her or champion her cause outside of his cab, still

it would seem that the plaintiff's testimony, that after she had gotten in the cab and the cab had proceeded half a block the driver stopped the cab, with plaintiff's assailants surrounding, and left the scene, would afford some evidence of failure to exercise due care for the protection of one whom he had accepted as a passenger in his cab, and tend to sustain an action for damages for injuries received and property lost proximately resulting therefrom."

The Court there summarized the applicable law which we herewith quote, omitting citations:

"The duty owed by common carriers to passengers being transported by them has been frequently stated by this Court to be to provide for the safe conveyance of their passengers 'as far as human care and foresight' can go, consistent with practical operation of the business. And in the performance of its duty it is obligatory upon the carrier to protect a passenger from assault, not only by the carrier's employees, but also by intruders, when by the exercise of due care the acts of violence might have been *foreseen* and avoided. This obligation on the part of the carrier with respect to the safety of passengers continues until the journey expressly or impliedly contracted for is concluded. But before liability may be predicated for the injury to the passenger, it must have proximately resulted from the negligent failure of the carrier to perform its duty. And the carrier must have known of, or had reasonable grounds to anticipate the assault by intruders, with present ability to avoid injury to the passenger by the exercise of proper care.

"We do not conceive it to be the legal duty of the driver of a taxicab to interfere in a fight on the street or sidewalk between third parties and one who is desirous of becoming a passenger but who has not entered the vehicle, but after the person has been accepted as a passenger and has entered the conveyance, the duty is imposed upon the carrier to exercise due care and vigilance to protect the passenger in transit from violence threatened by third parties when the circumstances are such as to indicate that injury to the passenger might *reasonably* be *anticipated* and avoided by the exercise of proper care. However, the carrier is not an insurer of the safety of its passenger, and can only be held liable in damages for negligent breach of its duty, proximately resulting in injury to the passenger, or causing loss of packages accepted with the passenger for transportation." (Underscoring added.)

Tested by the above rules, we are of the opinion that the driver of the defendant's bus had no reasonable grounds to anticipate an assault by the unknown passenger upon the plaintiff. Taken in the light most favorable to the plaintiff, X was a loud talking, boisterous drunk person whom the bus driver asked to quiet down. While X had had an altercation with some people sitting near him at the back of the bus, the record does not show that they complained. There had been no kind of unpleasantness between him and the plaintiff and nothing to cause the bus driver to suspect an attack upon the plaintiff or any other passenger. The only knowledge or notice imputed to the defendant would be that of the driver. The latter did not see X drink any whiskey, smell any odor on him, or see him with any packages which might have contained liquor, or know of his striking one of the marines. When he asked him to lower his voice because some of the people liked to sleep, X replied he would be glad to, and he, the driver, did not hear him any more.

It was immediately following this peaceable attitude on the part of X that he stuck the pin or needle in the plaintiff as he was returning to his seat at the back of the bus. Since the plaintiff was lying on the seat with his hips exposed to the aisle, it is entirely likely that the action of X was impetuous in that the position of the plaintiff presented a target and a temptation which he could not resist.

On this bus, as in practically all of them, the carrier has only one employee — the driver. His primary duty is to give his full attention to the operation of the bus. If he concentrates his faculties upon this all-important duty, he is not likely to observe the conduct of the passengers except in most unusual cases. In the average bus, thirty or forty feet long, and with as many as sixty passengers, the noise of the bus and the voices of the passengers in conversation would prevent him from hearing anything at the back of the bus except extremely loud noise. And with duty of watching the road in front and other vehicles behind, through his rear view mirrors, he cannot give attention to the actions of the passengers unless so unusual as to demand it.

Here the driver, Norton, had seen no trouble from X but had learned (the record doesn't show how) that he was talking loudly. Upon being asked to lower his voice, X said he would be glad to, and returned toward his seat. There was nothing in his demeanor to cause Norton to foresee any trouble, there had been no altercation or unpleasantness between X and the plaintiff, and no reason for the driver to anticipate an attack on the plaintiff who had no connection with whatever X's previous conduct had been.

We are of the opinion that the facts in this case are governed by the rule laid down in *Mills v. R. R.*, 172 N.C. 266, 90 S.E. 221. In that case it appeared that a passenger, who was drinking, stumbled over a basket of eggs belonging to the conductor. They were in the baggage car, and the conductor told the passenger that he could not ride in the baggage car and that he then returned to his seat in the coach. Later, the plaintiff, who was also drinking, had an altercation with the other passenger, and they had a fight, resulting in injuries to the plaintiff. The Court held that these facts were not sufficient to go to the jury and ordered that the cause be nonsuited.

In *Pride v. R. R.*, 176 N.C. 594, 97 S.E. 418, the Court said:

> " 'The negligence for which the railway is held liable is not the wrong of the fellow-passenger or the stranger, but is the negligent omission of the carrier's servants to prevent the wrong from being committed. In order that such omission may constitute negligence, there is involved the essential element that the carrier or his servants had knowledge, or with the proper care could have had knowledge, that the wrong was imminent, and that he had such knowledge or the opportunity to acquire it sufficiently long in advance of the infliction of the wrong upon the passenger to have prevented it with the force at his command.' Hutchison on Carriers, § 980.
>
> "The converse of this proposition is equally true that the carrier is not responsible for injuries resulting from the unauthorized acts of strangers which could not be reasonable foreseen or anticipated by the exercise of ordinary care . . ."

We are of the opinion that the defendant's motion for judgment of nonsuit should have been allowed.

Reversed.

JOHN I. ELMORE v. EDWIN S. LANIER, COMMISSIONER OF INSURANCE.

(Filed 20 June, 1967.)

1. Administrative Law § 1—

Initial determination of civil controversies by administrative boards, with right of appeal to the courts, is an expeditious method for the adjudication of such questions, and such procedure is particularly efficient when the subject of inquiry is of a very technical nature, and administrative procedure has become necessary in many fields in the proper administration of justice.

2. Administrative Law § 3.1; Injunctions § 11—

Injunction will not lie for the purpose of interfering with valid and regular statutory procedure before an administrative board, there being ample opportunity for a party to redress any injustice by appeal from the final order of such board.

3. Administrative Law § 3.1; Insurance § 2—

In a hearing before the Insurance Commissioner of charges against an agent in proceedings for the revocation of the agent's license, the agent having been given more than the 10 day statutory notice, motion for a continuance and motion for a bill of particulars are addressed to the sound discretion of the Commissioner, and the denial of the motions will not be disturbed in the absence of a showing of abuse. G.S. 58-42.

4. Insurance § 2; Actions § 3—

Proceedings against an insurance agent for revocation of licenses do not become moot upon the surrender by the agent of his licenses or their expiration, since adjudication of the question of the agent's wrongdoing would affect subsequent issuance of license to him.

APPEALS by plaintiff and defendant from *Braswell, J.*, February 20, 1967, Second February Regular Civil Term of WAKE Superior Court.

As a result of some six months' investigation of the plaintiff's activities as an insurance agent, the Commissioner of Insurance, acting under the authority of Chapter 58 of the General Statutes, suspended the insurance licenses of the plaintiff, charged him with some twenty-two violations, and set a time for hearing on the charges. The notice was dated 25 January 1967, served on 26 January 1967, and fixed the date of the hearing for 6 February 1967, which, by second notice, was changed to 13 February 1967.

The Commissioner charged that in each of the cases the plaintiff had made false representations to insurance companies he represented, that the insured owned 100 per cent interest in certain tobacco lands in Lenoir County, when he knew that such claims were false. He also charged that the plaintiff had received money for the losses so claimed, and that he had failed to properly apply the proceeds, and that the total amount for which the plaintiff was indebted to the insurance agencies was some $33,000. Separate charges were made in each of the twenty-two cases in which it was alleged that Elmore had made false representations with reference to an application for insurance against direct loss by hail and additional perils on tobacco crops and had wrongfully signed, or caused to be signed, the name of the applicants, whereby he obtained drafts

from the insurance companies. That he negotiated the drafts but did not deliver the proceeds to the named insured. In each application the date of the alleged loss, the location of the acreage involved, and the name of the purported land owner was set forth.

Before the date of the hearing, on 5 February 1967, the plaintiff filed four motions: (1) motion to sever; (2) motion for bill of particulars; (3) motion for continuance; (4) motion that stenographic record be kept.

On 8 February the Commissioner wired plaintiff's attorney that the motions would be heard on 13 February and suggested that he prepare to proceed with the hearing "as scheduled in the event of the denial of motions."

On 13 February the plaintiff filed his own affidavit and the affidavit of his attorney, Thomas J. White, which in substance stated that the plaintiff had been unable to prepare for the hearing within the limited time allowed; that his attorney had many other obligations and engagements and was unable to work on the matter except at odd times; that his attorney was a member of the North Carolina Senate and Chairman of the Appropriations Committee of the Senate, and that his duties in that capacity, as well as a large legal practice, would prevent him from giving proper attention to the matter until the adjournment of the General Assembly in June 1967. The Commissioner denied all of the plaintiff's motions except the one requesting that a stenographic record be kept.

The hearing was thereupon begun on Monday, 13 February, and while it was in progress, an order signed by his Honor J. William Copeland, Judge of the Superior Court, was served upon the Commissioner. It restrained the Commissioner from proceeding further with the hearing "and from doing any act or thing in furtherance thereof in prosecution of the charges" and made the order returnable on 2 March 1967.

Two days later the Commissioner moved in Wake Superior Court that a hearing on Judge Copeland's order be had before the return date fixed therein, and as a result a hearing was set before Judge E. Maurice Braswell on 20 February 1967. At that hearing the plaintiff and his attorney were present, and affidavits setting forth in detail his claims and position were filed. The Commissioner filed counter-affidavits, and after a full hearing and arguments before Judge Braswell, the preliminary order was ordered dissolved; however, the Court ordered that pending the appeal that no further hearing or proceedings be had in the matter.

From the order dissolving the preliminary injunction the plaintiff appealed. The defendant also appealed from the order staying the dissolution of the injunction pending the appeal.

Thos. J. White, Attorney for the plaintiff.

Howard E. Manning, Special Counsel to the Department of Insurance; T. Wade Bruton, Attorney General, by Bernard A. Harrell, Assistant Attorney General, for defendant.

PLESS, J. The pertinent sections of Chapter 58 of the General Statutes — Insurance — are summarized as follows:

G.S. 58-42 provides that when the Commissioner of Insurance is satisfied that any insurance agent has willfully violated any of the insurance laws of the State or willfully misrepresented any policy of insurance, or willfully deceived any person in regard to any insurance policy, or has failed to pay over any money or property in his hands belonging to an insurance company, the Commissioner may immediately suspend his license, giving the licensee ten days' notice of the charges and of a hearing thereon; and if, upon the hearing, the Commissioner finds any of the above violations, he shall specifically set out such finding and revoke the license of the agent. The agent may have the revocation reviewed as provided in G.S. 58-9.3 by filing a petition in the Superior Court of Wake County within thirty (30) days from the date a copy of the order is delivered to the petitioner. The cause will be heard by the trial judge as a civil case, upon transcript of the record, for review of findings of fact and errors of law only, and the order may be affirmed or set aside as the record may justify. The order of the superior court is subject to appeal to the Supreme Court, by any party to the action, as in other civil cases.

Legislation of this type has become necessary in many fields, and so a system of administrative procedure has been instituted in which matters of regulation and control may, and must be, tried by properly established commissions and agencies that are peculiarly qualified for the purpose. Thus, we have the Workmen's Compensation Commission, the Utilities Commission, and the Insurance Commission which are similarly empowered to hear and determine controversies in their respective fields. Since practically every case originating in the courts must, as a matter of absolute right, be tried by a jury — unless all parties waive it — it has been found more efficient and practical to use the administrative process in these instances. This procedure is particularly efficient when the subject of inquiry is of a very technical nature, or involves the analysis of

many records. After the hearings before the agencies have been conducted, the statute gives any aggrieved party his "day in court" by appeal or other recognized procedure.

To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies. To allow it would mean that in some instances a case might pend in the courts until a jury trial could be held, which would frequently cause unjustified delay, and result in thwarting the purpose for which the administrative investigation was established, and the constitutionality of the proceedings may not be tested except in rare instances — not applicable here — until the matter has reached the courts for review.

In *Summrell v. Racing Association,* 239 N.C. 591, 80 S.E. 2d 638, Bobbitt, J., speaking for the Court, said:

> "Where a resident and citizen seeks to enjoin public officials from putting into effect the provisions of a statute enacted by the General Assembly on the ground that the statute is unconstitutional and is therefore void, it is held that he is not entitled to injunctive relief in the absence of allegations and proof that he will suffer direct injury, such as a deprivation of a constitutionally guaranteed personal right or an invasion of his property rights. In the absence of such allegation and proof the Court will not pass on the constitutionality of the statute. *Wood v. Braswell,* 192 N.C. 588, 135 S.E. 529; *Newman v. Comrs. of Vance,* 208 N.C. 675, 182 S.E. 453."

In *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482, Justice Bobbitt, again speaking for the Court, said:

> "In 28 Am. Jur., Injunctions sec. 182, the general rule is stated as follows: 'The usual ground for asking injunctive relief against the enforcement of statutes is their invalidity, but that, of itself, is not sufficient to warrant the exercise by equity of its extraordinary injunctive power. In other words, the mere fact that a statute is alleged to be unconstitutional or invalid will not entitle a party to have its enforcement enjoined.' "

In this case, after some six months of investigation, the Commissioner of Insurance has charged that the petitioner has fraudulently and flagrantly filed false claims for insurance losses by virtue of his license as an insurance agent. Whether the charges will be proven is yet to be established, but we can assume that the elected Commissioner of Insurance would not temporarily suspend the plaintiff's

licenses and prefer these serious charges without substantial evidence to support them. The action of the plaintiff in closing out his business and moving to another county in the midst of the Commissioner's investigation indicates that he, too, had some fears of the outcome.

The petitioner offered impressive reasons for a continuance of the hearing, but the motion was denied. While the statute provides for ten days' notice, he was given seventeen. Moreover, the investigation by the Commissioner could not have been conducted without the knowledge of the petitioner, and his concern for the outcome is demonstrated by the closing of his business three months before the hearing and indicates that he was forewarned of the likelihood of this proceeding well in advance, and had substantially more notice than the statute requires. In the absence of abuse of discretion, which is not shown, the refusal of the Commissioner to allow a continuance cannot be overruled. The motions to sever and for a bill of particulars were also determined in the discretion of the Commissioner, and, no abuse being shown, the rulings thereon will not be disturbed.

At the hearing, the petitioner surrendered his insurance licenses, all of which expired on March 31. The petitioner claims that under these circumstances the cause is now moot. He further calls attention to G.S. 58-48 which he says provides for punishment in criminal proceedings if his guilt should be established. An inspection of that statute leaves some question of its applicability to the allegations made by the Commissioner. Even if the petitioner is correct, this would constitute no defense to these proceedings. The Insurance Commissioner has no authority to require the Solicitor to institute or prosecute a criminal action nor to require a judge to punish the defendant upon conviction. Then too, repayment of the alleged misappropriation of $33,000 would not necessarily be required in criminal proceedings.

With no adjudication of his wrongdoing, and upon the dismissal of these charges (solely because the petitioner, with whatever motive, reason or hope, has found it expedient to surrender his licenses), he could have substantial hope of regaining them within a comparatively short time. To move across a nearby state line, he would, in all probability, have little difficulty in obtaining licenses in the other state. While the agent in this kind of investigation may be presumed to be guiltless until his improper conduct has been formally proven, we must recognize that he would not be likely to close up his business, surrender his means of livelihood, and move his home unless

he had substantial fear of the results of the investigation he is trying so desperately to prevent.

The plaintiff must accede to the laws of the State which require that his alleged derelictions be first adjudicated by the Insurance Commissioner. This has been prevented because of the *ex parte* preliminary injunction obtained by the plaintiff. Ample safeguards are provided by appeals to the courts, at the proper time, to protect him from any improper or illegal results.

Judge Braswell was correct in dissolving the temporary injunction, and the cause is hereby remanded for further proceedings before the Commissioner of Insurance under Chapter 58 of the General Statutes.

Affirmed.

LEONARD Y. SAFRIT, JOHN S. BALL, MRS. RAY L. MORSE, LOUIS STYRON, F. B. ESKRIDGE, STEVE BEACHAM, SR., GILBERT WHITEHURST, TOM ADAMS, N. C. McNEILL, TULL WILLIAMS, MRS. H. L. HOLEBROOK, EARL LEWIS, SAM GIBBS, JOHN D. NELSON, ARVIS McGEHEE, RAY M. WILLIS, BILLY J. BALES, BANZELL LEWIS, JR., AND BANZELL LEWIS, SR., FOR AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *v.* JOHN D. COSTLOW, MAYOR, EARL MADES, DAVID C. FARRIOR, FRANK LANGDALE, OSBORNE G. DAVIS AND GLENN B. WILLIS, JR., COMMISSIONERS OF THE TOWN OF BEAUFORT, AND THE TOWN OF BEAUFORT, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA.

(Filed 20 June, 1967.)

1. Municipal Corporations § 2—

The owner of property within territory annexed by a municipality may bring an action after the expiration of one year from the effective date of annexation and prior to the expiration of 15 months from such date, to compel the municipality to follow through on its plans for furnishing essential municipal services to the area annexed in accordance with the plans filed in the proceedings. G.S. 160-453.5(h).

2. Same—

Where a municipality is unable to extend its municipal sewerage system to an annexed territory because such system has been declared obsolete and a source of unlawful pollution, but the municipality has planned to construct a new sewerage system to service all areas within the municipal limits, and has initiated studies for such plan by an engineering firm, *held*, a resident of the area is entitled to maintain an action, timely instituted, to compel the municipality to follow through on its plan for the new sewerage system.

3. Mandamus § 1—

The purpose of *mandamus* is identical with that of a mandatory injunction, and its function is to enforce, but not to establish, a legal right.

4. Mandamus § 2—

Ordinarily, *mandamus* does not lie to control the exercise of a discretionary power.

5. Same; Municipal Corporations § 2—

Where more than a year after the effective date of an annexation ordinance, a municipal corporation has failed to take steps to provide sewerage service to the annexed area in accordance with its plans theretofore filed, the owners of property within the territory annexed, while not having the right to require any particular type of sewerage system be installed, do have a clear legal right to require that the municipality provide a sewerage system which will offer them the same benefits as those offered any other property owners throughout the municipality.

APPEAL by plaintiffs from *Latham, Special Judge,* November 28, 1966 Civil Session of CARTERET.

Civil action (No. 121 on our docket) instituted July 29, 1965, in which plaintiffs seek relief by writ of *mandamus* or, alternatively, that an Annexation Ordinance of the Town of Beaufort be adjudged void *ab initio.*

On January 15, 1966, these plaintiffs instituted a separate action (No. 110 on our docket) under the Declaratory Judgment Act, seeking to have the same Annexation Ordinance declared void *ab initio.*

The two cases were heard together. A jury trial was waived. The court's findings of fact in each case are based on the same stipulations and evidence. An opinion in the subsequent separate action is being filed simultaneously herewith.

The Annexation Ordinance was adopted March 16, 1964, effective May 1, 1964, by the Board of Commissioners of the Town of Beaufort, after compliance with the procedural requirements prescribed in G.S. 160-453.5. A public hearing was held March 2, 1964. More than fourteen days prior thereto, a "Report Setting Forth Plans as to Services to Areas to be Annexed," including a map showing existing municipal limits and the areas under consideration for annexation, was filed in the office of the Town Clerk. Owners of property in these areas appeared at the public meeting and expressed their opposition to adoption of the proposed Annexation Ordinance.

The plan filed in purported compliance with G.S. 160-453.3 is comprehensive, relating to (1) lights and water; (2) sewer; (3) police protection; (4) fire protection; (5) garbage collection; and (6) street maintenance.

The controversy relates to the following provision of the plan:

"2. SEWER: The municipal sewerage system of the Town of

Beaufort is based upon a gravity outfall towards the navigable waters that border the Town on the north and west; these two bodies of water are part of the White Oak River Basin and, as such, have been included in the State Stream and Sanitation study heretofore provided by the State Stream and Sanitation Act. Due to the nuisance created by said system in depositing raw sewage in these navigable waters, the sewerage system of the Town of Beaufort has been declared to be obsolete and a source of unlawful pollution to adjacent streams or waters by the State Stream and Sanitation Committee, and whereas the General Assembly of North Carolina, Session 1963, did amend subsection 3(b) of G.S. 160-453.3 by adding: 'provided, however that in the event the sewerage system of the municipality shall have been declared to be unfit, obsolete or a source of unlawful pollution to the adjacent streams or waterways by the State Stream Sanitation Committee, then the municipality shall not be required to extend any sewerage outfall into the area to be annexed; provided, further, that the area to be annexed shall be provided sewerage service on substantially the same basis and in the same manner as such service is provided within the rest of the municipality whenever a modernized sewerage system is created subject to the approval of the State Stream Sanitation Committee.' Whereas, the Town of Beaufort has employed an engineering firm to determine the feasibilities of a new sewerage system and that the said Tracts One and Two as herein described are included or will be included in said studies and that, when the new sewerage system as contemplated by the Town of Beaufort is constructed, said system will service the two areas as hereinabove described and that said areas will receive the same benefits in this regard as present portions of the municipality.

"That it is further found that each of the areas at present are being serviced by septic tank systems which require attention in the form of pumping and other cleaning, and that large portions of the Town of Beaufort are now similarly serviced and that the Town of Beaufort has heretofore obtained equipment incidental to the pumping or cleaning of septic tanks and employs personnel for this purpose and this septic tank cleaning or pumping service will, on request of the individual owners in Tracts One and Two, be furnished said areas."

Judge Latham concluded as matters of law that this action was timely and properly brought pursuant to G.S. 160-453.5(h); that plaintiffs had failed to show defendant did not comply with the "Report Setting Forth Plans as to Services to Areas to be Annexed"; and that the court was "without authority to amend the plan for services to be provided to annexed areas and to force compliance to

the plan as amended by the use of *mandamus.*" Judgment was entered dismissing the action. Plaintiffs excepted and appealed.

Harvey Hamilton, Jr., and Ward & Tucker for plaintiff appellants.

Wheatly & Bennett for defendant appellees.

BOBBITT, J. Judge Latham ruled in the separate action (No. 110 on our docket) that the 1963 statute, to wit, Chapter 1189, Session Laws of 1963, referred to in the quoted paragraph of the plan, was unconstitutional and void as violative of Article II, Section 29, of the Constitution of North Carolina. As to this, as set forth in the opinion in the separate action, this Court is in accord. Defendants may not predicate rights upon said 1963 statute.

The court ruled correctly that this action was timely and properly brought pursuant to G.S. 160-453.5(h). The court's further rulings appear to be in accord with defendants' contention that the plan contains no provision for a sewerage system in the annexed areas and therefore affords no basis for the issuance of a writ of *mandamus.* As to this, we take a different view.

The plan contemplates the construction of a new sewerage system from which property owners in the annexed area will receive the same benefits as property owners in the then existing portions of the municipality. We cannot accept the view that this reference to a new sewerage system should be treated as a mere will-o'-the-wisp, so lacking in substance that plaintiffs had no right to rely thereon.

Independent of references to said 1963 statute, we think the proposal set forth in said plan was in substance as follows: The existing municipal sewerage system, having been declared obsolete and a source of unlawful pollution to adjacent streams or waters, could not be extended into the annexed areas. The Town of Beaufort planned to construct a new sewerage system from which all areas within the municipal limits, including the annexed areas, would receive the same benefits. Studies to accomplish this result were in progress. Temporarily, the Town of Beaufort would upon request pump or clean privately owned septic tanks located in the annexed areas.

In G.S. 160-453.1, it is declared as a matter of State policy, *inter alia:* ". . . (3) That municipal boundaries should be extended, in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for the public health, safety and welfare; and . . . (5) That areas annexed to municipalities in ac-

cordance with such uniform legislative standards should receive the services provided by the annexing municipality as soon as possible following annexation."

G.S. 160-453.3(3)b requires, in respect of a plan for extension of services to areas proposed to be annexed, the following: "Provide for extension of water mains and sewer lines into the area to be annexed so that property owners in the area to be annexed will be able to secure public water and sewer services according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions. If the municipality must, at its own expense, extend water and/or sewer mains into the area to be annexed before property owners in the area can, according to municipal policies, make such connection to such lines, then the plans must call for contracts to be let and constructon to begin on such lines within one year following the effective date of annexation."

In the separate action (No. 110 on our docket), we have held that plaintiffs are precluded by G.S. 160-453.6(a) from attacking the validity of the annexation by reason of their failure, within thirty days following the passage of the Annexation Ordinance, to file a petition in the Superior Court of Carteret County seeking a review of the action of the Board of Commissioners of the Town of Beaufort.

Plaintiffs' property is now located within the municipality. They are entitled "to secure public . . . sewer services according to the policies in effect in such municipality for extending . . . sewer lines to individual lots or subdivisions." G.S. 160-453.3(3)b. The plan of the Town of Beaufort for *extending* sewer lines necessitates the construction of a new sewerage system, and in the "Report Setting Forth Plans as to Services to Areas to be Annexed" it is stated that "said (new) system will service the two (newly annexed) areas as hereinabove described. . . ."

The statutory remedy for owners of property in the annexed territory where "the municipality has not followed through on its service plans adopted under the provisions of §§ 160-453.3(3) and 160-453.5(e)" is by writ of *mandamus*. G.S. 160-453.5(h). Plaintiffs have no other legal remedy.

The nature and function of a writ of *mandamus* have been fully discussed in prior decisions. *Hospital v. Wilmington*, 235 N.C. 597, 70 S.E. 2d 833, and cases cited; *St. George v. Hanson*, 239 N.C. 259, 78 S.E. 2d 885, and cases cited; *Young v. Roberts*, 252 N.C. 9, 112 S.E. 2d 758.

The function of a writ of *mandamus*, "when issued to compel a board or public official to perform a duty imposed by law," is iden-

tical with that of a mandatory injunction. *Hospital v. Wilmington, supra.* Its function is to enforce, not to establish, legal rights. *St. George v. Hanson, supra.* Ordinarily, *mandamus* "does not lie to control the exercise of a discretionary power." 3 Strong, N. C. Index, Mandamus § 2.

Although plaintiffs have no right to require that any particular type of sewerage system be installed, they do have a clear legal right to require that defendants provide a new sewerage system which will offer to them the same benefits offered to other property owners throughout the municipality. The tax burden imposed on plaintiffs' property is the same as that imposed on property throughout the municipality. The statutes contemplate, and elemental fairness requires, that plaintiffs receive the same benefits.

Absent a specific provision in the plan for the construction of the new sewerage system, the law allowed defendants a reasonable time within which to discharge their obligations. G.S. 160-453.5(h) provides that application for writ of *mandamus* as authorized thereby shall be made not earlier than one year nor later than fifteen months from the effective date of annexation. The effective date of annexation was May 1, 1964. This action was instituted July 29, 1965. The hearing before Judge Latham was at November 28, 1966 Civil Session. Notwithstanding this lapse of time, defendants offer no evidence that a new sewerage system is in process of construction or that contract for the construction of such sewerage system has been let.

The foregoing leads to this conclusion: The court was in error in dismissing the action. Hence, the judgment is vacated and the cause remanded for further proceedings. Upon the basis of such evidence as may be offered upon further hearing in the superior court, the judge thereof will make such order as may be appropriate to require that defendants proceed promptly with the construction of a new sewerage system.

Error and remanded.

ORVILLE G. GASKILL, LEONARD Y. SAFRIT, G. W. HUNTLEY, JR., ET ALS., *v.* JOHN D. COSTLOW, MAYOR, EARL MADES, DAVID C. FARRIOR, FRANK LANGDALE, OSBORNE G. DAVIS AND GLENN B. WILLIS, JR., COMMISSIONERS OF THE TOWN OF BEAUFORT; AND THE TOWN OF BEAUFORT, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA; AND THOMAS WADE BRUTON, ATTORNEY GENERAL OF NORTH CAROLINA.

(Filed 20 June, 1967.)

1. Municipal Corporations § 2; Statutes § 2—

Chapter 1189, Session Laws of 1963, applicable solely to the Town of Beaufort and providing that in the event the sewerage system of a municipality shall have been declared a source of unlawful pollution to adjacent streams or waterways the municipality should not be required to extend any sewerage outfalls into an area annexed by it, *held* a local act relating to health and sanitation within the meaning of Article II, § 29, of the Constitution of North Carolina, and therefore void.

2. Municipal Corporations § 2; Administrative Law § 2—

An owner of land in an area annexed by a municipality may attack the validity of the annexation ordinance only by filing a petition within 30 days following the passage of the ordinance seeking a review of the action of the municipal board of commissioners, in accordance with the procedure provided by the statute, and an independent action instituted some 22 months after the adoption of the ordinance and seeking to have it declared void *ab initio*, should be dismissed. G.S. 160-453.6.

APPEAL by defendants from *Latham, Special Judge,* November 28, 1966 Civil Session of CARTERET.

Civil action (No. 110 on our docket) instituted January 15, 1966, under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, for a determination that Chapter 1189, Session Laws of 1963, is unconstitutional, and that an Annexation Ordinance adopted March 16, 1964, by the Board of Commissioners of the Town of Beaufort is void *ab initio.*

On July 29, 1965, these plaintiffs instituted a separate action (No. 121 on our docket) seeking relief by writ of *mandamus* or, alternatively, that the same Annexation Ordinance be declared void *ab initio.*

The two cases were heard together. A jury trial was waived. The court's findings of fact in each case are based on the same stipulations and evidence. An opinion in the prior separate action is being filed simultaneously herewith. Reference is made to the preliminary statement therein for pertinent facts relating to the annexation proceedings, including the provision of the "Report Setting forth Plans as to Services to Areas to be Annexed" relating to sewerage.

Judge Latham held said 1963 statute unconstitutional, and ad-

judged said Annexation Ordinance null and void. Defendants excepted and appealed.

Harvey Hamilton, Jr., and Ward & Tucker for plaintiff appellees.

Wheatly & Bennett for defendant appellants.

BOBBITT, J. G.S. 160-453.3(3)b requires, in respect of a plan for extension of services to areas proposed to be annexed, the following: "Provide for extension of water mains and sewer lines into the area to be annexed so that property owners in the area to be annexed will be able to secure public water and sewer services according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions. If the municipality must, at its own expense, extend water and/or sewer mains into the area to be annexed before property owners in the area can, according to municipal policies, make such connection to such lines, then the plans must call for contracts to be let and construction to begin on such lines within one year following the effective date of annexation."

Chapter 1189, Session Laws of 1963, enacted subsequent to our decision in *Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681 (1961), provides:

"Section 1. Subsection (3)b of G.S. 160-453.3 is hereby amended by changing the period at the end thereof to a semicolon, and by adding immediately thereafter the following: 'provided, however, that in the event the sewerage system of the municipality shall have been declared to be unfit, obsolete, or a source of unlawful pollution to adjacent streams or waterways by the State Stream Sanitation Committee, then the municipality shall not be required to extend any sewerage outfalls into the area to be annexed; provided, further, that the area to be annexed shall be provided sewerage service on substantially the same basis and in the same manner as such service is provided within the rest of the municipality whenever a modernized sewerage system is created subject to the approval of the State Stream Sanitation Committee.'

"Sec. 2. This Act shall apply only to the Town of Beaufort.

"Sec. 3. All laws and clauses of laws in conflict with the provisions of this Act are hereby repealed to the extent of such conflict.

"Sec. 4. This Act shall become effective upon its ratification.

"In the General Assembly read three times and ratified, this the 25th day of June, 1963."

Article II, Section 29, of the Constitution of North Carolina, in pertinent part, 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; . . . 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."

Manifestly, said 1963 Act, which applies "only to the Town of Beaufort," is a local act. *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521; *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888. Relating exclusively to sewerage facilities in the Town of Beaufort, it is a local act *relating to health and sanitation* within the meaning of Article II, Section 29, and therefore unconstitutional and void. *Lamb v. Board of Education,* 235 N.C. 377, 70 S.E. 2d 201; *Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313; *Board of Health v. Comrs. of Nash,* 220 N.C. 140, 16 S.E. 2d 677; *Sams v. Comrs. of Madison,* 217 N.C. 284, 7 S.E. 2d 540; *Sanitary District v. Prudden,* 195 N.C. 722, 143 S.E. 530; *Armstrong v. Comrs.,* 185 N.C. 405, 117 S.E. 388. In these cases, local statutes were held unconstitutional on the ground they related to health and sanitation and therefore were in violation of Article II, Section 29. The act involved in *Sanitary District v. Prudden, supra,* provided for the creation of a special sanitary district in Henderson County. The act involved in *Lamb v. Board of Education, supra,* prohibited the Board of Education of Randolph County from expending more than two thousand dollars for water and sewer service to any one school unless approved by a vote of the people. With reference thereto, Devin, C.J., states: "The statute in question is a local or special act. It relates only to Randolph County, and in Randolph County affects only a single agency, the County Board of Education. (Citations.) It relates to health and sanitation, since its sole purpose is to prescribe provisions with respect to sewer and water service for local school children in Randolph County. It purports to limit the power of the County Board of Education to provide for sanitation and healthful conditions in the schools by means of a sewerage system and an adequate water supply."

While in agreement with Judge Latham's ruling that said 1963 statute is unconstitutional and void, we are of opinion, and so decide, plaintiffs' action should have been dismissed on account of their failure, within thirty days following the passage of said Annexation Ordinance, to file a petition in the Superior Court of Carteret County seeking a review of the action of the Board of Commis-

sioners in accordance with the procedure prescribed by G.S. 160-453.6. Under the prescribed statutory procedure, plaintiffs could have challenged the constitutionality of said 1963 statute; the sufficiency of the plan for the extension of services to the areas proposed to be annexed; and the sufficiency of the plan and Annexation Ordinance in any other respect. The prescribed statutory procedure has been followed in prior litigation relating to annexations: *In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795; *Huntley v. Potter, supra; In re Annexation Ordinance,* 255 N.C. 633, 122 S.E. 2d 690.

In many jurisdictions, unless such ordinance be absolutely void, *e.g.,* on the ground of lack of legislative authority for its enactment, private individuals may not attack, collaterally or directly, the validity of proceedings extending the corporate limits of a municipality, this being an action to be prosecuted only by the state through its proper officers. Annotation, 13 A.L.R. 2d 1279. In this jurisdiction, G.S. 160-453.6(a) provides that any person owning property in the annexed territory has a right, "(w)ithin thirty days following the passage of" such ordinance, to challenge its validity by petition for review filed in the superior court.

A similar factual situation was considered in *Leavell v. Town of Texico,* 63 N.M. 233, 316 P. 2d 247, where the plaintiffs, owners of property in an annexed area, undertook to challenge the validity of an annexation resolution (ordinance) by independent action against the municipality and its officials. The statute under consideration provided that any aggrieved owner of property within the annexed area "shall have the right to appeal to the district court by filing his petition praying a review of the council's action within thirty (30) days after the adoption of such resoultion by the council." It was held that this statutory remedy was exclusive and the action was dismissed. Chief Justice Lujan, for the Court, stated: "Where a statute limits the time for appeal from municipal acts the action is barred if not brought within that period (62 C.J.S., Municipal Corporations § 65, p. 176), and a statutory remedy is exclusive (62 C.J.S., Municipal Corporations § 65 c, p. 177). The statute in prescribing a time for appeal gave the appellants an adequate remedy, and they can not be heard to complain if they did not take advantage of that remedy." *Leavell v. Town of Texico, supra,* is cited with approval in *City and County of Denver v. Board of County Comr's.,* 141 Colo. 102, 347 P. 2d 132.

The statute under consideration in *Hite v. Town of West Columbia,* 220 S.C. 59, 66 S.E. 2d 427, prescribed the procedure for contesting an extension of the limits of a city or town and the time

allowed for the commencement of such contest. It was held the action was barred on account of the plaintiffs' failure to file notice and institute suit within the prescribed statutory time. Justice Fishburne states: "It was doubtless in the mind of the general assembly that annexation issues should be decided without undue delay, so that the town officials would be advised whether the affected area would become a part of the municipality. Many questions connected with municipal government, including that of taxation, would need to be known with reasonable promptness." In this connection, it is noted that certain municipal services have been provided in the annexed areas of the Town of Beaufort since May 1, 1964, the effective date of the Annexation Ordinance, and that property owners within the annexed areas have paid municipal taxes.

We are of opinion, and so decide, that the statutory remedy provided by G.S. 160-453.6 was the only procedure available to plaintiffs to *prevent* the annexation provided by the Annexation Ordinance. Having been completed without being challenged in the manner prescribed by statute, the annexation is an accomplished fact; and the remedies of property owners and citizens within the annexed areas are those provided in G.S. 160-453.5(h).

For the reasons stated, the judgment purporting to adjudge the Annexation Ordinance and the annexation pursuant thereto void, is reversed.

Reversed.

GRADY L. GODWIN, BY HIS NEXT FRIEND, THELTON P. GODWIN, EMPLOYEE, v. SWIFT AND COMPANY, EMPLOYER; SECURITY MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 20 June, 1967.)

1. Master and Servant § 74—

Testimony to the effect that subsequent to the award of compensation, the injured employee, who had suffered a brain injury, was "gradually going backwards now" and that his condition required increased care so that someone should be on call for his needs 24 hours a day, *held* to support a finding of a change of condition justifying an increase in the award.

2. Master and Servant § 67—

The limitation of compensation payments for ordinary injuries to 400 weeks and a maximum of $12,000, does not apply to compensation for spinal cord and brain injuries, which may be authorized for the life of the injured employee. G.S. 97-29.

3. Same—

In cases of spinal cord and brain injuries, provision may be made for the payment of compensation for reasonable and necessary nursing services, medicines, sick travel, medical, hospital and other treatment or care, and the provision for payment for "other treatment or care" authorizes payment for such purposes in addition to the specifics set out in this statute.

4. Same—

The requirement of prior written authority of the Industrial Commission for the payment of fees for practical nursing by a member of the family of the injured employee, applies to ordinary injuries; in regard to spinal and brain injuries the statute specifically provides that payment may be made for "other treatment or care" which may include nursing care by a member of the employee's family, and therefore in such case approval of payment for such nursing care by the Commission before payment or demand for payment is a substantial compliance with the Commission's rules.

5. Same— Evidence held to support conclusion that employee's brother and sister-in-law could give him better nursing care in the home.

The evidence tended to show that the injured employee, who was suffering from a brain injury, was getting progressively worse, that the nursing home which was caring for him could not provide attendants for more than 16 hours out of the 24, that the injured employee's condition required someone to be on call to provide attention at any time during the day or night, and that the injured employee's brother and his sister-in-law could give him such attention if the employee lived in his trailer home attached to the home of his brother. *Held:* The evidence supports the Commission's findings that the employee would be better off in his trailer home, and that the increased demand and need for around the clock attention and care entitled his brother and wife to an increase in the per week compensation for such services, and the award of such compensation is authorized by the provisions for payment for "other treatment or care" as specified in G.S. 97-29.

6. Master and Servant § 93—

Findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence.

APPEAL by defendants from *Cohoon, J.*, November, 1966 Civil Session, WILSON Superior Court.

This proceeding originated before the North Carolina Industrial Commission as a compensation claim filed on behalf of Grady L. Godwin, employee, by Thelton P. Godwin, his brother, as next friend. The claim is based on injuries by accident arising out of and in the course of his employment by Swift and Company at its Wilson, North Carolina plant. All jurisdictional facts were stipulated.

At the first hearing, the Deputy Commissioner, Mr. Delbridge, found that on February 8, 1962, the claimant, age 28, while unloading a railway tank car, received an injury by accident. "The

employee sustained a serious head injury when he fell to the concrete floor." When discovered, he was unconscious and remained so for two months, during which time brain surgery was performed. Hospitalization and attempts at rehabilitation were made. During the latter, it was discovered that as a result of the brain and other injuries sustained in the fall, he was totally and permanently blind in both eyes, partially paralyzed, emotionally unstable, and mentally deficient. The claimant was in hospitals, nursing homes and rehabilitation centers at the expense of the employer and its insurance carrier.

The Commission, after full review, made an award of $35 per week and reasonable medical, hospital and nursing bills for the remainder of the claimant's life, without regard to the 400 weeks limitation or the $12,000 maximum. The Commission found that at times when the claimant was not in the hospital or in a nursing home, his brother, Thelton P. Godwin, and wife, rendered personal services which were reasonably worth $50 per week and that a lump sum payment for past services should be made by the employer and its carrier.

As a result of the hearing before Deputy Commissioner Delbridge on January 17, 1966, the Commissioner found there was a change in the claimant's condition and that the change "required increased care, that his recent admission to and treatment by Wilson Memorial Hospital and thereafter in a nursing home were reasonable and necessary expenses in the course of care and treatment." The Commissioner found the claimant would receive constant attention and be better off in his trailer home (which was connected to the home of Thelton P. Godwin and his wife) than was available elsewhere, and that because of the increased demands and need for around-the-clock attention and care, his brother and wife were entitled to the payment of $65 per week for such services. The defendants filed exceptions to the Commissioner's findings and award and applied for and obtained a review by the full Commission.

The full Commission, after review, concluded the hearing commissioner's findings of fact were supported by competent evidence, adopted them as its own, approved the conclusions of law and affirmed the award. The defendants filed detailed exceptions to the findings of fact, to the conclusions of law, and to the award of the full Commission and appealed to the Superior Court of Wilson County.

At the November, 1966 Civil Session of Wilson Superior Court, Judge Cohoon heard the appeal. The parties agreed that he might consider the record and render judgment out of the county and out of the district. On January 27, 1967 he filed the judgment overruling the several exceptions and affirmed the Commission's findings of

fact, conclusions of law and approved the awards. The defendants excepted and appealed.

Gardner, Connor & Lee by David M. Connor for defendant appellants.

Narron, Holdford & Holdford by William H. Holdford for plaintiff appellee.

HIGGINS, J. The appellants challenge the Commission's findings that a change of condition justified the increase in the awards to the brother and his wife for "other treatment and care" not embraced in the medical, hospital, and nursing expenses. Prior to the change of condition, the brother and his wife had been providing services and were allowed $50 per week under the Commission's order. There is neither claim nor evidence to support the contention the claimant's condition had improved. There is evidence his condition had deteriorated and his need of personal attention more demanding. His meals had to be carefully prepared. His attempt at bodily movement and needed exercise had to be supervised and encouraged. Being blind, his calls for assistance were made at all hours. It was always night to him. Either the brother or his wife was available for calls around the clock. There was abundant evidence he was happiest and best off in his trailer home. There was evidence to support the finding that $15 per week increase in the allowance for treatment and care was warranted.

Ordinarily, weekly compensation payments for injuries as a result of industrial accidents may not exceed 400 weeks or a maximum of $12,000. However, "In cases in which total and permanent disability results from paralysis resulting from an injury to the brain or spinal cord or from loss of mental capacity resulting from an injury to the brain, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital *and other treatment or care* shall be paid during the life of the injured employee. . . ." (Emphasis added) G.S. 97-29. "Indeed, there is no maximum where there is permanent disability due to injury to the spinal cord. G.S. 97-29; G.S. 97-41." *Baldwin v. Cotton Mills,* 253 N.C. 740, 117 S.E. 2d 718.

Spinal cord and brain injuries are placed in the same category by G.S. 97-29. The statute makes provision for payment for named essential items and services, and adds *"other treatment or care."* The provision for other treatment or *care* goes beyond and is in addition to the specifics set out in the statute.

While some of the charges did not have the prior approval of the Commission, they were so approved before payment or demand for payment was made. This was a substantial, if not a technical, compliance with the Commission's rules. The case of *Hatchett v. Hitchcock Corp.*, 240 N.C. 591, 83 S.E. 2d 539 does not support the appellants' objection to them, on the ground they were without the Commission's prior approval. In *Hatchett,* the claimant suffered a broken leg. His mother, who was not a nurse, filed claim for nursing him during his convalescence. The regulations provided fees for practical nursing by a member of the family will not be honored unless written authority has been obtained in advance. The claim was filed under G.S. 97-25 and G.S. 97-26 which did not contain provisions for the *care* of the injured claimant. Payment for care is proper in a case of brain or spinal cord injury causing paralysis and is authorized for a blind paralytic, but not for an injured who has only a broken leg.

There was evidence in the record to support the finding that other treatment or care was reasonably necessary for the welfare of the claimant and the costs thereof were not excessive. Mrs. Glasgow testified she was business manager of the Friendly Elm Nursing Home. Grady Godwin had been a patient in the home in 1965. The witness testified: "We had been requested to have special attendants put on with him. . . . However, we could not get them around the clock. We were able to get them for sixteen hours from seven in the morning until eleven at night." When asked where, in her opinion, Grady is best off, she replied, "In my opinion right where he is." The brother testified that Grady went from the hospital to the nursing home and from the nursing home to the trailer. "The reason I took Grady away from there (the nursing home) was that he was not getting proper care. He was not getting any help to walk. He could not get up and get water. . . . I could not leave him there . . . under those conditions. . . . Grady is gradually going backwards now." The foregoing and other evidence in the record supported the findings of fact; hence, the findings are conclusive on appeal. *Taylor v. Twin City Club,* 260 N.C. 435, 132 S.E. 2d 865; *Baldwin v. Cotton Mills, supra; Murray v. Knitting Co.,* 214 N.C. 437, 199 S.E. 609; *Knight v. Body Co.,* 214 N.C. 7, 197 S.E. 563.

On March 1, 1966 the hearing commissioner, after full hearing at which all interested parties were represented, found there had been a change in the condition of the claimant, and need for additional services and care, and made an award therefor. The defendants duly excepted and gave notice of appeal to the full Commission. On August 1, 1966 the full Commission overruled all exceptions,

adopted the hearing commissioner's findings and conclusions and approved the award. The defendants appealed to the Superior Court. At the November, 1966 Civil Session, Wilson Superior Court, Judge Cohoon heard the appeal and on January 27, 1967 rendered judgment overruling all exceptions, affirmed the findings and conclusions and approved the award.

The hearing commissioner, the full Commission, and Judge Cohoon concluded the evidence warranted the specific awards designated in the order, which included an allowance of $65 per week to the claimant's brother and wife for the around-the-clock services to the blind and almost helpless victim of injuries sustained while he was in the employer's services. He is now 33 years old and "gradually going backwards now." On this record, we are not willing to say the Superior Court, the full Commission, and the hearing commissioner committed error of law by finding the services were necessary and the awards reasonable solely upon the ground that some less expensive arrangement might have been made for them.

The judgment of the Superior Court of Wilson County is

Affirmed.

SARAH REBECCA PATTERSON BURTON, WIDOW, AND NEXT FRIEND OF WALTER PATTERSON BURTON, MINOR SON, AND BRUCE LEE BURTON, MINOR SON OF BOBBIE LUCIAN BURTON, DECEASED, EMPLOYEE, v. PETER W. BLUM & SON, EMPLOYER, TRAVELERS INSURANCE CO., CARRIER.

(Filed 20 June, 1967.)

1. Master and Servant § 67—

When the death of the employee occurs more than two years after the accident, the award of compensation for the death is authorized only if there is evidence to support a finding that from the date of the accident to the time of death the employee had a continuing incapacity because of the injury to earn the wages which he was receiving at the time of the accident. G.S. 97-38.

2. Same—

Disability as used in the Workmen's Compensation Act means incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment, G.S. 97-2(9), and therefore "disability" as used in the Act refers not to physical injury but to diminished capacity to earn money, and such definition must be read into G.S. 97-38.

3. Same—

Where the parties stipulate that after the injury the injured employee worked for the same employer, in one instance for over thirteen months and in another instance for over five months, at his regular wages, such stipulation precludes a finding by the Commission that the employee's total disability continued without interruption from the date of the accident.

4. Master and Servant § 93—

When all the evidence and inferences to be drawn therefrom permit but a single conclusion, liability under the Workmen's Compensation Act is a question of law subject to review.

APPEAL by defendants from *Gambill, J.*, at the 26 September 1966 Civil Session of FORSYTH.

The defendants appeal from a judgment affirming an award by the North Carolina Industrial Commission under the Workmen's Compensation Act on account of the death of Bobbie Lucian Burton, husband and father of the plaintiffs.

It was stipulated before the Commission that:

The deceased was an employee of Peter W. Blum & Son at the regular wage rate of $90.00 per week on 20 June 1960, when he sustained injuries by an accident arising out of and in the course of his employment. While at work on that date, he fell from the roof of a two story building and sustained a severe fracture of the right hip and multiple fractures in the pelvic region.

The defendants, who are the employer and the employer's insurance carrier under the Workmen's Compensation Act, entered into an agreement with Burton, which was approved by the Industrial Commission on 15 July 1960, whereby they agreed to pay him compensation for total disability as the result of this accident. Compensation was so paid until 28 December 1960, on which date Burton returned to work for the same employer at the same wage rate, $90.00 per week. On 31 January 1961, Burton, the employer and the insurance carrier entered into a further agreement, approved by the Industrial Commission, for the payment to Burton of compensation for 139½ weeks on account of permanent partial disability of his right hand and right leg as the result of the injuries sustained on 20 June 1960. Compensation for this partial permanent disability was paid, in accordance with this agreement, from Burton's return to work on 28 December 1960 to his death on 16 December 1962.

Burton worked regularly in the same employment from his return to it on 28 December 1960 through the week ending 14 April 1962. He was absent from work, due to total disability, for the next four weeks. He then returned to work at the same wage and continued to work regularly through the week ending 20 October 1962.

He did not work the next two weeks due to total disability. He returned to work on 5 November 1962 and worked regularly at the same wage through 8 December 1962. From then until his death on 16 December 1962, he was totally disabled.

Burton consulted his physician at the latter's office six times during the year 1961, and twice in February, three times in March, four times in April, three times in May, once in July, once in October and once in December 1962. He was hospitalized once in April, twice in October and once in December 1962, his death occurring during the last of these confinements in the hospital.

The Industrial Commission found as facts, among other findings of fact, that Burton's death "resulted approximately from the injury by accident arising out of and in the course of his employment with defendant employer on June 20, 1960; that such injury by accident was the proximate cause, that is, an operating and efficient cause, without which death would not have occurred"; and that "the death of the deceased employee occurred more than two years and within six years after said injury by accident while total disability still continued." The Commission accordingly issued its award directing that the defendants pay compensation to the widow for the use of herself and of her two minor children, on account of the death of Burton, in the amount and for the period prescribed in the Workmen's Compensation Act.

Testimony by the widow was to the effect that Burton was in good health prior to the accident on 20 June 1960, but "never spent a well day after that." She testified:

> "He had phlebitis off and on and he couldn't go to church like he wanted to and sit there long on account of that leg, swells, being bruised all on the inside. * * * He had to take drugs the whole time to keep himself going what little he did do. And he couldn't rest at night like he ought to and had to keep his leg up on a pillow to elevate it at times. These complaints that I have told you about continued from the date of his fall on June 20 up to his death in December of 1962."

Medical testimony was to the effect that:

In 1961, Burton consulted his regular, personal physician for pain in his legs, swelling, difficulty in walking, pain in his hip and pain in the lower abdomen. During his original hospitalization as the result of his fall, he developed a pulmonary embolism from thrombosis of the deep pelvic veins. At the times that he consulted his physician in 1961, he was still showing evidence of the thrombophlebitis and of vascular insufficiency.

When the abdominal pains continued and became more persistent in April 1962, his physician and a surgeon, then called in for consultation, advised an exploratory laparotomy, thinking they would find acute appendicitis. The operation was performed and the appendix removed but "the pathology did not bear out acute appendicitis." He continued to have pain but not so much as prior to the operation.

In October 1962, the abdominal pain again became severe. He was again hospitalized for observation. Adhesions and gall bladder disease were considered as possible explanations of the pain, but it was determined to observe him further prior to additional surgery. On 10 December 1962, he was readmitted to the hospital with severe abdominal pain. An extensive exploratory abdominal operation was performed by a different surgeon on 12 December 1962. The omentum was removed, having been found considerably swollen, and certain adhesions were corrected, but the suspected difficulties were not discovered and the cause of the pain was not determined. For two days he appeared to be progressing normally but suddenly developed kidney failure and died two days later. The immediate cause of death was uremia due to acute kidney failure. No evidence of kidney disorder was observed prior to two days before the death.

The physician and the surgeon who performed the final operation each testified that in his opinion the injury by the fall on 20 June 1960 could have been the cause of the death. However, each testified in effect that this was speculation and something which he could not prove. Neither expressed any opinion as to the cause of the kidney failure or as to the cause of the acute abdominal pain. The surgeon testified, "The breakdown which this man suffered during the past, the last several hours of his life, particularly the last day to two days, apparently came as a complete surprise."

At the time of the hospitalization following the fall on 20 June 1960, it was first suspected that there was "possible bladder" damage but no evidence of such injury was then discovered. The final report of the then attending physician to the Industrial Commission, dated 17 January 1961, evaluated the permanent partial disability of the right leg and of the right hand, and stated, "No further medical care is indicated," and that Burton had "returned to work on 12-28-60."

W. Scott Buck for defendants.
Martin and Martin for plaintiff.

LAKE, J. The Workmen's Compensation Act authorizes the Industrial Commission to make an award of compensation on account

of the death of an employee only in the event that "death results approximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident." G.S. 97-38. The accident which the Commission found to be the proximate cause of the death occurred 20 June 1960. The death occurred 16 December 1962. The award of compensation was, therefore, authorized only if the employee's "total disability" resulting from the fall still continued at the time of death. It is not sufficient that death occurred while the employee was totally disabled, even though his then disability was the result of the accident. The statute, by its express terms, makes a continuing total disability from the time of the accident to the time of the death a condition precedent to the making of an award of death benefits where, as here, the death occurred more than two years after the accident.

The Act defines disability as follows: "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment." G.S. 97-2(9). This definition must be read into G.S. 97-38 in lieu of the word "disability." Thus, an award of compensation, on account of a death occurring more than two years after the accident, is authorized only if there is evidence to support a finding that, from the accident to the death, the employee had a continuing incapacity, because of the injury, to earn the wages which he was receiving at the time of his accident. "Under the Workmen's Compensation Act *disability* refers not to physical infirmity but to a diminished capacity to earn money." *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857. *Accord: Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438; *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265.

The award in the present instance cannot be sustained on the basis of testimony by the widow that the deceased employee "never spent a well day" after his accident and suffered pain and discomfort throughout the time when he was back at work. In *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865, Barnhill, J.. later C.J., speaking for the Court, said:

> "The statute provides no compensation for physical pain or discomfort. It is limited to the loss of ability to earn. * * * However urgently he [the claimant employee] may insist that he is 'not able to earn' his wages, the fact remains that he is receiving now the same wages he earned before his injury. That fact cannot be overcome by any amount of argument. * * * There is no 'disability' if the employee is receiving the same wages in the same or any other employment. That 'in the same'

employment he is not required to perform all the physical work theretofore required of him can make no difference."

In the present case, it is stipulated that from 28 December 1960 to 21 April 1962 the deceased employee worked regularly for the same employer at the same wage for which he worked prior to the accident, and again worked for the same employer at the same wage from 14 May 1962 to 27 October 1962. In the face of this stipulation, the Commission's further finding and conclusion that this employee's "total disability" continued from the accident to his death more than two years later cannot be sustained.

Although a finding of fact by the Industrial Commission which is supported by some competent evidence is binding upon the superior court and upon this Court on an appeal, *Osborne v. Ice Co.*, 249 N.C. 387, 106 S.E. 2d 573, "when all the evidence and the inferences to be drawn therefrom result in only one conclusion, liability is a question of law subject to review." *Hensley v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289; *Dependents of Poole v. Sigmon*, 202 N.C. 172, 162 S.E. 198.

The award being beyond the authority of the Commission for the above reasons, it is unnecessary for us to determine whether there was sufficient evidence to support the Commission's finding of fact that the accident on 20 June 1960 was the proximate cause of the death, or to determine the competency of the expert testimony upon that question which was admitted over objection by the defendants.

Reversed.

LEWIS B. UNDERWOOD, ADMINISTRATOR OF THE ESTATE OF HAROLD DEAN UNDERWOOD, DECEASED, v. O. F. STAFFORD, JR., PICKETT C. STAFFORD, ROBERT L. LENTZ AND MRS. ROBERT L. LENTZ.

(Filed 20 June, 1967.)

1. Corporations § 4—

Liabilities imposed by G.S. 55-32 upon the directors of a corporation are in addition to other liabilities imposed by law upon them, and officers and directors may be held liable in this State for breach of their fiduciary duties to the corporation in failing to preserve and to distribute properly the assets of the corporation.

2. Corporations § 12—

Plaintiff recovered judgment against a corporation and execution on the judgment was returned unsatisfied. Plaintiff instituted this action

against the officers, directors and stockholders of the corporation alleging that they had committed a fraud upon the creditors of the corporation by wrongfully appropriating to themselves all of the assets of the corporation. *Held:* The breach of duty on the part of defendants alleged in the complaint was a duty owed primarily to the corporation, and the corporation is a necessary party to the suit, and in such suit appointment of a receiver would be appropriate.

8. Appeal and Error § 2; Parties § 1—

The Supreme Court will take notice *ex mero motu* of the absence of a necessary party to an action and remand the cause for joinder of such necessary party.

LAKE, J., concurring in result.

APPEAL by plaintiff from *Gambill, J.*, 31 October 1966 Civil Session of FORSYTH.

On 4 August 1958 Harold Dean Underwood was killed in an accident while riding as a guest passenger in an automobile driven by Jerry Wayne Otwell. Thereafter, plaintiff administrator sued the estate of Jerry Wayne Otwell for the wrongful death of plaintiff's intestate, and recovered judgment in the amount of $8,000, which was duly docketed 10 February 1961. Execution was issued and returned unsatisfied. In April 1961 plaintiff brought action against National Grange Mutual Liability Company, the alleged insurer of the deceased Otwell, and against Southern Excess, Inc. (formerly Freeman and Stafford Insurance Agency, Inc.), the alleged successor to the issuing agent. In July 1962 judgment was entered against National Grange, and judgment of nonsuit entered as to Southern Excess, Inc. Plaintiff and National Grange appealed to this Court, which reversed the judgment as to National Grange and granted plaintiff a new trial against Southern Excess, Inc. (*Underwood v. Liability Co.*, 258 N.C. 211, 128 S.E. 2d 577).

In May 1963 plaintiff secured a judgment against Southern Excess, Inc., in the amount of $8,000. Execution was issued on this judgment and returned unsatisfied. On 5 October 1963 defendants were examined pursuant to G.S. 1-352 *et seq.* On 31 October 1963 plaintiff filed complaint in this action alleging that after notice of plaintiff's claim, defendants, as officers, directors and stockholders of Southern Excess, Inc., had committed a fraud upon creditors by wrongfully appropriating to themselves all the assets of the corporation. It was further alleged that the corporation ceased doing business after March 1961, but dissolution of its corporate existence was not effected. Plaintiff prayed that he recover the amount of his judgment with interest and costs. By pre-trial order dated 31 August 1964 this action was dismissed as to Robert L. Lentz. The case

came on for trial in October 1966, and at the close of plaintiff's evidence judgment as of involuntary nonsuit was entered. Plaintiff appeals.

Alvin A. Thomas and Randolph & Drum for plaintiff.

Jordan, Wright, Henson & Nichols, by William D. Caffrey for defendant appellees.

BRANCH, J. G.S. 55-32 provides for the liability of directors in certain cases, and in each section where liability is imposed on directors, it is stated that the directors shall be *"liable to the corporation."* G.S. 55-114(d) in pertinent part provides:

> "The dissolution of a corporation shall not take away or impair any remedy available to or against such corporation for any right or claim, not covered by subsection (f) of this section, existing or for any liability incurred prior to such dissolution if the action or proceeding is commenced within two years after the filing of a certificate of completed liquidation, and the plaintiff or petitioner must allege and prove that the action or proceeding is commenced within such period. Nothing herein shall extend any applicable period of limitation."

The liabilities imposed by G.S. 55-32 are in addition to other liabilities imposed by law upon directors of a corporation. We recognize that North Carolina adheres to the "trust fund doctrine," which means, in a sense, that the assets of a corporation are regarded as a trust fund, and the officers and directors occupy a fiduciary position in respect to stockholders and creditors, which charges them with the preservation and proper distribution of those assets. It is firmly established in our jurisdiction that a person occupying a place of trust, or a fiduciary relation, should not put himself in a position in which self interest conflicts with any duty he owes to those for whom he acts, and upon purchasing the property of those to whom he owes a fiduciary duty he must affirmatively show full disclosure and fair dealing. *McIver v. Hardware Co.*, 144 N.C. 478, 57 S.E. 169; *Hospital v. Nicholson*, 189 N.C. 44, 126 S.E. 94; *Manufacturing Co. v. Bell*, 193 N.C. 367, 137 S.E. 132.

The duty which plaintiff contends has been breached is a duty owed primarily to the corporation. *Fulton v. Talbert*, 255 N.C. 183, 120 S.E. 2d 410.

In the case of *Goodwin v. Whitener*, 262 N.C. 582, 138 S.E. 2d 232, plaintiff instituted action against Anna B. Whitener and her husband, Claude R. Whitener, Jr., directors of Southern Protective

Patrol Service, Inc., alleging that the corporation was indebted to the plaintiff by virtue of a judgment previously obtained in the federal court, and that execution on the judgment had been issued and returned unsatisfied for lack of assets. The plaintiff further alleged that the defendant, Anna B. Whitener, acting as manager of the corporation, by her reckless, extravagant and fraudulent schemes and devices caused the insolvency of the corporation. The Clerk of Superior Court entered a judgment by default and inquiry for failure to file answer, and upon defendants' motion the default judgment was set aside on the grounds of excusable neglect and the "possibility that the defendants had a good and meritorious defense." Plaintiff appealed from this order. Holding that the complaint failed to state a cause of action, and remanding the cause to the Superior Court for entry of judgment dismissing the action, the Court, speaking through Higgins, J., stated:

> ". . . The complaint alleges that two directors of the corporation were guilty of such mismanagement of the corporate affairs as caused the company to become insolvent and unable to pay the plaintiff's judgment. A claim of mismanagement exists in favor of the corporation. The duties which have been breached by this mismanagement are duties primarily to the corporation. Before a creditor or stockholder may sue those guilty of mismanagement, he must allege a demand on the corporation, or its receiver if insolvent, to bring the suit and a refusal to do so. Even then the corporation must be made a party defendant; and any recovery must be held for the benefit of the corporation. *Coble v. Beall,* 130 N.C. 533, 41 S.E. 794; *McIver v. Hardware Co.,* 144 N.C. 478, 57 S.E. 169; *Douglass v. Dawson,* 190 N.C. 458, 130 S.E. 195; *Corporation Commission v. Bank,* 193 N.C. 113, 136 S.E. 362."

If the cause of action were founded on injuries peculiar or personal to plaintiff himself, so that any recovery would not pass to the corporation and indirectly to other creditors, the cause of action could have been properly asserted by plaintiff; however, where the alleged breach or injuries are based on duties owed to the corporation and not to any particular creditor or stockholder, the creditor or stockholder cannot maintain the action without a demand on the corporation, or its receiver if insolvent, to bring the suit and a refusal to do so, and a joinder of the corporation as a party. *Coble v. Beall,* 130 N.C. 533, 41 S.E. 793; *Goodwin v. Whitener, supra;* G.S. 55-32(1).

Out statutory law has not changed, but rather has codified the

rule that the primary right of enforcement of liabilities to the corporation lies in the corporation, and as such the corporation is the real party in interest and a necessary party to such action. G.S. 55-32; *Skinner v. Transformadora, S. A.*, 252 N.C. 320, 113 S.E. 2d 717; G.S. 1-57.

In the case of *Chapman v. McLawhorn*, 150 N.C. 166, 63 S.E. 721, an agent for Royster Guano Company brought action in his own right to recover the account due Royster. The Court, in affirming nonsuit entered by the lower court, stated:

> "As it is clear that the proceeds of any judgment in this action, if recovered by the plaintiffs, would be the property of the Royster Guano Company, the court properly allowed the motion for nonsuit, on the ground that 'the evidence disclosed that the plaintiffs were not the owners of the account sued on.'"

See also *McCarley v. Council*, 205 N.C. 370, 171 S.E. 323, and *Godwin v. Vinson*, 251 N.C. 326, 111 S.E. 2d 180.

> "Whenever, as here, a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court. *Peel v. Moore*, 244 N.C. 512, 94 S.E. 2d 491; *Edmondson v. Henderson, supra* (246 N.C. 634, 99 S.E. 2d 869)." *Morganton v. Hulton & Bourbonnais Co.*, 247 N.C. 666, 101 S.E. 2d 679.

The pleadings and evidence tend to show that the corporation was insolvent and inactive, and that the property of the corporation had been divided among or purchased by the directors and stockholders for an undisclosed consideration. Under the circumstances, the corporation should be made a party to the action, and the appointment of a receiver would be appropriate.

Without dealing with the merits of the case, the judgment below is vacated and the case is remanded to the end that further proceedings may be had consistent with this opinion.

Error and remanded.

LAKE, J., concurring: The alleged wrong is not an injury to the corporation by mismanagement of its business of properties. The alleged wrong is a fraudulent conveyance of its assets to the injury of its creditors, specifically this plaintiff. He does not allege a derivative right originating in a wrong done to the corporation. He alleges a personal right originating in a direct injury to him. He sues the

defendants not as incompetent, negligent or dishonest directors who wronged their corporation, but as *mala fide* grantees in a fraudulent conveyance of his debtor's property. The corporation may have no cause of action. A fraudulent conveyance is not a wrong to the fraudulent grantor. The defrauded creditor can sue in his own name to set it aside, or to subject the assets so conveyed by his debtor to the payment of his claim, because the conveyance is a wrong to him. He is the real party in interest because it is he who has been injured. That his debtor, the fraudulent grantor is a corporation does not alter this. See: *McIver v. Hardware Co.*, 144 N.C. 478, 57 S.E. 169; 19 Am. Jur. 2d, Corporations, § 1352; Stevens on Corporations, § 187; 19 C.J.S., Corporations, § 1382. The distribution by a corporation of all of its assets among its stockholders without paying its debts is just a common, garden variety of a fraudulent conveyance. The trust fund theory of a stockholder's liability on an unpaid stock subscription is not involved in a proceeding to reach assets fraudulently conveyed. If there are other creditors entitled to share in the assets fraudulently distributed among the shareholders, they may intervene in the plaintiff's suit to protect their rights. *Refining Co. v. Bottling Co.*, 259 N.C. 103, 130 S.E. 2d 33. The appointment of a receiver in order that the property may be recovered and applied for the benefit of all the creditors would be appropriate. *Pender v. Speight*, 159 N.C. 612, 75 S.E. 851, *McIver v. Hardware Co., supra.* That, however, is not the only remedy available to a defrauded judgment creditor of the corporation. I, therefore, concur in the result reached by the majority.

JAMES F. AUTRY v. DOROTHY W. JONES AND POWELL M. JONES, ORIGINAL DEFENDANTS AND HARRY C. BOAHN, JR., ADDITIONAL DEFENDANT.

(Filed 20 June, 1967.)

1. Torts § 7—

An instrument under which a party covenants not to assert any claim or sue other named parties, directly or indirectly, for injuries or damages arising out of a specified accident, and stipulating that the agreement might be pleaded in bar to any action by the party executing the agreement or his heirs, executors, administrators, and assigns, *is held* a covenant not to sue and not a release.

2. Same; Automobiles § 35—

A passenger in one vehicle involved in a collision sued the driver and the owner of the other vehicle involved in the collision, and defendants

filed a cross-action for contribution against the driver of the vehicle in which plaintiff was riding. The driver of the car in which plaintiff was riding pleaded a covenant not to sue theretofore executed by the owner of his vehicle in favor of the owner and the driver of the other vehicle involved in the collision. *Held:* The covenant not to sue does not bar the cross-action for contribution, since the driver of the car in which plaintiff was riding was not a party to the covenant.

3. Same—

A covenant not to sue executed by the owner of one car involved in a collision in favor of the owner and the driver of the other car involved in the collision precludes litigation *inter se* by either party to the agreement, but does not bar the owner and the driver of the second car from asserting a claim against the driver of the first car, who was not a party to the covenant, notwithstanding a settlement embodied in a consent judgment would constitute *res judicata* barring such claim.

APPEAL by additional defendant, Harry C. Boahn, Jr., from *Hall, J.*, March 28, 1967 Civil Session of CUMBERLAND.

This litigation grows out of a collision that occurred May 28, 1965, at an intersection of streets in Fayetteville, North Carolina, between a Studebaker car operated by Harry C. Boahn, Jr., and a Dodge car owned by Powell M. Jones and operated by Dorothy W. Jones.

Plaintiff (Autry), a passenger in the Studebaker, sued defendants Jones, alleging their negligence proximately caused the collision and the personal injuries he sustained as a result thereof. Answering, defendants Jones denied all allegations as to their negligence; and as further answers pleaded (1) the negligence of Harry C. Boahn, Jr., was the sole proximate cause of the collision and plaintiff's injuries, and (2) if they were negligent in any respect, their negligence and the negligence of Harry C. Boahn, Jr., acting jointly and concurrently, proximately caused the collision and plaintiff's injuries. Upon their motion, Harry C. Boahn, Jr., was made an additional party defendant.

Answering the cross complaint of defendants Jones, Harry C. Boahn, Jr., pleaded, as a bar to the right of defendants Jones to recover contribution from him, a writing entitled "Covenant," executed by his father, Harry C. Boahn, Sr., in words and figures as follows:

"FOR THE SOLE CONSIDERATION OF EIGHT HUNDRED ($800.00) DOLLARS, the receipt and sufficiency whereof is hereby acknowledged, the undersigned does hereby covenant and undertake with Dorothy W. Jones and Powell M. Jones, their heirs, executors, administrators, agents and assigns, to forever refrain and desist from instituting or asserting against them any claim, demand, action or suit of whatever kind or nature, either directly or indirectly, for injuries

or damage, to person or property, resulting or to result from an accident which occurred on or about the 28th day of May, 1965, at or near the intersection of Russell Street and Robeson Street, Fayetteville, North Carolina.

"It is understood that the said Dorothy W. Jones and Powell M. Jones expressly deny any negligence on their part causing or contributing to said accident and any liability therefor, and that this agreement is entered into for the purpose of avoiding litigation and shall not be construed as an admission of liability on their part, that the undersigned hereby expressly reserves the right to sue any other person or persons against whom he may have or assert any claim on account of damages arising out of the above described accident.

"It is further expressly understood and agreed that as against undersigned, his heirs, executors, administrators and assigns, this instrument may be pleaded as a defense in bar or abatement of any action of any kind whatsoever, brought, instituted or taken by or on behalf of the undersigned on account of said supposed claim or claims against said Dorothy W. Jones and Powell M. Jones.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of March, 1966."

In his plea in bar, Harry C. Boahn, Jr., alleged the Studebaker car he was driving on the occasion of the collision was the property of his father, Harry C. Boahn, Sr., and that he was operating the car on said occasion as his father's agent and employee, pursuant to his father's instructions, and within the scope and course of said employment.

Defendants Jones demurred to and moved to strike said plea in bar. Judge Hall sustained the demurrer to said plea in bar and ordered that it be stricken from Harry C. Boahn, Jr.'s, answer.

Defendant Harry C. Boahn, Jr., excepted and appealed.

Quillan, Russ, Worth & McLeod for additional defendant appellant.

Nance, Barrington, Collier & Singleton for original defendant appellees.

BOBBITT, J. Appellant contends the execution by Harry C. Boahn, Sr., of the "Covenant" and payment therefor by defendants Jones constitutes a mutual release as between these parties; *and* that the release of Harry C. Boahn, Sr., inured to the benefit of and released Harry C. Boahn, Jr.

Appellant, citing and stressing *Simpson v. Plyler*, 258 N.C. 390,

128 S.E. 2d 843, contends the "Covenant" now under consideration is a release rather than a covenant not to sue. In the cited case, Moore, J., for the Court, set forth basic differences between a release extinguishing a cause of action and a covenant to refrain from bringing suit on account of asserted (but denied) tortious conduct. In *Simpson v. Plyler, supra,* pursuant to the terms of a settlement agreement, the plaintiff's cause of action against one defendant was expressly "terminated" by the provisions of a (paid) consent *judgment.* It was held that the plaintiff's *cause of action* had been *extinguished* by said (paid) judgment; therefore, the remaining defendant (allegedly a joint tort-feasor) was also released.

The provisions of the "Covenant" executed by Harry C. Boahn, Sr., constitute a covenant not to sue rather than a release. Even so, the execution thereof by Harry C. Boahn, Sr., upon the payment to him by defendants Jones of the consideration of $800.00 precludes both Harry C. Boahn, Sr., and defendants Jones from pursuing actions against *each other* in respect of any claim or liability arising out of said collision. *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805. It is noted that defendants Jones did not join Harry C. Boahn, Sr., as an additional defendant, and allege a cross action for contribution against him.

The determinative question is whether the settlement between defendants Jones and Harry C. Boahn, Sr., upon the terms set forth in the "Covenant," is a bar to the right of defendants Jones to assert a cross action against Harry C. Boahn, Jr., for contribution in respect of such damages, if any, as plaintiff may recover herein on account of personal injuries resulting from said collision. Seemingly, the same considerations would determine whether defendants Jones would be barred from asserting a cause of action against Harry C. Boahn, Jr., on account of personal injuries or property damage, if any, which they, or either of them, have sustained as a result of said collision.

Appellant contends *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570, "fits our facts" and supports his position. Consideration thereof impels a different conclusion.

In *Leary v. Land Bank, supra,* this Court held *the judgment* in the former action of *Newbern v. Leary,* 215 N.C. 134, 1 S.E. 2d 384, was *res judicata* and a bar to the plaintiffs' action. Newbern, the bank's agent, was fatally injured as a result of the collision between the bank's car and the Leary truck. The car was operated by Best as chauffeur for Newbern and the bank. In said prior (wrongful death) action, the verdict and judgment were in favor of Newbern's administratrix and against Leary. The plea in bar was upheld on the

ground plaintiffs' cause of action against the defendants rested solely on *respondeat superior,* and that all pertinent issues had been adjudicated adversely to the plaintiffs in said prior action.

In addition to *Leary v. Land Bank, supra,* appellant cites the following: *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345; *Stone v. Coach Co.,* 238 N.C. 662, 78 S.E. 2d 605; *Light Co. v. Insurance Co.,* 238 N.C. 679, 79 S.E. 2d 167; *Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132; *Taylor v. Hatchery, Inc.,* 251 N.C. 689, 111 S.E. 2d 864; *Williams v. Hunter,* 257 N.C. 754, 127 S.E. 2d 546. It would serve no useful purpose to review here the factual situation in each of these cases. Suffice to say, these and many others (see *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688, and cases cited) relate to whether *a judgment* in a prior action adjudicating issues raised by the pleadings therein constitutes *res judicata* and therefore a bar to the subsequent action.

The cases referred to in the preceding paragraph are not germane to the question now before us. There has been no adjudication of the rights and liabilities as between defendants Jones and Harry C. Boahn, Sr. Hence, there is no basis for a plea of *res judicata* as a bar to the alleged cross action by defendants Jones against Harry C. Boahn, Jr. To surmount this hurdle, appellant relies upon *Snyder v. Oil Co., supra;* but, as indicated above, this decision would be authority only for the proposition that defendants Jones would be precluded from joining Harry C. Boahn, Sr., as an additional party defendant and from asserting a cross action for contribution against him.

In *Snyder v. Oil Co., supra,* the plaintiff sued the Oil Company and Keen, its driver, on account of injuries she received as a result of a collision between the Oil Company's truck and a car in which plaintiff was a passenger. On motion of the original defendants, the operator (Dixon) of the car in which the plaintiff was riding, was made an additional party defendant for the purpose of enforcing contribution. No alleged agent of Dixon was in any way involved. Answering the allegations of the original defendants, Dixon pleaded, *inter alia,* that the Oil Company had settled *her* claim against it for damages caused by the collision. This Court held the motion by the original defendants to strike Dixon's allegations as to such settlement was properly denied. Thus, decision was to the effect that the alleged settlement precluded the Oil Company from asserting a claim against Dixon.

It is noteworthy that Harry C. Boahn, Sr., in said "Covenant," reserved the right "to sue any *other* person or persons against whom he may have or assert any claim on account of damages arising out

of the above described accident." (Our italics.) Conversely, settlement between defendants Jones and Harry C. Boahn, Sr., in accordance with the terms of the "Covenant," did not impair the right of defendants Jones to sue any *other* person or persons against whom they may have or assert any claim on account of damages arising out of said collision.

Appellant's plea in bar is based solely on the contention that the protection afforded Harry C. Boahn, Sr., by *his* settlement with defendants Jones inures to the benefit of Harry C. Boahn, Jr. It is noted that appellant does not allege he was a party to, participated in, or had knowledge of, negotiations resulting in the settlement between defendants Jones and Harry C. Boahn, Sr. Being a stranger thereto, the said settlement neither protects nor precludes Harry C. Boahn, Jr., in respect of rights and liabilities between him and defendants Jones growing out of said collision.

For the reasons stated, the judgment of the court below is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. TOMMY FULLER.

(Filed 20 June, 1967.)

1. Criminal Law § 42—

A baseball bat, identified by an eye witness as the one used by defendant in striking deceased, is competent as an exhibit, and there is no requirement that the testimony of the witness be corroborated.

2. Homicide § 20—

Evidence tending to show that defendant, after an altercation, struck the unarmed deceased in the back of the head with a baseball bat, that deceased was standing with his back to defendant at the time, and that the blow caused death, *held* sufficient to overrule nonsuit in a prosecution for homicide.

3. Criminal Law § 71—

Testimony on the *voir dire* to the effect that an eye witness accused defendant of inflicting a mortal injury on the unarmed deceased, and that defendant was advised that anything he said or did not say in response could be used for or against him, *held* to render incompetent defendant's incriminating statement in reply, since such statement could not be voluntary in view of the fact that defendant was advised that the failure to make a statement might be used against him.

4. Criminal Law § 48—

Defendant's silence in face of an accusation of guilt cannot be competent as an implied admission when the accusation is made during interro-

gation of defendant by officers of the law. To compel defendant to reply to an accusation under such circumstances on pain of having his silence considered against him would amount to an infringement of his constitutional right not to be compelled to incriminate himself. Constitution of North Carolina, Art. I, § 11.

5. Criminal Law § 84—

Where corroborating evidence includes incompetent and prejudicial testimony of a fact independent of and unrelated to the corroboration, the testimony is incompetent.

6. Homicide § 30—

Where, in a prosecution for murder in the first degree, the solicitor announces that he would not seek a verdict graver than murder in the second degree, a verdict of the jury of "guilty as charged" leaves the matter in conjecture, and the court should require the jury to be more specific.

APPEAL by defendant from *Copeland, S.J.*, at 18 July 1966 Criminal Session, DURHAM County Superior Court, docketed and argued at Fall Term 1966 as No. 744.

The defendant was charged with murder in the first degree of Robert Jenkins. At the call of the case, the Solicitor announced he would not ask a verdict of murder in the first degree, but would seek a verdict of murder in the second degree or manslaughter as the facts might justify.

Upon a verdict of guilty as charged, the court imposed a prison sentence of not less than 25 and not more than 30 years.

Defendant appealed.

The evidence for the State tended to show that the deceased, the defendant, and two women had been in deceased's room for several hours, drinking, when the deceased and defendant got into an argument "about women." The deceased went to the window, and while his back was turned, defendant hit him in the back of the head with a baseball bat. He fell to the floor, and the defendant took off deceased's trousers, got his money — sixty cents — out of his pocket, and bought wine and liquor with it. Some hours later the deceased was taken by ambulance to a hospital. He died — apparently soon after being struck — although the record is vague about it. The Coroner testified that in his opinion the deceased had died as a result of a blow on the back of his head, and that the baseball bat exhibited to him could have been the instrument inflicting the damage found to the head and brain of deceased.

The defendant was represented by court-appointed counsel, who noted proper exceptions throughout the trial.

T. W. Bruton, Attorney General, and James F. Bullock, Assistant Attorney General, for the State.

William A. Marsh, Jr., Attorney for defendant appellant.

PLESS, J. Upon his appeal the defendant through his counsel presents four questions, three of which are without merit. The other is well taken and entitles the defendant to a new trial for the reasons stated later.

The defendant challenges the admission into evidence of the baseball bat, saying there was "no corroborating evidence connecting the defendant with the exhibit." However, an eye witness to the event identified it as being the one used by Fuller to strike Jenkins. This alone made it admissible as an exhibit. No corroborating evidence is required.

The defendant also complains that G.S. 1-180 was violated for the failure of the judge to give certain instructions to the jury. In view of the result here, this will not recur in a later trial and therefore requires no discussion.

Another exception is to the failure of the Court to allow the motion for nonsuit. The State's evidence, outlined below, demonstrates beyond question that the Court was correct.

Margaret Campbell testified that she was with Robert Jenkins and Tommy Fuller on the night of April 2 and the morning of April 3 in the Old Jones Hotel, and that all of them were drinking. During the night Fuller and Jenkins started arguing, and Robert turned away and was standing at the foot of the bed when Tommy Fuller hit him in the back of the head with a baseball bat; that Robert was looking out of the window and facing away from Fuller when he was struck. She identified a baseball bat which was shown to her as being the one with which Fuller struck Robert Jenkins, and it was thereupon offered as an exhibit and admitted in evidence. She testified that the bat was standing at the door about seven feet from Jenkins when Fuller picked it up; that Fuller walked about three steps and hit Robert in the head; that Robert fell to the floor and did not move after he hit the floor; that Tommy picked him up and threw him on the bed; that she did not see any other weapon than the baseball bat, and that Jenkins did not have anything in his hands. In addition, she testified that at daylight she told Fuller that Robert was sleeping mighty late; that Tommy looked down there and said, "No wonder, he is hurt." She further testified that she took sixty cents from Robert's pocket, and that she and Tommy went across the street, bought a half pint of wine and a quart of whiskey. Upon their return to the room, she saw "Robert was still

out," and she told Tommy to call an ambulance, which he did, and Jenkins was then taken to the hospital. He died a few hours later.

The Court then permitted the State's witness, Detective Cox, to testify as follows:

> "Margaret Campbell told Detective Allen and myself, *in the presence of Tommy Fuller,* that they were in Robert Jenkins' room drinking; that Tommy and Jenkins engaged in an argument; and that Tommy reached beside the door and hit Jenkins in the back of his head with a baseball bat and knocked him down; he picked him up and put him on the bed; and Jenkins rolled off the bed; that Tommy Fuller went and sat down in a chair and she thought he went to sleep, she said he went to sleep.
>
> * * *
>
> "I recognize State's Exhibit E, which has been introduced into evidence. It is a baseball bat that was found in Robert Jenkins' room. Margaret Campbell did have something to say to me about the baseball bat there in the room. It was there when she was making her statement.
>
> ". . . She said *in the presence of Tommy Fuller* that that was the baseball bat he used to hit Robert Jenkins." (Emphasis added.)

Defendant's motion to strike was overruled. Cox then testified, *inter alia:*

> "After Margaret Campbell finished telling me that, the defendant Tommy Fuller was asked if he had anything to say in regard to her statement and said, 'Yes, I hit the man, but I did not think I hit him that hard.' "
>
> * * *
>
> "Margaret Campbell stated *in Tommy Fuller's presence* that he and Robert Jenkins (deceased) were arguing. . . ." (Emphasis added.)

Prior to the admission of this testimony, Officer Cox had been examined upon *voir dire* in the absence of the jury with reference to Margaret Campbell's confrontation of defendant. Defendant was also heard. At the conclusion of the *voir dire,* Judge Copeland made specific findings of fact. Summarized (except as quoted), they were that all of defendant's constitutional rights had been fully protected, that the officers offered him no reward and threatened him with no violence; that *"he was advised by the officers that anything*

he said or did not say in response to anything said by Margaret Campbell could be used for or against him"; and that, if he made any statement, it was made freely and voluntarily. Defendant excepted to each of his Honor's findings.

In *State v. Ross,* 269 N.C. 739, 153 S.E. 2d 469, we cited *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, as follows:

> " '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.' "

In that opinion, as in other recent opinions, we cited the Court's summary of the rulings in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694, which is applicable here. No purpose would be served by further repetition. It includes the following sentence: (The defendant) "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, . . ." When the officer told the defendant that "anything he said, *or did not say,* in response to anything said by Margaret Campbell could be used for or against him," it violated the above rulings as well as the provisions of the North Carolina Constitution, Article I, § 11, which says that no person charged with crime shall be compelled to give self-incriminating evidence.

There are times when an accused's silence is admissible against him, but this must be done on occasion when a reply from him might be properly expected. *State v. Temple,* 240 N.C. 738, 83 S.E. 2d 792.

In *State v. Moore,* 262 N.C. 431, 437, 137 S.E. 2d 812, Higgins, J., enunciated the principle here involved:

> "A suspect is not required to defend himself or prove his innocence to investigating officers. When they accuse him, he may decline their invitation to plead to their charge. Ordinarily, silence, or refusal or failure to deny may be shown only when an accusation is made in the presence of an accused — not by investigating officers who get their information second-hand — but only by someone who has first-hand knowledge and makes

a charge based thereon which the occasion, the nature of the charge, and the surrounding circumstances would call for a denial if the accusations were untrue."

Had the officer told the defendant that he could make any comments he desired with reference to Margaret Campbell's statement or that he could make none at all, that, if he made any comments, they could be used against him, and that if he chose to remain silent, his silence could not be used against him, the evidence would have been admissible. However, when he was told that "anything he said or did not say . . . could be used for or against him," the evidence became inadmissible under the above rulings. To make a prisoner listen to an accuser with the admonition that if he talks or doesn't talk — to be damned if he does, and to be damned if he doesn't — is to put him in an impossible position. It violates the rights of the captive audience, which constitutes reversible error.

While the statement Margaret Campbell made to the officer could have been related by him in corroboration of her testimony from the witness stand, it constituted error to disclose to the jury that it was made in defendant's presence.

The verdict rendered by the jury in this case was "guilty as charged." The charge was first degree murder, but the Solicitor had announced that he would not seek that verdict, but one of guilty of murder in the second degree or manslaughter. From the sentence imposed, it is apparent that the Court considered it as a verdict of guilty of murder in the second degree. However, under these conditions, the matter should not be left to conjecture or surmise, and the Court should have required the jury to be more specific.

The defendant is entitled to a

New trial.

ROSALIE EUGENIA STIER CALVERT RAY, EXECUTRIX OF THE WILL OF ROSALIE EUGENIA STIER CALVERT, AND ROSALIE EUGENIA STIER CALVERT RAY, INDIVIDUALLY, v. DAVID RANDOLPH RAY, GEORGE CALVERT RAY AND OTHER CHILDREN WHO MAY HEREAFTER BE BORN TO ROSALIE EUGENIA STIER CALVERT RAY, AND JAMES MACRAE, GUARDIAN AD LITEM.

(Filed 20 June, 1967.)

1. Wills § 32—

When applicable, the rule in *Shelley's* case is applicable to both real and personal property in this jurisdiction.

2. Wills § 35—

Provision in a will that others named should take in the event the primary beneficiary should predecease testatrix without heirs, creates a gift in substitution which is eliminated if the primary beneficiary survives testatrix.

3. Wills § 32—

The rule in *Shelley's* case applies to a devise or bequest only if testator uses the word "heirs" in its technical sense of heirs general, designating persons to take in an indefinite line of succession, and when used to refer to the children or issue of the first taker, the rule does not apply; however, it will be presumed that testator used the technical term in its technical sense unless the contrary intent can be ascertained from the language of the instrument.

4. Same—

Testatrix devised and bequeathed all her property to her daughter during her lifetime and at her death to the "heirs of her body, if any", with further provision that if the daughter should die before testatrix without heirs of the body, the property should go to named collateral kin. *Held:* The daughter takes a fee tail under the rule in *Shelley's* case, converted into a fee simple by G.S. 41-1, since the instrument does not show that testatrix intended to use the word "heirs" in a sense other than heirs general, there being no limitation over in the event the daughter survived testatrix and then died without issue.

APPEAL by defendants from *Bailey, J.*, October 1966 Civil Session of CUMBERLAND, docketed in the Supreme Court as Case No. 701 and argued at the Fall Term 1966.

Action under the Uniform Declaratory Judgment Act (G.S. 1-253 through G.S. 1-267).

Plaintiff, as executrix and as a beneficiary named therein, brings this action to construe Article 2 of the will of her mother, Mrs. Rosalie Eugenia Stier Calvert. Mrs. Calvert died 5 September 1964. After directing the payment of her debts and funeral expenses, testatrix provided:

"Article 2.

"I hereby give, devise and bequeath all the rest, residue, and remainder of my estate, real, personal, or mixed, wheresoever situated, whereof I may be seized or possessed, or to which I may be in any manner entitled, or in which I may be interested at the time of my death, unto my dearly beloved daughter, Rosalie Eugenia Stier Calvert, to do with as she so desires during her lifetime, and at her death to the heirs of her body, if any; but if she should die before I, without heirs of the body, then to my following nieces, nephews, great-nieces and great-nephews as hereinafter designated." (The names of these collateral relations — 14 in number — and the property which they would have taken had

plaintiff predeceased testatrix, are set out in Articles 4, 5, and 6 of the will.)

Plaintiff is the Rosalie Eugenia Stier Calvert named in Article 2; however, she is now Rosalie Eugenia Stier Calvert Ray (Mrs. Ray). Mrs. Ray is the only child of testatrix and would have been her only heir had she died intestate. Plaintiff has two sons, defendants David Randolph Ray, now 21 years of age, and George Calvert Ray, aged 19.

Plaintiff contends that under Article 2 she takes her mother's entire estate in fee simple. Defendants contend that she takes only a life estate with remainder to her children. Judge Bailey held that, under the rule in *Shelley's case,* Mrs. Ray took all the property, both real and personal, in fee simple. Defendants were represented at the trial by their guardian *ad litem,* James MacRae, who was also guardian *ad litem* for any children who may hereafter be born to Mrs. Ray. From the judgment rendered, defendants appealed.

Maupin, Taylor & Ellis for plaintiff appellee.
MacRae, Cobb & MacRae for defendant appellants.

SHARP, J. Whenever applicable, the rule in *Shelley's case* applies to both real and personal property in this jurisdiction. *Riegel v. Lyerly,* 265 N.C. 204, 143 S.E. 2d 65; *Chappell v. Chappell,* 260 N.C. 737, 133 S.E. 2d 666; *Martin v. Knowles,* 195 N.C. 427, 142 S.E. 313; *Welch v. Gibson,* 193 N.C. 684, 138 S.E. 25; *Hampton v. Griggs,* 184 N.C. 13, 113 S.E. 501; *Starnes v. Hill,* 112 N.C. 1, 16 S.E. 1011. There are many statements of the rule. One, approved by the Court in *Martin v. Knowles, supra* at 429, 142 S.E. at 313, is:

> "The rule in *Shelley's case* says, in substance, that if an estate of *freehold* be limited to A., with *remainder* to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A., the ancestor."

The question posed by this appeal is whether the rule applies to Article 2 of Mrs. Calvert's will, the substance of which is: I give all my estate to my daughter *R* for life, to do with as she desires, then to the heirs of her body, if any; but if she should predecease me without heirs of the body, then to 14 nieces and nephews subsequently named.

The final clause in the devise was a substitutional gift to testatrix' nieces and nephews in the event the primary object of her bounty, Mrs. Ray, should predecease her without heirs of her body. *Whitley v. McIver,* 220 N.C. 435, 17 S.E. 2d 457; *Early v. Tayloe,* 219 N.C.

363, 13 S.E. 2d 609. "Gifts are said to be substitutional when provision is made for someone to take the gift in the event of the death of the original beneficiary before the period of distribution. . . . Words of substitution become inoperative by the vesting of the gift, devise, or bequest in the primary taker." 96 C.J.S., Wills § 737 (1957). Therefore, when Mrs. Ray survived testatrix, the substitutional clause was eliminated, leaving the devise to Mrs. Ray, "to do with as she so desires during her lifetime, and at her death to the heirs of her body, if any. . . ."

Had the final phrase, *if any,* been omitted from the devise, we surmise that defendants would not have questioned the applicability of the rule in *Shelley's case.* A devise to *A* for life and at her death to the heirs of her body presents a classic case for its application. *Hammer v. Brantley,* 244 N.C. 71, 92 S.E. 2d 424; *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404; *Helms v. Collins,* 200 N.C. 89, 156 S.E. 152; *Bradley v. Church,* 195 N.C. 662, 143 S.E. 211; *Bank v. Dortch,* 186 N.C. 510, 120 S.E. 60; *Daniel v. Harrison,* 175 N.C. 120, 95 S.E. 37. See Block, The Rule in *Shelley's Case* in North Carolina, 20 N. C. L. Rev. 49, 64 (1941). By such a devise, the rule in *Shelley's case,* and the doctrine of merger, give *A* an estate tail which G.S. 41-1 converts into a fee simple. *In re Will of Wilson,* 260 N.C. 482, 133 S.E. 2d 189. Defendants contend, however, that when testatrix used the words *heirs of her body,* she was not using the term in its unrestricted technical sense as the lineal descendants of her daughter "who, from generation to generation become entitled by descent under the entail." Black's Law Dictionary (4th Ed., 1951) 856; *In re Will of Wilson, supra.* On the contrary, they argue that she used the term *descriptio personæ,* referring to the children or issue of her daughter who might be living at the daughter's death; that she did not mean successive generations of children, each generation of which should take under the entail. When the term *heirs of the body* is used in its technical sense, it imports a class of persons to take indefinitely in succession, from generation to generation. *Donnell v. Mateer,* 40 N.C. 7.

From their premise that testatrix did not use *heirs of the body* in its technical sense, defendants argue, therefore, that the rule in *Shelley's case* is inapplicable, for, unless the language of the instrument discloses that the words *heirs* or *heirs of the body* were used to designate an indefinite line of succession from generation to generation, the rule is irrelevant. *Wright v. Vaden,* 266 N.C. 299, 146 S.E. 2d 31. In support of this contention, defendants rely upon *Rollins v. Keel,* 115 N.C. 68, 20 S.E. 209; *Francks v. Whitaker,* 116 N.C. 518, 21 S.E. 175; *Sain v. Baker,* 128 N.C. 256, 38 S.E. 858;

Puckett v. Morgan, 158 N.C. 344, 74 S.E. 15; *Pugh v. Allen,* 179 N.C. 307, 102 S.E. 394; *Hampton v. Griggs, supra; Welch v. Gibson, supra.* In his opinion in *Welch v. Gibson, supra* at 691, 138 S.E. at 28, Stacy, C.J., stated the rule of these cases as follows:

> "When there is an ulterior limitation which provides that upon the happening of a given contingency, the estate is to be taken out of the first lines of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker, this circumstance may be used as one of the guides in ascertaining the paramount intention of the testator, and, with other indicia, it has been held sufficient to show that the words 'heirs' or 'heirs of the body' were not used in their technical sense."

The foregoing statement points up the distinction between the instruments construed in those cases and Mrs. Calvert's will. In each of the foregoing cases, the Court concluded that the author of the instrument had used the words *heir* or *heirs, bodily heirs,* or *heirs of the body,* to mean children or issue (thereby eliminating the application of the rule in *Shelley's case*) because there was an ulterior limitation over to a restricted class of heirs of the first taker or life tenant upon his death without "heirs" or "heirs of the body."

The rule of construction enunciated in *Welch v. Gibson, supra,* can have no application to Article 2 of Mrs. Calvert's will because it contains *no* limitation over in the event Mrs. Ray should die without heirs of her body *after* the death of testatrix. Testatrix' nieces and nephews, although cousins of Mrs. Ray and therefore presumptively among her heirs general, were to take only in the event Mrs. Ray died without heirs of the body before Mrs. Calvert's death.

This case is controlled by *Glover v. Glover,* 224 N.C. 152, 29 S.E. 2d 350, wherein the plaintiff devised title to land under a deed "to him his lifetime, and at his death to his heirs, if any." In holding that the conveyance invoked the rule in *Shelley's case* and vested the fee in the plaintiff, this Court said: "The use of the phrase 'if any' following the word heirs may not be held to prevent the application of the rule, since there is no limitation over. This distinguishes this case from *Puckett v. Morgan,* 158 N.C. 344, 74 S.E. 15, and *Jones v. Whichard,* 163 N.C. 241, 79 S.E. 503, relied on by defendant." *Id.* at 152, 29 S.E. 2d at 351.

Foley v. Ivey, 193 N.C. 453, 137 S.E. 418, involved a deed in which the description was followed by this clause, "this deed shall

hold good to and for the said *F. B., Jr.*, during his natural life and after that to the heirs of his body only." In holding that the rule in *Shelley's case* applied, this Court said:

> "In our opinion the addition to the usual formula of the word 'only' is not sufficient to justify the conclusion that the phrase 'heirs of his body' was not employed in the usual technical sense, but on the other hand as indicating issue or children. *It will be noted that there is no limitation over in the event of the grantee's death without 'bodily heirs,' or 'heirs of his body,'* . . . and in this respect several of the cases cited in the appellants' brief are distinguishable from the case under consideration." *Id.* at 453-454, 137 S.E. at 418. (Italics ours.)

In *Sharpe v. Isley*, 219 N.C. 753, 14 S.E. 2d 814, testator devised all his property to his wife, "to her and her heirs by me." He then added, "My wife is to have the exclusive and sole use of both my personal and real property and should she have living heirs by me, then all my estate . . . shall belong to her and her heirs in fee simple." No children were born to testator and his wife, and the question was whether the subsequent words, "and should she have living heirs by me, then all my estate . . . shall belong to her and her heirs in fee simple" limited the wife to a life estate. In holding that the wife took a fee tail estate, converted by G.S. 41-1 into a fee simple, the Court said:

> "If the testator had incorporated in his will a provision for a limitation over in the event his wife did not have 'living heirs' or children by him, a different situation would have been presented. . . . But there are no such words here and we may not add them to the will in order to serve a supposed intent. The intention of the testator must be ascertained from the language in which it is expressed, and it is the duty of the court to give the words used their legal effect." *Id.* at 754, 14 S.E. 2d at 815.

Cf. Williams v. R. R., 200 N.C. 771, 158 S.E. 473, and *Sharpe v. Brown*, 177 N.C. 294, 298, 98 S.E. 825, 827 (cases in which the devisee, under the rule in *Shelley's case*, took a fee, subject to be divested for failure of issue).

There is no language in Mrs. Calvert's will to rebut the presumption that she used the words *heirs of her body* in their technical sense. The "real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it." *Leathers v.*

Gray, 101 N.C. 162, 165, 7 S.E. 657, 658. When a grantor or testator uses technical words or phrases in disposing of property, he is deemed to have used them in their well-known legal or technical sense unless, in some appropriate way, he indicates in the instrument that a different meaning shall be ascribed to them. *Whitley v. Arenson*, 219 N.C. 121, 127, 12 S.E. 2d 906, 910; "(O)therwise, technical words have no certain meaning or effect." *Pittman v. Stanley*, 231 N.C. 327, 329, 56 S.E. 2d 657, 659.

We hold that Article 2 of Mrs. Calvert's will comes within the rule in *Shelley's case*. Mrs. Ray, therefore, acquired an estate tail which G.S. 41-1 converted into a fee simple.

The judgment of the court below is

Affirmed.

ELIZABETH ANN CHILDERS v. WILLIAM JESSE SEAY, JR. AND TRUMAN CHILDERS.

(Filed 20 June, 1967.)

1. Automobiles §§ 41h, 43— Evidence held sufficient to be submitted to jury on question of concurring negligence causing intersection accident.

Evidence tending to show that one defendant, in approaching an intersection, passed a sign limiting speed to 35 miles per hour, that he nevertheless continued his speed of 45 to 50 miles per hour and, upon first seeing the other defendant's vehicle some 150 feet away, was unable to stop in time to avoid striking the right rear of the vehicle, which had approached from the opposite direction and had turned left at the intersection across the path of the first defendant's line of travel, *held* not to warrant nonsuit on the ground of insulating negligence, since the sign limiting speed was sufficient to put a reasonably prudent man on notice that he was approaching conditions under which consequences of an injurious nature would likely ensue if speed were not reduced.

2. Negligence § 27—

Negligence cannot be insulated by the intervening act of another if such intervening act was reasonable foreseeable or if the injurious consequences which ensued, or consequences of like nature, could have been reasonably anticipated from the primary negligence.

3. Appeal and Error §§ 4, 20—

Where the complaint states a cause of action against each of two defendants as joint tort-feasors, one defendant cannot be the party aggrieved by error in the court's instruction to the jury as to the negligence of the other defendant, since defendants' rights *inter se* in regard to contribution are not precluded by plaintiff's judgment. G.S. 1-277.

4. Negligence § 28—

In an action against joint tort-feasors, correct instructions on proximate cause, without elaboration on the subordinate phase of insulating negligence, are sufficient in the absence of a prayer for special instructions.

APPEAL by defendant Childers and plaintiff from *Hasty, J.*, 13 June 1966 Schedule "D" Session of MECKLENBURG. Docketed and argued as Case No. 288, Fall Term 1966, and docketed as Case No. 284, Spring Term 1967.

This is a civil action instituted by plaintiff against both defendants to recover damages for injuries growing out of an automobile collision which occurred about 1:45 p.m. on 18 July 1964 at the intersection of U. S. Highway No. 21 and County Road No. 2145, a public road in Mecklenburg County. U. S. Highway No. 21, at this location, runs generally in a north-south direction and has one lane for northbound traffic and one lane for southbound traffic. County Road No. 2145 runs generally in an east-west direction and has one lane for eastbound traffic and one lane for westbound traffic.

The plaintiff, at the time of the collision, was a passenger in a 1964 Ford automobile owned and being operated by her husband, defendant Childers. This automobile was proceeding in a southerly direction along U. S. Highway No. 21. The parties have stipulated that as the defendant Childers approached the intersection at which the collision occurred, he passed a sign, placed by the North Carolina State Highway Commission, which was a diamond-shaped sign with a cross thereon and a rectangular sign thereunder bearing the letters and figures "35 MPH." Defendant Childers' own evidence indicates that after passing the sign he proceeded at approximately the same rate of speed, *i.e.*, 45 to 50 miles per hour, up a grade to the crest of a hill which was more than 200 feet north of the intersection and proceeded downgrade to the intersection where the collision occurred. A light rain was falling and the highway was wet.

Defendant Seay was operating a 1959 Buick station wagon owned by him. He was proceeding in a northerly direction on U. S. Highway No. 21. As he approached the intersection, he reduced his speed and proceeded to turn left in order to travel in a westerly direction on County Road No. 2145. Before his Buick station wagon completed crossing the southbound lane of U. S. Highway No. 21, it was struck on the right rear portion by the right front of the Ford automobile.

J. F. Peacock, a North Carolina State Highway Patrolman, arrived at the scene of the collision about 20 minutes after it occurred. He was a witness for plaintiff. He testified that during his investigation "Mr. Childers said he was right on Mr. Seay's car when he

first saw it but I don't believe he said how far he was from it." He further testified, "Mr. Seay stated he didn't see him until he had nearly completed his turn." Damage to the Childers automobile was on the right front, and damage to the Seay vehicle was about over the right rear wheel.

The plaintiff pleaded negligence on the part of each defendant and alleged that such negligence was the proximate cause of her injury. She alleged, *inter alia,* that defendant Seay turned from a direct line of travel to his left and crossed the lane of travel of the Ford automobile without first ascertaining that such turn could be made in safety and without giving a clearly visible signal of his intention to turn left, and that defendant Childers was negligent in driving his automobile at a speed that was greater than was reasonable and prudent under the conditions then existing, in failing to keep a proper lookout, and in failing to keep his automobile under proper control.

Plaintiff's evidence supports the above allegations of negligence as to each defendant.

Defendant Seay's evidence was that he slowed to a few miles per hour in preparation for making his turn; that he looked up U. S. Highway No. 21 to the north, and in both directions on County Road No. 2145, and saw no one coming; that he could have seen an automobile approaching from the north on U. S. Highway No. 21 at least 300 feet north of the intersection and that the driver could have seen him from that distance; that upon observing no other traffic coming and after giving his left turn signal he proceeded with his turn; that in the course of the turn he saw the Ford automobile approaching and pressed his accelerator to the floor; and that he had almost cleared the intersection when his station wagon was struck by defendant Childers' automobile.

Other evidence in the record will be stated in the opinion.

Both defendants denied negligence and each alleged that the negligence of the other was the sole proximate cause of the collision and subsequent injury. Defendant Childers further alleged that any negligence on his part was insulated by negligence of defendant Seay.

The jury found by its verdict that plaintiff was not injured by the negligence of defendant Seay, as alleged in the complaint; that plaintiff was injured by the negligence of the defendant Childers, as alleged in the complaint, and awarded damages to plaintiff in the amount of $7,500. Judgment was signed in accordance with the verdict.

From this judgment plaintiff and defendant Childers appealed.

Bradley, Gebhardt, DeLaney and Millette by S. M. Millette for plaintiff appellant and appellee.

Jones, Hewson & Woolard for defendant Seay, appellee.

Kennedy, Covington, Lobdell & Hickman by Hugh L. Lobdell and Charles V. Tompkins, Jr., for defendant Childers, appellant.

PARKER, C.J.

APPEAL BY DEFENDANT CHILDERS.

Defendant Childers assigns as error failure of the court to grant his motion for judgment of compulsory nonsuit; error in the charge on the first issue with respect to negligence of defendant Seay; and failure of the court to charge the jury on the second issue involving the alleged negligence of Childers with respect to the doctrine of insulating negligence.

Childers' motion for judgment of compulsory nonsuit was properly overruled. There was ample evidence of negligence on the part of defendant Childers to go to the jury. Defendant Childers' own evidence indicates that he drove past a sign indicating an intersection ahead and advising a reduced speed; that he proceeded at the same rate of speed; that he saw defendant Seay's station wagon when there was approximately 150 feet between them; that he applied his brakes and skidded 40 or 50 feet before hitting the station wagon. The purpose of the advisory signs was to warn passing motorists that there was an intersection ahead and that motorists should observe a speed limit of 35 miles per hour. They put the motorist on notice that there might be conditions ahead, such as traffic in the intersection, which require increased caution. The warning signs and inclement weather were sufficient to enable a reasonable person to foresee that his failure to heed the warning and proceed with increased caution might produce the result which actually ensued here, or some similar result. There was also evidence for plaintiff that Childers said to a State Highway Patrolman that he was right on Mr. Seay's car when he first saw it. Highway Patrolman Peacock also testified as a witness for the State: "Approaching this particular intersection that we are talking about from the north going in a southerly direction, the farthest distance north from the intersection that a driver would be when he could see another vehicle in the intersection would be about 350 feet."

This Court said in *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241:

> "The test of whether the negligent conduct of one tortfeasor is to be insulated as a matter of law by the independent act of another, is well settled by our decisions. In *Harton v.*

Telephone Co., 141 N.C. 455, 54 S.E. 299, the Court said: '* * * the test * * * is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected * * *. We think it the more correct rule that, except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act. * * *' "

This principle was quoted and applied in *Davis v. Jessup* and *Carroll v. Jessup,* 257 N.C. 215, 125 S.E. 2d 440. In *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912, the facts were similar to the facts of this case except for an increased distance between the two automobiles. The Court held that the evidence did not compel the single conclusion that negligence of the turning driver was the sole proximate cause of the accident. The language used in *Rouse v. Jones,* 254 N.C. 575, 119 S.E. 2d 628, might be applicable here. The rule there suggested was, if the injurious result was not reasonably unforeseeable, the subsequent negligence would not insulate the initial negligence.

The assignment of error to the court's charge on the first issue relating to negligence of defendant Seay is overruled. In *Coburn v. Timber Corporation,* 260 N.C. 173, 132 S.E. 2d 340, the Court said: "The right to appeal is limited to a party aggrieved. G.S. 1-271. A party is aggrieved if his rights are substantially affected by judicial order. G.S. 1-277. If the order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed." Defendant Childers was aggrieved by the verdict rendered and judgment entered against him. However, if error be conceded in the charge on the first issue as to negligence of defendant Seay, it did not adversely affect defendant Childers' substantial rights. In response to a similar contention where one defendant complained of error in the charge relating to the other defendant's negligence, the Court said in *Taylor v. Rierson,* 210 N.C. 185, 185 S.E. 627: ". . . (I)t relates solely to the first issue and could in no way affect the interest of the appellant Taylor, whose contentions were presented under the second and third issues."

Construing the amended complaint, upon which the case was tried, liberally, with a view to substantial justice between the parties, G.S. 1-151, it appears that plaintiff has alleged a cause of action against the defendant Seay and against the defendant Childers, and neither defendant could set up in this action a plea for contribu-

tion against his co-defendant. *Streater v. Marks,* 267 N.C. 32, 147 S.E. 2d 529; *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82. In fact, neither defendant in his answer set up a plea for contribution against his co-defendant. In this action, each was an adverse party to the plaintiff, only. They were not adversaries *inter se,* and could not litigate their differences *inter se.* As between them, the judgment is not conclusive. Upon paying the judgment, defendant Childers may maintain an action against defendant Seay for contribution. *Streater v. Marks, supra; Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736, 149 A.L.R. 1183.

The third assignment of error is likewise overruled. The doctrine of insulating negligence is an elaboration of a phase of proximate cause. Where proper instructions on proximate cause are given, the court is under no duty to instruct the jury specifically with respect to insulating negligence in the absence of proper request, and no such request was made by defendant Childers here. *Rouse v. Jones, supra; Whiteman v. Transportation Co.,* 231 N.C. 701, 58 S.E. 2d 752.

PLAINTIFF'S APPEAL.

Plaintiff stated in her brief: "This appeal by the plaintiff is a precautionary measure only. Should this Court decide that no prejudicial error was committed in the trial against the defendant Childers, then the plaintiff withdraws her appeal and respectfully requests this Court to treat her appeal as withdrawn." Her request is allowed.

On defendant Childers' appeal,

No error.

On plaintiff's appeal,

Appeal dismissed.

STATE OF NORTH CAROLINA v. MANUEL SAVANUS MILLER.

(Filed 20 June, 1967.)

1. Criminal Law § 99—

Motion to nonsuit requires that the evidence be interpreted in the light most favorable to the State and all reasonable inferences favorable to the State must be drawn from it.

2. Same—

On motion to nonsuit in a criminal, as well as in a civil, action the credibility of witnesses and the weight to be given their testimony is to

be determined by the jury and not the court, and the court may not enter nonsuit on the ground that a witness is unworthy of belief: nevertheless, when the crucial testimony of a witness is irreconcilable with the physical facts established by the State's own uncontradicted evidence, nonsuit should be allowed.

3. Criminal Law § 65—

Ordinarily, the probative force of the testimony of a witness identifying defendant by sight is for the jury, but when the State's uncontradicted evidence as to the physical conditions makes the testimony of identity inherently incredible, the court may properly determine that such testimony has no probative force.

4. Criminal Law § 101— Uncontradicted evidence of physical facts held to render testimony as to identity by sight without probative force.

The only evidence tending to identify defendant as one of the perpetrators of the offense was the testimony of a witness identifying defendant in a lineup as one of the persons he had seen at the scene of the crime. The State's uncontradicted evidence further tended to show that the witness was never closer than 286 feet from a man he saw running along the building in question, that the witness had never seen the man theretofore, that he saw this man run once in each direction, stop at the front of the building, "peep" around it and look in the witness' direction, and that the witness could not describe the color of the man's hair or eyes, or the color of his clothes, except that his clothes were dark. *Held:* The uncontradicted testimony as to the physical facts discloses that the witness' observation of defendant was insufficient to permit a reasonable possibility of the subsequent identification of the defendant with that degree of certainty which would justify the submission to the jury of the question of defendant's guilt.

APPEAL by the defendant from *Froneberger, J.*, at the 31 October 1966 Regular Criminal Session of MECKLENBURG.

Miller and one Robert Lee Early were indicted for feloniously breaking and entering the storehouse of the Hall Oil Company and for attempting to force open the company's safe in such building. The cases were consolidated for trial and both defendants were found guilty on each charge. The charges against Miller were consolidated for judgment and he was sentenced to confinement in the State Prison for 10 years. From this judgment he appeals. His codefendant, Early, did not appeal. Miller, the appellant, assigns as error the denial of his motion for judgment as of nonsuit, the admission over his objection of certain evidence offered by the State, and a number of alleged errors in the court's charge to the jury

The evidence introduced by the State is ample to show that the building of the Hall Oil Company, located at 2600 East 7th Street in the city of Charlotte, was broken and entered by two or more men between 6 p.m. and midnight on 28 September 1966, and that its safe, which contained money and other valuable properties, was

then damaged in an effort by such men to force it open. It also shows that the exterior of the building and surrounding grounds were well lighted by street lights nearby, floodlights at the front and back, and spotlights attached to the eaves, all of which lights were burning at the time in question. The building is approximately 286 feet from a Texaco Service Station, a vacant lot lying between the two buildings.

The sufficiency of the evidence to survive the motion by Miller for judgment as of nonsuit turns upon its adequacy to identify him as one of the men who participated in the breaking and entering.

Richard Melton, 16 years of age, walking past the service station building, which was closed, stopped there and, while standing at the rear of the service station, observed a man, whom he identified the next morning at the police station, and again in the courtroom, as Miller, move from the rear of the Oil Company building to the front thereof as an automobile passed by. Melton testified that this man "peeped out and then he went back." Melton then purchased a drink (presumably from a vending machine) and sat down to observe what was going on. As another automobile passed, Melton observed a man, whom he subsequently identified as Early, run from the Oil Company building to some trucks parked in the rear thereof. Melton then transferred his position to a bridge some 300 feet from the Oil Company building. He then heard a "banging noise" which appeared to come from the rear of the Oil Company building. He stopped a passing police car and told the officers there was someone in the Oil Company building. At that time, he observed Early run from the trucks to the building. Shortly thereafter, he went to the building and observed Early, then in custody, one of the officers having found him hiding two blocks away.

The next morning Melton went to the police station and picked Miller and Early out of a "lineup" of six men and identified them as the two men he had seen at the Oil Company building the night before. The other four men in the "lineup" were two neatly dressed police officers and two prisoners held on the charge of drunkenness.

Miller was not arrested by the police in the vicinity of the Oil Company building. He was picked up by an officer between 2 a.m. and 3 a.m. at a point 1.3 miles from the Oil Company building while walking along the street in the direction of his brother's home. At that time he was dressed in dark clothing. His trousers were wet almost up to the knees. He wore a jacket. His shirt was wet with perspiration.

On interrogation by the officers, Miller denied any knowledge of the events at the Oil Company building and stated that he had been out looking for employment. He rejected the offer of the police to

check this story if he would tell them where he had been so seeking employment.

Melton testified that he saw the man at the Oil Company building, whom he says was Miller, twice. The first time was when this man "was trotting toward the front of the Hall Oil Company building," at which time Melton could not see his face. The second time was when the man was "peeping out" from the front of the building, looking up and down 7th Street. Melton had then moved to the front corner of the service station. He observed this man then turn and run back toward the rear of the Oil Company building. In these several positions Melton saw the back of the man's head and each side. He also saw him "head-on" as the man looked down the street in the direction of the service station. He then saw the man's "facial features" and when the man turned he had a "side view of him." The man was wearing dark clothes. Melton had never seen Miller before. In describing the man, whom he had so observed, to the officers at the scene and time of the offense, Melton stated only that the man wore dark clothing and was about 6 feet, 3 inches tall. Miller is 5 feet, 11 inches tall. Melton was unable to tell the officers the color of the man's clothes, other than that they were dark, or the color of his hair or eyes.

Police Officer Bowman testified as to the identification of Miller and Early by Melton in the "lineup" the following morning, and also testified that he, Bowman, knew Miller had served a prison sentence and was "a good safe man."

The defendant testified in his own behalf to this effect: He had been released from prison the day before these alleged events. He spent the first night in Charlotte at his sister's home and then went to visit his brother, also a resident of Charlotte. While serving his prison sentence, he was employed in the poultry business under the Work Release Program. From this experience, he knew that truck drivers delivered poultry to the markets between midnight and dawn. Hoping to get work in the making of such deliveries, he went to the plant of the Southeastern Poultry Company about midnight and remained there until approximately 2 a.m., walking about, including some walking in high grass, which dampened the bottoms of his trousers. There being no one at the poultry plant and no trucks arriving, he left and was returning to his brother's home when picked up by the officers. He had never been in the vicinity of the Hall Oil Company and did not know where it was located. The first time he ever saw Early was when they were placed in the "lineup" at the police station for inspection by Melton. He did not tell the officers

where he had been in search of employment for the reason that he found no one there and thus no one could corroborate his statement.

Attorney General Bruton, Staff Attorney White and Staff Attorney Partin for the State.

Sanders, Walker & London by James E. Walker and Arnold M. Stone for defendant appellant.

LAKE, J. This Court has said many times that upon a motion for judgment of nonsuit in a prosecution for a criminal offense, the evidence must be interpreted in the light most favorable to the State, and all reasonable inferences favorable to the State must be drawn from it. *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555; *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; Strong, N. C. Index, Criminal Law, § 99. Ordinarily, the credibility of witnesses and the proper weight to be given their testimony is to be determined by the jury, not by the court upon a motion for judgment of nonsuit. *State v. Orr,* 260 N.C. 177, 132 S.E. 2d 334. In *State v. Bowman,* 232 N.C. 374, 61 S.E. 2d 107, Ervin, J., speaking for the Court, said:

> "The defendant insists secondarily, however, that the testimony of the State tending to show his guilt was incredible in character, and that the trial court ought to have nonsuited the action on the ground that the witnesses giving it were unworthy of belief. * * * In ruling on such motion, the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. Whether the testimony is true or false, and what it proves if it be true are matters for the jury."

Thus, in *State v. Humphrey,* 261 N.C. 511, 135 S.E. 2d 214, this Court, in sustaining the denial of a motion for judgment of nonsuit, said:

> "We are not impressed with the argument that we should hold, as a matter of law, that the lights on the street and automobile were not bright enough to enable the witness to *recognize* the defendant. The court properly left that question to the jury." (Emphasis added.)

Again, in *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14, this Court, in affirming the denial of a motion for nonsuit on the charge of robbery, said:

"The question whether the testimony of the prosecuting witness, tending to identify appellant as one of the robbers, has any probative force was for the jury."

This rule does not apply, however, where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred. In *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105, Bobbitt, J., speaking for the Court, in sustaining a judgment of nonsuit in an action for damages, said:

"Ordinarily, the weight to be given the testimony of a witness is exclusively a matter for jury determination. Even so, this rule does not apply when, as here, the only testimony that would justify submission of the case for jury consideration is in irreconcilable conflict with physical facts established by plaintiff's uncontradicted evidence. * * *

" 'As a general rule, evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury, and in case of such inherently impossible evidence, the trial court has the duty of taking the case from the jury.' 88 C.J.S., Trial, § 208(b)(5); *Powers v. Sternberg,* 213 N.C. 41, 43, 195 S.E. 88; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337; *Tysinger v. Dairy Products,* 225 N.C. 717, 723, 36 S.E. 2d 246; *Carr v. Lee, supra* [249 N.C. 712, 107 S.E. 2d 544]."

Similiarly, in *Keith v. Gas Co.,* 266 N.C. 119, 146 S.E. 2d 7, we said:

"The rule that, in passing upon a motion for judgment of nonsuit, the plaintiff's evidence must be taken to be true does not extend to an opinion by a witness, not present at the event, to the effect that a condition existed which is contrary to scientific truth so well established that the court would take judicial notice of it."

Upon a motion for judgment of nonsuit in a criminal action, the function of the court and its authority to consider the credibility of the evidence offered by the State, are the same as the function and authority of the court upon a similar motion in a civil action with reference to evidence offered by the plaintiff. *State v. Ormond,* 211 N.C. 437, 191 S.E. 22; *State v. Sigmon,* 190 N.C. 684, 130 S.E. 854; *State v. Fulcher,* 184 N.C. 663, 113 S.E. 769.

Without the testimony of Richard Melton, there would be a complete failure of the State's evidence to connect the defendant Miller with the offense with which he is charged. Melton's own testimony shows that he was never closer than 286 feet from the man whom he saw running along the side of the Oil Company building. He saw this man run once in each direction, stop at the front of the building, "peep" around it and look in Melton's direction. Melton did not then know Miller. Thus, his testimony is not that he recognized at that distance a man previously known to him, but that he saw for the first time a stranger. Some six hours later, he saw Miller in a police "lineup," so arranged that the identification of Miller with the man seen earlier would naturally be suggested to the witness.

Notwithstanding the fact that the exterior of the Oil Company building and the surrounding area were well lighted, it is apparent that the distance was too great for an observer to note and store in memory features which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of the guilt of such person to the jury.

It is to be noted that immediately after observing the man who ran beside the Oil Company building, Melton described him to the police as one substantially taller than the defendant Miller actually is and otherwise described him only as a man dressed in dark clothing.

Where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury, and the court's doubt upon the matter will not justify granting a motion for judgment of nonsuit, but upon the physical conditions shown here by the State's evidence, the motion should have been allowed.

Reversed.

WATSON *v.* NICHOLS.

JIMMY GREY WATSON, BY HIS NEXT FRIEND, EARL W. VAUGHN, PLAINTIFF, v. JAMES BRADFORD NICHOLS, MARION A. NICHOLS AND CHARLENE B. NICHOLS, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JAMES BRADFORD NICHOLS, ORIGINAL DEFENDANTS AND EMORY M. WATSON, MARY C. WATSON AND MITCHELL WATSON, ADDITIONAL DEFENDANTS.

(Filed 20 June, 1967.)

1. Parent and Child § 2—

Since an unemancipated infant who is a member of the household cannot maintain an action for negligence against his parents, in an action on behalf of an unemancipated child to recover for negligent injury from the power lawn mower of a neighbor, the defendants may not file a cross-action against the plaintiff's parents, either on the ground of primary negligence on the part of plaintiff's parents or for contribution, since such cross-action would indirectly hold the unemancipated minor's parents liable to him for the injury.

2. Parent and Child § 5— Responsibility for care of minor child rests upon parent when parent is present.

In this action on behalf of a four-year old child to recover for injuries from a power lawn mower operated by a child of a neighbor, defendants filed a cross-action against the minor plaintiff's older brother, alleging that the brother promised to keep the plaintiff out of the way of the mower and negligently failed to do so, but the cross-complaint further alleged that the minor plaintiff's parents were at the scene at the time and in charge of plaintiff during the episode. *Held:* The cross-action was properly dismissed upon demurrer, since responsibility for the care and safety of minor children falls on their parents when they are present, and any promise made by an older brother would not relieve the plaintiff's parents of that responsibility. As to whether one unemancipated infant may maintain an action against another unemancipated infant who is a member of the same household, *quære?*

APPEAL by original defendants from *Lupton, J.*, March 6, 1967 Civil Session, ROCKINGHAM Superior Court.

The plaintiff, Jimmy Grey Watson, age 4 years, by his next friend, instituted this civil action against James Bradford Nichols, age 13 years, and Marion A. and Charlene B. Nichols, his parents, to recover damages for the personal injury the infant plaintiff sustained by reason of the alleged negligent acts of James Bradford Nichols in backing a power driven lawn mower over the infant plaintiff, inflicting serious injuries to his foot. The plaintiff alleged Marion A. and Charlene B. Nichols, parents of James Bradford Nichols, were negligent in that they procured a power driven lawn mower, equipped with a seat for the operator, and permitted their son, James Bradford Nichols, to operate it in and about the yard of the Nichols home and the adjoining Watson home when they knew, or should have known, that he was inexperienced and uninstructed in the safe operation of this dangerous instrumentality and

that children, including the infant plaintiff, were accustomed to playing in and around both the Watson and Nichols residences and that the inexperienced operator, suddenly and without looking backward, reversed the mower and negligently backed the same over the infant plaintiff, inflicting serious injury.

The original defendants filed an answer and cross action in which they denied all negligence and attempted to interplead as additional defendants Emory M. Watson and Mary C. Watson, father and mother, and Mitchell Watson, infant brother of Jimmy Grey Watson, for the purpose of (1) having them declared primarily liable for any damages which the plaintiff may recover, or (2) having them held under G.S. 1-240 as joint tort feasors and be required to contribute to the payment of any judgment recovered by the plaintiff. The original defendants alleged as against the additional defendants that the father, mother and brother of the infant plaintiff were actively negligent in permitting James Bradford Nichols to enter their lawn with the mower and the original defendants were only passively negligent by the operation of the mower.

As against the additional defendants, the original defendants alleged that James Bradford Nichols, after mowing the Nichols yard, undertook to mow the Watson yard; that Mitchell Watson, age 10 years, promised James Bradford Nichols that he would look after the 4 year old plaintiff, and keep him out of the way of the mower; that if the original defendants were negligent, which they deny, then Emory M. and Mary C. Watson, individually and through their son and agent, Mitchell Watson, were negligent in permitting the infant plaintiff to fling himself "suddenly and without warning," and without the knowledge of the operator, James Bradford Nichols, in such manner as negligently to expose him to danger which proximately caused his injury.

The additional defendants filed a demurrer to the cross action which Judge Lupton sustained. The original defendants excepted and appealed.

Armistead W. Sapp, Jr., for Original Defendant Appellants

Jordan, Wright, Henson & Nichols by G. Marlin Evans and Perry C. Henson for Additional Defendant Appellees.

HIGGINS, J. This appeal is from the Superior Court judgment sustaining the demurrer to the cross action. In the cross action, the original defendants alleged, conditionally, that if they are held liable to the plaintiff, then Emory M. and Mary C. Watson, parents of the infant plaintiff, individually and through their agent, Mitchell Watson, were negligent and primarily liable to the plaintiff by per-

mitting him to approach the moving mower from behind without notice or warning to James Bradford Nichols, the operator; that the negligence of the additional defendants was primary and any negligence on the part of the original defendants was secondary.

The cross action alleged that the additional defendants, Emory M. and Mary C. Watson, are the parents of the plaintiff, age 4 years, and of Mitchell Watson, age 10 years, all of whom are members of the household. These allegations render the cross action demurrable as to the parents, Emory M. and Mary C. Watson.

An unemancipated infant, who is a member of the household, cannot maintain an action based on ordinary negligence against his parents. *Lewis v. Ins. Co.,* 243 N.C. 55, 89 S.E. 2d 788; *Redding v. Redding,* 235 N.C. 638, 70 S.E. 2d 676; *Small v. Morris,* 185 N.C. 577, 118 S.E. 12; 19 A.L.R. 2d 423. Since the parent is not liable in a direct action against him, he cannot be made liable by cross action. The demurrer was properly sustained as to the parents.

This Court has never passed on the question whether one unemancipated infant may maintain an action for negligence against another unemancipated infant who is a member of the same household. Courts which have passed on the question have generally held the action may be maintained. These actions usually involve injuries growing out of automobile accidents. *Midkiff v. Midkiff,* 201 Va. 829, 113 S.E. 2d 875 (1960); *Overlock v. Ruedemann,* 147 Conn. 649, 165 A. 2d 335 (1960); *Herrell v. Haney,* 341 S.W. 2d 574 (Tenn., 1960); *Emery v. Emery,* 45 Cal. 2d 421, 289 P. 2d 218 (1955); *Rozell v. Rozell,* 281 N.Y. 106, 22 N.E. 2d 254 (1939); *Munsert v. Ins. Co.,* 229 Wisc. 581, 281 N.W. 671 (1938).

At this time, and in this case, we do not find it necessary to pass on the question whether one infant member of a household may be held liable for a negligent injury to another infant member of the same household. The facts alleged in the cross action do not make out a case of liability against Mitchell Watson. In the cross action, the original defendants alleged:

> ". . . that plaintiff's parents were at their residence and in charge of plaintiff during the afternoon of Monday, the 6th day of September, 1965, and were present and at their residence and in charge of their children, including minor plaintiff, at all times when the infant defendant was operating the Rugg Company mower on the premises of the infant plaintiff and infant plaintiff's parents.
>
> * * *
>
> . . . the infant plaintiff, Jimmy Grey Watson, at the time when Emory M. and Mary C. Watson individually and through

their agent and son, Mitchell Watson, were carelessly and negligently failing to exercise any supervision of the infant plaintiff as was their duty to do, the infant plaintiff, in some manner unknown to these answering defendants, flung himself, suddenly and without warning, behind the power mower . . . so as to cause the power mower to back up and run over his right foot, and which action on his part was the sole proximate cause of all of the injuries complained of. . . ."

The allegations place the plaintiff, age 4 years, and the son, Mitchell Watson, age 10 years, at the home, with their parents, throughout the mowing operations. Ordinarily when parents are present, in charge of their children of tender years, responsibility for their care and safety falls on the parents. In this case the parents were at home. Both the plaintiff and Mitchell were under their control. Any promise made by Mitchell to take care of Jimmy would not relieve the parents of that responsibility. The allegations of the cross action are insufficient to state a cause of action against Mitchell Watson. The demurrer was properly sustained as to him for that reason. The judgment of the Superior Court sustaining the demurrer to the cross action against the three additional defendants was properly sustained.

Affirmed.

ELIZABETH WRIGHT FLEEK v. JOHN SHERWOOD FLEEK.

(Filed 20 June, 1967.)

1. Divorce and Alimony §§ 1, 22; Judgments § 1—

The courts of this State have jurisdiction of an action instituted by a resident plaintiff against a nonresident defendant for divorce, and have power in such action to award custody of the children of the marriage when the children are within the State, but service by publication cannot support a judgment *in personam* ordering defendant to pay a stipulated sum per month for the support of the children, and motion to quash the order for such payments is properly allowed upon defendant's motion upon special appearance.

2. Judgments § 1; Constitutional Law § 24—

A judgment *in personam* against a defendant served by publication is void as violating due process, which requires actual notice and an opportunity to be heard.

3. Process § 9—

Service by publication is in derogation of common law rights, and G.S. 1-98.2(3), providing for such service, must be strictly construed; even if a statute should be construed as authorizing a judgment *in personam* upon substituted service, such provision would be unconstitutional.

APPEAL by plaintiff from *Hasty, S.J.*, April 3, 1967 Assigned Civil Session, DURHAM Superior Court.

The plaintiff, Elizabeth Wright Fleek, a citizen and resident of Durham County, North Carolina, instituted this civil action in the Durham County Civil Court against her husband, John Sherwood Fleek, a resident either of Switzerland or Italy. The plaintiff's purpose in bringing the action was to obtain an absolute divorce from the defendant on the ground the parties separated and have lived separate and apart for the statutory period.

The plaintiff alleged the parties were married in Durham, North Carolina on June 18, 1953; that they separated on June 17, 1963; that two children were born of the marriage, John Sherwood Fleek, Jr. and Elizabeth Wright Fleek, who, since the separation, have been in the exclusive custody of the plaintiff in Durham County, North Carolina.

Service of process on the non-resident defendant was completed by publishing notice in a Durham County newspaper for the required period, and by mailing copies of the summons and complaint to the defendant at his last known addresses in Switzerland and in Italy.

Trial was had, the jury answered appropriate issues in favor of the plaintiff, and the Court entered judgment dissolving the bonds of matrimony between the parties; and awarding custody of the children to the plaintiff. The plaintiff made a motion in the cause for an order that the defendant be required to pay the sum of $500 per month for the support of each of the children. The plaintiff published notice in the newspaper and mailed copies to the defendant's last known addresses. The defendant, through counsel, entered a special appearance, moved to quash the service, and to deny the motion upon the ground the Court was without power to enter an *in personam* judgment in the absence of personal service of process on the defendant. Judge Bane granted the motion to dismiss upon the grounds alleged. The plaintiff appealed to the Superior Court. Judge Hasty, after hearing, affirmed the judgment of the Durham County Civil Court. The plaintiff appealed.

Powe, Porter & Alphin by E. K. Powe and Willis P. Whichard for plaintiff appellant.

Purrington, Joslin, Culbertson & Sedberry by William Joslin for defendant appellee.

HIGGINS, J. The plaintiff has insisted the service of process outside the State of North Carolina, under G.S. 1-98.2(3), gave the Court authority to enter judgment against the defendant, for the support of the children, although he is either in Switzerland or Italy. The statute provides:

> "Service of process by publication or service of process outside the State may be had in the following kinds of actions and special proceedings:
>
> (3) Those for annulment of marriage, divorce, adoption or custody of a minor child, or for any other relief involving the domestic status of the person to be served; * * *"

The plaintiff was a resident of North Carolina. The parties were married in this State and had lived here as husband and wife. Undoubtedly the Court had jurisdiction of the plaintiff and of the marriage status, and authority to grant the divorce. The children were before the Court in the actual custody of the plaintiff and the Court unquestionably had authority to award custody to her. The defendant's domestic status as a party to the marriage (a proceeding *quasi in rem*) was before the Court for adjudication. In a proper case, the Court may acquire jurisdiction of a non-resident defendant's rights to property in this State by attachment or by garnishment, but the Court is without power to enter a judgment *in personam* unless and until the defendant is before the Court in person, that is, by personal service of process, or by a general appearance before the Court. The terms of the statute relating to the "domestic status of the person to be served" do not give the Court authority to render a personal judgment. A judgment *in personam* on such service would violate due process which requires actual notice and an opportunity to be heard.

Service of process by publication is in derogation of common law rights and the statute providing for such service must be strictly construed. *Harrison v. Hanvey,* 265 N.C. 243, 143 S.E. 2d 593; *Jones v. Jones,* 243 N.C. 557, 91 S.E. 2d 562; *Com'rs of Roxboro v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144. In *Surratt v. Surratt,* 263 N.C. 466, 139 S.E. 2d 720, this Court stated:

> "We hold, under the facts revealed by the record, the defendant was a non-resident of North Carolina at the time service of process was made upon him outside the State and that the judgment entered against the defendant at the December Session

1963 of the Superior Court of Randolph County was not a judgment *in personam*, and that the orders adjudging the defendant in contempt for failing to comply therewith were improvidently entered and are hereby reversed and set aside."

In the case of *Lennon v. Lennon*, 252 N.C. 659, 114 S.E. 2d 571, this Court stated that the full faith and credit clause of the Federal Constitution does not entitle a judgment *in personam* to extra-territorial effect when such judgment is rendered without jurisdiction over the person sought to be bound. In adopting the language in the case of *May v. Anderson*, 345 U.S. 528, 97 L. Ed. 1221, this Court stated:

"It is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam* to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."

Lee, in his work, NORTH CAROLINA FAMILY LAW, Sec. 99, states:

". . . while a divorce decree may be entitled to full faith and credit in all states so far it affects a dissolution of the marriage, yet it may be invalid with respect to economic or property incidents of the marriage.

A valid divorce which has been obtained in the state of domicile of only one of the parties through the use of constructive or substituted service of process, is not entitled to full faith and credit with respect to an adjudication or destruction of personal and property rights incidental to the marriage relation. The court must gain jurisdiction *in personam* over the defendant, as by a general appearance or personal service within the divorcing state, in order to adjudicate separable personal rights and duties." (citing numerous cases in footnote.)

A pertinent statement of the rule concerning jurisdiction over an absent father-husband is contained in 24 Am. Jur. 2d, Divorce and Separation, Sec. 828, as follows:

"While a court may gain jurisdiction to grant a divorce on constructive service, it cannot gain jurisdiction upon such a service which will support a judgment binding the party served personally, at least not if he is a non-resident."

In 24 Am. Jur. 2d, Divorce and Separation, Sec. 542, after stating that a court may enter a valid judgment of divorce without ever

acquiring jurisdiction over the person of the defendant, it is then stated:

> "Such jurisdiction, however, although sufficient to support a decree changing the marital status, will not necessarily sustain a judgment for alimony and costs. A decree for the payment of money as alimony or for the payment of costs is void in the absence of actual jurisdiction over the person or property of the one against whom it is awarded."

For the reasons assigned and upon the basis of the authorities cited and many others of like import, the judgment of the Superior Court of Durham County is

Affirmed.

ALBERT CLIFTON SHAW v. SARAH BAXLEY, OSCAR BAXLEY, GUARDIAN AD LITEM FOR SARAH BAXLEY, A MINOR, OSCAR BAXLEY, INDIVIDUALLY, AUBERT BLAKE WARWICK, CARR OIL COMPANY, A CORPORATION, AND ROBERT SINGLETARY.

(Filed 20 June, 1967.)

1. Torts § 4—

The right of contribution between joint tort-feasors is solely statutory and may be enforced only in accordance with the procedure set forth in the statute.

2. Same; Statutes § 5—

The first two paragraphs of G.S. 1-240 are interrelated and must be construed *in pari materia*, and therefore when plaintiff has recovered judgment against defendants as joint tort-feasors, no one of defendants is entitled to file petition for a determination of the defendants' respective liabilities *inter se* unless and until such defendant has first paid the judgment and had it transferred to a trustee for his benefit.

APPEAL by defendants Carr Oil Company and Robert Singletary from an order entered by *McKinnon, Resident Judge*, at LUMBERTON, N. C., on December 19, 1966.

Plaintiff was injured February 20, 1965, as the result of a collision between a 1960 Falcon, operated by defendant Warwick, and a tractor-trailer operated by defendant Singletary. Plaintiff, a passenger in the Falcon, instituted this action to recover damages, alleging his injuries were proximately caused by the concurrent negligence of Warwick and of Singletary. He alleged Warwick was act-

ing as agent for defendant Sarah Baxley and Oscar Baxley; that Singletary was acting as agent for defendant Carr Oil Company.

Plaintiff's said action was tried before Judge McKinnon at the July 1966 Session of the Superior Court of Robeson County. All issues raised by the pleadings were submitted to and answered by the jury. The jury found Warwick was *not* acting as agent of defendant Oscar Baxley. All other issues were answered in favor of plaintiff. He was awarded damages in the amount of $5,000.00.

In accordance with said verdict, the court entered judgment "that the plaintiff have and recover of the defendants, Sarah Baxley, Oscar Baxley, Guardian *ad litem* for Sarah Baxley, Aubert Blake Warwick, Carr Oil Company, and Robert Singletary, jointly and severally the sum of FIVE THOUSAND EVEN ($5000.00) DOLLARS and the costs of this action to be taxed by the Clerk."

Carr Oil Company and Robert Singletary gave notice of appeal. Subsequently, by *consent* order, their appeal was dismissed.

On October 19, 1966, Carr Oil Company and Robert Singletary filed a petition in the cause in which they set forth in substance the following: That the defendants against whom said judgment was entered "have been unable to agree as to their proportionate liability"; that they "are informed and believe that . . . SARAH BAXLEY, OSCAR BAXLEY, guardian *ad litem* for Sarah Baxley, and AUBERT BLAKE WARWICK are insolvent and that they cannot be forced under execution of the Court to contribute to the payment of the Judgment"; that Carr Oil Company and Singletary "are solvent and can satisfy the Judgment"; and that "it is just and proper for the Court to declare in this action the proportionate part each judgment debtor should pay in order that further litigation might be avoided."

Defendants Sarah Baxley and Oscar Baxley, guardian *ad litem* for Sarah Baxley, a minor, demurred to and moved to dismiss the petition. Defendant Warwick answered the petition; and, at the hearing, demurred *ore tenus* to and moved to dismiss the petition. Judge McKinnon, being of the opinion the petitioners had not alleged facts sufficient to entitle them to relief, dismissed the petition. Petitioners excepted and appealed.

Marshall & Williams and A. Dumay Gorham, Jr., for defendant appellants Carr Oil Company and Robert Singletary.

Henry & Henry for defendant appellees Sarah Baxley and Oscar Baxley, guardian ad litem for Sarah Baxley, a minor.

Johnson, McIntyre, Hedgpeth, Biggs & Campbell for defendant appellee Aubert Blake Warwick.

BOBBITT, J. Plaintiff (Shaw) is not a party to this appeal. Under the judgment establishing his right to "recover of the defendants, Sarah Baxley, Oscar Baxley, guardian *ad litem* for Sarah Baxley, Aubert Blake Warwick, Carr Oil Company, and Robert Singletary, jointly and severally," each of these judgment debtors became and is obligated to plaintiff for the payment of the full amount thereof. The judgment is based upon their liability to plaintiff as joint tort-feasors. *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911; *Simpson v. Plyler,* 258 N.C. 390, 393, 128 S.E. 2d 843, 845.

G.S. 1-240, on which petitioner relies, provides:

"§ 1-240. PAYMENT BY ONE OF SEVERAL; TRANSFER TO TRUSTEE FOR PAYOR. — In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if *one* of the judgment debtors *shall pay the judgment creditor,* either before or after execution has been issued, *the amount due on said judgment,* and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity, (and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant.)

"If the judgment debtors do not agree as to their proportionate liability, and it be alleged in such action by petition that any judgment debtor is insolvent or is a nonresident of the State and cannot be forced under the execution of the court to contribute to the payment of the judgment, the court shall, *in the action in which the judgment was rendered,* after notice to the defendants or such of them as may be within the jurisdiction of the court, submit proper issues to a jury to find the facts arising on such petition and any

answer that may be filed thereto, and shall, upon such verdict and any admissions in the petition and answer, enter judgment declaring the proportionate part each judgment debtor shall pay.

"Any judgment creditor who refuses to transfer a judgment in his favor to a trustee for the benefit of a judgment debtor who shall tender payment and demand in writing a transfer thereof to a trustee to preserve his rights in the same action, as contemplated by this section, shall not thereafter be entitled to an execution against the judgment debtor so tendering payment." (Our italics.)

G.S. 1-240 is based on Chapter 194, Public Laws of 1919, codified as C.S. 618, as amended by Chapter 68, Public Laws of 1929. The provisions within parentheses were added by the 1929 amendment. They are not directly involved. Here the plaintiff sued *all* alleged joint tort-feasors.

At common law, as between joint tort-feasors, there was no right of contribution. *Hayes v. Wilmington,* 239 N.C. 238, 242, 79 S.E. 2d 792, 795, and cases cited. See Comment Note, "Contribution between negligent tortfeasors at common law," 60 A.L.R. 2d 1366. In this jurisdiction, the common law rule has been modified by G.S. 1-240 so as to provide for enforcement of contribution *as between joint tort-feasors* in accordance with its provisions. *Herring v. Jackson,* 255 N.C. 537, 543, 122 S.E. 2d 366, 372.

G.S. 1-240, quoted above, consists of three paragraphs. Petitioners stress the procedure authorized in the second paragraph. However, the provisions now constituting the first and second paragraphs (exclusive of the provision added by said 1929 amendment) were included in a single paragraph (Section 1) of said act of 1919. The two paragraphs are interrelated, are *in pari materia,* and must be considered and construed together.

Under the provisions now constituting the first paragraph of G.S. 1-240, *if* said judgment were paid by one of the judgment debtors, *e.g.,* Carr Oil Company, it would be the duty of the judgment creditor to transfer the judgment without recourse to a trustee for the benefit of Carr Oil Company, and such transfer would preserve the lien of the judgment and keep the same in full force against any judgment debtor who did not pay his or her proportionate part. In such case, if the judgment debtors did not agree as to their proportionate liabilities, the Carr Oil Company, in a post-judgment proceeding in this action, could petition for and obtain a determination as to the amount it was entitled to recover from other judgment debtors to the end that execution in favor of the trustee to whom the judgment was assigned for its benefit would issue for the amounts so determined.

We are of opinion and so hold that the provisions now constituting the second paragraph of G.S. 1-240, relating to a determination of proportionate liabilities, do not apply unless and until one of the judgment debtors pays the amount thereof and has the judgment assigned to a trustee for his benefit. Only when this has been done may such judgment debtor seek a determination, under conditions then existing, of the amount due him by other judgment debtors.

The petitioners do not allege that they have paid all or any part of the judgment. Nor do they allege that the judgment has been assigned to a trustee for their benefit. Hence, their petition is fatally defective. The order dismissing the petition is affirmed.

Petitioners' brief cites decisions of this Court in which the status of the liability insurance carrier of a joint tort-feasor has been considered. Since their petition contains no reference to a liability insurance carrier, these decisions are not pertinent to the question presented on this appeal.

Affirmed.

CATHERINE BOYD v. DR. CHARLES M. KISTLER.

(Filed 20 June, 1967.)

1. Physicians and Surgeons § 16—

The doctrine of *res ipsa loquitur* does not apply in malpractice cases and a showing of an injurious result is not enough, but plaintiff must offer proof of facts and circumstances which permit a legitimate inference of actionable negligence on the part of the physician, surgeon, or dentist.

2. Same—

Plaintiff's evidence tended to show that plaintiff entered a hospital for oral surgery and new dentures, that while she was under anesthesia defendant dentist completed the work, that after the operation she discovered a red mark on her left lip running to her cheek, which mark developed into a permanently disfiguring scar, and that the red mark corresponded to an arm of the prop used to keep her mouth open during the operation. *Held:* Nonsuit was correctly allowed, there being no evidence as to when or how the injury occurred and who caused it.

APPEAL by plaintiff from *Mallard, J.*, Second October 1966 Civil Session, WAKE Superior Court.

The plaintiff, Catherine Boyd, instituted this civil action for damages against the defendant, Dr. Charles M. Kistler, alleging the

damages were proximately caused by the defendant's negligence. In substance, the plaintiff alleged that she employed the defendant as her dentist, "to extract all of the plaintiff's teeth and replace them with artificial . . . dentures." During the process of extraction and replacement, the plaintiff was under anesthesia.

> "That while the defendant was performing the aforesaid extraction and replacement of the plaintiff's teeth he negligently injured the outside area of plaintiff's lip and cheek by bruising, burning or lacerating the same, the same being an area outside of the work the defendant was employed to perform and an area where the defendant had no right, authority, or reason to work."

The plaintiff further alleged the injury resulted in a permanently disfiguring and repulsive scar which caused embarrassment.

By answer, the defendant admitted the relationship of dentist and patient, the contract to remove and replace the plaintiff's teeth, and his performance of that undertaking. All other allegations were denied.

The plaintiff testified her regular physician found all her teeth were bad and should be removed. She employed the defendant to do the extraction and the fitting of the artificials. Dr. Kistler, in his office on different occasions, extracted her back teeth two or three at a time. However, he had her admitted to Rex Hospital so that the front teeth might be removed and an artificial plate fitted while she was under anesthesia. At the hospital, Dr. Gaskin administered the anesthetic. The plaintiff testified she realized that a mouth prop would be used to keep her mouth open while she was asleep so that the extraction could be made and the new dentures fitted. "I have seen the mouth prop. The outside arm fits similar to the scar on my face." The plaintiff went to the operating room about 7:30 in the morning. The work was completed about 10:30.

After the plaintiff regained consciousness, her mouth was sore. A red streak on her lip and cheek was irritated or burned. After treatment by the application of ointment, a scab formed which, when removed, left a permanent scar. The plaintiff was the only witness who testified in the case. At the close of her testimony the Court, on defendant's motion, entered judgment of involuntary nonsuit, from which plaintiff appealed.

Yarborough, Blanchard, Tucker & Yarborough by Irvin B. Tucker, Jr., for plaintiff appellant.

Smith, Leach, Anderson & Dorsett by John H. Anderson and C. K. Brown, Jr., for defendant appellee.

HIGGINS, J. This action is unusual by reason of what the complaint does not allege and what the evidence does not disclose. The complaint does not charge or suggest the defendant lacked the requisite degree of learning, skill, or ability ordinarily possessed by dentists in the vicinity of Raleigh; or that he failed to exercise reasonable care and diligence in the use of these requisite qualities in the treatment of the plaintiff's case; or that he failed to use his best judgment in that treatment. She simply alleged that the defendant contracted to remove her teeth and fit new dentures and that in performing these duties ". . . he negligently injured the outside area of (her) lip and cheek by bruising, burning or lacerating the same." Significantly, she alleges her injury was disassociated from the work the defendant was employed to do. On the contrary, she alleged her injury was outside the area involved in removing and replacing teeth.

The plaintiff testified she went to the operating room at 7:30 in the morning, Dr. Gaskin administered the anesthetic, the work was completed and she left the operating room around 10:30 in the morning. The old teeth were out and the replacements were in. The left side of her face was burning. "I was able to look in the mirror that afternoon at about 3:00. I saw a red mark . . . on my . . . left lip running to the cheek." Dr. Kistler prescribed a white salve treatment. A scab developed which came off, leaving a scar. The plaintiff does not know what caused the red streak, whether bruise, burn, or laceration. She does not know how she received this injury or the agency that caused it. She knows it was not there when she entered the operating room. It was there at 3:00 in the afternoon. The prop used to keep the mouth open while she was unconscious had an arm outside the mouth which appeared to fit the scar and may have caused it. The plaintiff fails to offer evidence that the device was defective or that its use was not entirely proper in her case.

In the cases which this Court has said should go to the jury, the evidence disclosed much more than appears in this case. In *Pendergraft v. Royster,* 203 N.C. 384, 166 S.E. 285, the evidence permitted the inference the operating surgeon had left a part of a broken drainage tube in the body of the patient after the operation. In *Covington v. James,* 214 N.C. 71, 197 S.E. 701, the plaintiff alleged and offered evidence which permitted the inference the defendant, in treating the plaintiff for a simple fracture of a small bone in the leg, negligently broke a larger bone and failed to discover this break and remedy it until the break had abscessed and had passed the reuniting and healing stage. In *Mitchell v. Saunders,* 219 N.C. 178, 13 S.E. 2d 242, the surgeon had left a gauze absorption sponge in the

body when he closed the incision. In *Buckner v. Wheeldon,* 225 N.C. 62, 33 S.E. 2d 480, the physician put a cast on a broken leg without removing the dirt and sand from an exposed broken bone which had protruded through the flesh. Later, abscess developed, disclosing the presence of the dirt and sand in the wound which had been enclosed in a cast. In *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508, the recovery was denied because the action was barred by the statute of limitations.

To warrant the submission of a malpractice case to the jury, there must be proof of facts or circumstances which permit a legitimate inference of actionable negligence on the part of the physician, surgeon, or dentist. A showing of an injurious result is not enough. "The doctrine of *res ipsa loquitur* cannot be relied on to supply deficiencies in the proof." *Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617; *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762; *Hawkins v. McCain,* 239 N.C. 160, 79 S.E. 2d 493; *Grier v. Phillips,* 230 N.C. 672, 55 S.E. 2d 485; *Smith v. Wharton,* 199 N.C. 246, 154 S.E. 12. Parker, C.J., in *Belk v. Schweizer,* 268 N.C. 50, 149 S.E. 2d 565, and Lake, J., in *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861, have analyzed and discussed our decisions in malpractice cases and have fully documented the decisions, by citation of authorities from this and other jurisdictions.

The plaintiff alleged and testified she entered the hospital for oral surgery and new dentures. After she was already asleep, Dr. Kistler completed, to the plaintiff's satisfaction insofar as the record discloses, the services which he had undertaken to render. Several hours later, she had a red streak on her lip and cheek. What or who caused it, the record does not disclose. By investigation, the plaintiff surely could have obtained evidence as to when and how the injury occurred and who caused it. No doubt the plaintiff's able counsel knew of their right to make inquiry by adverse examination of witnesses and the examination of documents.

The plaintiff did not offer evidence sufficient to entitle her to have the jury consider it. Nonsuit was required and judgment to that effect is

Affirmed.

N. J. BRYANT v. DR. R. J. DOUGHERTY.

(Filed 20 June, 1967.)

1. Appeal and Error § 60; Pleadings § 34—

Where it is determined on appeal that a certain state of facts does not constitute a defense to plaintiff's action, and the cause is remanded, defendant's allegation thereafter of the same state of facts as a defense is properly stricken.

2. Courts § 3; Pleadings § 34; Judgments § 19—

The Superior Court has no jurisdiction to transfer to another tribunal a matter over which the Superior Court has jurisdiction and such other tribunal has none, and therefore an order of the Superior Court transferring a cause within its jurisdiction to the Industrial Commission is void, and such order, even though no appeal is entered therefrom, cannot constitute a bar, and allegations that such an order constituted *res judicata* are properly stricken on motion.

3. Judgments § 30; Pleadings § 34—

An award of compensation to an employee against his employer and the employer's insurance carrier for an injury arising out of and in the course of the employment does not purport to adjudicate the employee's claim against a physician for damages sustained from the negligent treatment of the injury by the physician, and therefore allegations setting up the award of the Industrial Commission as a bar to the action for malpractice are properly stricken.

4. Courts § 2; Pleadings § 34—

Subsequent to a void order of the Superior Court transferring the cause to the Industrial Commission, the plaintiff requested the Commission to hear the matter. *Held:* Plaintiff's request that the Commission hear the matter could not confer jurisdiction on the Commission, since jurisdiction may not be conferred on a court by consent, and the order of the Commission dismissing the action cannot constitute *res judicata* of the plaintiff's right to proceed with the action in the Superior Court.

5. Same; Limitation of Actions § 12—

A void order purporting to transfer the cause from the Superior Court which had jurisdiction to the Industrial Commission which had no jurisdiction, does not take the cause out of the Superior Court, and the cause remains in the Superior Court so that when a voluntary nonsuit is thereafter entered in the Superior Court another action entered within a year is not barred. G.S. 1-25.

APPEAL by defendant from *Brock, S.J.*, at the September 1966 Civil Session of MOORE.

Upon the former appeal in this action, 267 N.C. 545, 148 S.E. 2d 548, a judgment of the superior court dismissing this action for want of jurisdiction in such court was reversed. The matter then came on for further hearing in the superior court upon the motion of the plaintiff to strike five further answers and defenses included

in the answer filed by the defendant. Upon such hearing, each of the said further answers and defenses was "overruled"; that is, in effect, the motion to strike each such further answer and defense was allowed.

The allegations of the complaint, the answer in chief, and each of the five further answers and defenses may be briefly summarized as follows:

I. *The Complaint.* The plaintiff sustained an injury by accident arising out of and in the course of his employment. He consulted the defendant, a physician, with reference to such injury. By negligence of the defendant in his treatment of the plaintiff, the plaintiff's injury was aggravated, causing him damage for which he sues. This action was instituted within 12 months after the plaintiff took a judgment of voluntary nonsuit in a former action brought for the same cause in the Superior Court of Moore County.

II. *Answer in Chief.* The superior court had no authority to enter the judgment of voluntary nonsuit in the former action. The defendant treated the plaintiff for the injury described in the complaint. All allegations of negligence by the defendant in such treatment are denied.

III. *First Further Answer and Defense.* At the time of the plaintiff's injury, he and his employer were subject to the provisions of the North Carolina Workmen's Compensation Act. The defendant examined and treated the plaintiff at the request of the employer and was paid for his services by the employer's compensation insurance carrier. If the plaintiff sustained injuries as the result of any negligence by the defendant in his treatment of the plaintiff, the alleged cause of action therefor is within the exclusive jurisdiction of the North Carolina Industrial Commission and the superior court is without jurisdiction of this action.

IV. *Second Further Answer and Defense.* On 30 October 1962, the plaintiff instituted an action in the superior court to recover damages from the defendant on account of the matters and things alleged in the present complaint. [This is the former action referred to in the present complaint.] At the September 1963 Session of the superior court, McConnell, J., adjudged as a matter of law that such former action was within the exclusive jurisdiction of the North Carolina Industrial Commission and thereupon entered a judgment that such former action "be retired from the civil issue docket and that the same be and it is hereby transferred to the North Carolina Industrial Commission for further proceedings according to law." The plaintiff did not appeal from that judgment. It "is *res judicata* of all the matters and things alleged in the complaint filed by the

plaintiff in this action," and is pleaded in bar of the plaintiff's right to maintain this action.

V. *Third Further Answer and Defense.* The plaintiff filed with the Industrial Commission a claim against his employer and its compensation insurance carrier for compensation in conformity with the Workmen's Compensation Act. Such claim was heard by the Commission, which issued an award of compensation to the plaintiff. The plaintiff did not appeal therefrom, but received and accepted the compensation so awarded him from his employer's insurance carrier. Such award was in full payment of all compensation to which the plaintiff was entitled on account of his injury and is "*res judicata* of all the matters and things alleged in the complaint filed by the plaintiff in this action." It is pleaded in bar of his right to maintain this action.

VI. *Fourth Further Answer and Defense.* Subsequent to the judgment of McConnell, J., in the former action, the plaintiff requested the Industrial Commission to hear its docket entitled "*N. J. Bryant vs. West End Table Company and Lumbermens Mutual Casualty Company*" [the matter in which the Commission had previously entered its award of compensation]. The Commission set that matter for a further hearing and, at such hearing, entered its order reciting its finding [which was correct] that the plaintiff therein was not seeking a further award from his employer or his employer's insurance carrier but was seeking recovery from the present defendant, for which reason the Commission dismissed the employer and its insurance carrier as party defendants, made the present defendant a party to that proceeding and thereupon dismissed the entire proceeding "for lack of jurisdiction by the Industrial Commission." The plaintiff did not appeal from such order of the Industrial Commission. It "is *res judicata* of all matters and things alleged in the complaint filed by the plaintiff in this action," and is pleaded in bar of the right of the plaintiff to maintain this action.

VII. *Fifth Further Answer and Defense.* The right of the plaintiff to maintain this action is barred by the Three Year Statute of Limitations.

William D. Sabiston, Jr., for defendant appellant.
Seawell & Seawell & Van Camp for plaintiff appellee

LAKE, J. Upon the former appeal in this action, 267 N.C. 545, 148 S.E. 2d 548, we had before us the judgment entered by Riddle, S.J., dismissing the action for lack of jurisdiction in the superior court to hear and determine it for the reason that the matter was

within the exclusive jurisdiction of the Industrial Commission. We reversed the judgment, saying:

> "The Workmen's Compensation Act does not confer upon the Commission jurisdiction to hear and determine an action, brought by an injured employee against a physician or surgeon, to recover damages for injury due to the negligence of the latter in the performance of his professional services to the employee. G.S. 97-26 relates to the right of the employee to recover damages or benefits under the Act from the employer, and so from the insurance carrier of the employer. It does not impose liability upon the physician or surgeon or relieve him thereof.
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> "Since the Workmen's Compensation Act does not abrogate the employee's common law right of action against the attending physician or surgeon, and does not confer upon the Industrial Commission jurisdiction to hear and determine such action, the superior court had jurisdiction to do so, and the judgment dismissing this action for want of jurisdiction in the superior court was erroneous."

The question of the sufficiency of the defendant's First Further Answer as a defense to the cause of action alleged in the complaint was, therefore, determined by our decision on the former appeal and there was no error in the order now before us adjudging that such First Further Answer is overruled; *i.e.*, stricken.

Since the Superior Court of Moore County had jurisdiction over the former action and the North Carolina Industrial Commission had no jurisdiction to hear and determine it, the judgment of McConnell, J., that it "be retired from the civil issue docket" of the superior court and be "transferred to the North Carolina Industrial Commission for further proceedings according to law" was void. The superior court has no jurisdiction to transfer to another tribunal for trial and determination a matter over which the superior court has jurisdiction and such other tribunal has none. This order by McConnell, J., did not purport to dismiss the former action or to determine its merits, but only to transfer it to the Industrial Commission, which the superior court had no power to do. There was, therefore, no error in the order now before us in determining that the Second Further Answer is not sufficient to constitute the defense to the cause of action alleged in the complaint and adjudging that such Second Further Answer be overruled; *i.e.*, stricken.

The original order of the Industrial Commission awarding compensation to the plaintiff was an award against his employer and

the employer's insurance carrier. As we stated in our opinion upon the former appeal, this was a determination of the plaintiff's rights against his employer and the latter's insurance carrier, not a determination of his rights against the defendant on account of the matters and things alleged in his present complaint. The matters now alleged are not *res judicata* by reason of that award. Consequently, there was no error in the order now before us in the determination that the Third Further Answer does not constitute a defense to the cause of action alleged in the present complaint and that it be overruled; *i.e.,* stricken.

Since the order of McConnell, J., purporting to "retire" the former action from the civil issue docket of the superior court and to transfer it to the Industrial Commission, for hearing and determination, was void, the Industrial Commission thereby acquired no jurisdiction over such former action. It is immaterial that subsequent to such order by McConnell, J., the plaintiff requested the Industrial Commission to hear the matter since jurisdiction over the subject matter of an action cannot be conferred by consent of the parties. *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673, and cases therein cited. The cause of action alleged in the present complaint is, therefore, not *res judicata* by reason of the order of the Industrial Commission entered with reference to the former action. There was no error in the order now before us in the holding that the defendant's Fourth Further Answer is not a sufficient defense to the cause of action alleged in the present complaint and that it be overruled; *i.e.,* stricken.

Since the order of McConnell, J., purporting to "retire" the former action from the civil issue docket of the Superior Court of Moore County and to transfer it, for hearing and determination, to the Industrial Commission was a nullity, the former action remained in the Superior Court of Moore County until the judgment of voluntary nonsuit was entered therein in January 1965. That judgment was, therefore, a valid judgment of voluntary nonsuit. The plaintiff having instituted the present action within a year after the entry of that judgment, namely, 16 December 1965, it was entered within the time allowed by G.S. 1-25. There was, therefore, no error in the order now before us by reason of the holding that the defendant's Fifth Further Answer is overruled; *i.e.,* stricken.

Affirmed.

STATE v. MICHAEL LAMAR MITCHELL.

(Filed 20 June, 1967.)

1. Criminal Law § 26—

Defendant's plea of former jeopardy upon his second trial obtained as a result of a post-conviction hearing upon defendant's petition is untenable.

2. Criminal Law § 70—

The victim's testimony that he knew defendant was the person who had taken his billfold because defendant had admitted taking the billfold *held* incompetent when the record discloses that defendant's asserted admission was made to an officer and that the victim was not even present at the time, and the identification of defendant as the culprit being the crucial question, the admission of the incompetent hearsay testimony must be held prejudicial.

3. Criminal Law §§ 71, 79—

Defendant's incriminating statement made upon interrogation by an officer is erroneously admitted when the evidence upon the *voir dire* discloses that the statement was made without defendant having been advised of his right to remain silent, his right to the presence of an attorney, and his right to have counsel appointed for him if he is unable to employ an attorney, and any evidence obtained as a result of such admission is also incompetent.

4. Criminal Law § 91—

Where testimony admitted over objection is of such an incriminating nature that its prejudicial effect cannot be erased from the minds of the jury, the court's subsequent instruction to the jury that the jury should not consider such evidence cannot be held to have cured the error.

APPEAL by defendant from *Bailey, J.*, 12 December 1966 Session of CUMBERLAND.

Defendant was convicted at the 15 June 1964 Criminal Session of Cumberland upon indictments charging felonious assault and armed robbery. In each case, the alleged vicitm was Eugene Yeatts. On the charge of armed robbery, defendant received a sentence of 7-9 years in State Prison; on the charge of felonious assault, a sentence of 5-7 years, this sentence to begin at the expiration of the sentence imposed for the armed robbery. As the result of a post-conviction hearing held under G.S. 15-217 *et seq.*, these sentences were vacated. Defendant had been tried without benefit of counsel. On 31 August 1966, a new trial was ordered on the original bills of indictment. When the case was called for retrial at the December 1966 Criminal Session, counsel for defendant moved that the charges against him be dismissed, for that "jeopardy attached to defendant at the June 15, 1964 Criminal Term of the Superior Court of Cumberland County on the two indictments. . . ." The plea of former

jeopardy was overruled, and defendant entered a plea of not guilty as to both charges. Upon the trial, the State offered evidence tending to show:

About 4:00 in the morning on 9 April 1964, the prosecuting witness, Eugene Yeatts, was seated in his automobile, which was stopped in the middle of Pearl Street near its intersection with Bragg Boulevard. Defendant Mitchell, a Negro man, was standing in the middle of the street on the driver's side. Defendant had never seen him before. Yeatts reached out to shut the door before leaving. When he did, defendant pulled a .25-caliber automatic pistol from his pocket, poked Yeatts in the ribs twice, and told him to move over in the seat. Yeatts leaned over, but before he could move to the other side, defendant shot him. The shot penetrated Yeatts' left arm, ranged up to the back of his head, came out, and went through the glass in the opposite door. Yeatts lay in the seat for an indeterminate time. Before he passed out, however, he felt someone "fumbling around in his pockets." He came to and then managed to drive off. In the meantime, defendant had disappeared. Yeatts drove up Pearl Street until he saw a porch light burning. He went to the door and requested the man who answered to call the police. The police took him to the hospital, where he discovered that his pocketbook had been taken from him.

After his wounds were treated, between 7:00 and 7:30 a.m. on 9 April 1964, the police took Yeatts to the police station, where defendant was in custody. He was directed to walk by the door of a room in which defendant and two officers were seated, to see if he could identify defendant as the man who had shot him. Yeatts identified defendant as the man. The officers had Yeatts' pocketbook, which had contained no money at the time it was taken from him. The police retained the pocketbook but gave Yeatts his driver's license from it.

About 5:00 a.m. on 9 April 1964, Officer Byers of the Fayetteville Police Department had seen defendant in a telephone booth about a mile from the intersection of Pearl Street and Bragg Boulevard. The officer was "looking for a subject," and he continued to observe defendant. He saw him step from the booth and lay a pistol down on the sidewalk. The officer placed defendant under arrest and sent him to the police station by Officer Brown. Defendant was sitting with Officer Brown in the detective's room when Yeatts identified him.

On cross-examination, the following exchange took place between Yeatts, defendant's counsel, and the judge:

"Q. I say right now, you do not know that this man took your billfold, do you?
"A. Yes, he did; he admitted he took it.
"MR. GILLIAM: Motion to strike, Your Honor.
"COURT: Denied.

DEFENDANT'S EXCEPTION #11.

"Q. He didn't admit it to you, did he?
"A. I am sorry; I didn't mean to answer it that way.
"Q. You haven't had any conversation with him directly, yourself, have you?
"A. No. He was standing at the car there only, when he was.
"Q. And, so your previous statement was on what somebody told you and not something you know, isn't it?
"A. True.
"MR. GILLIAM: Renew the motion to strike, Your Honor.
"COURT: Denied.

DEFENDANT'S EXCEPTION #12."

R. B. Evans, a city detective, testified in the presence of the jury that early in the morning of 9 April 1964 he saw defendant for the first time at Godwin's Realty Company on Bragg Boulevard in the custody of Officers Byers and Brown. At that time, he had a conversation with defendant. At this point in his testimony, the court excused the jury and Officer Evans told counsel and the court that he had questioned defendant at Godwin Realty Company and, as a result of his questions, defendant showed him where he had thrown Yeatts' billfold. In response to questions from the court, Evans said that he did not warn defendant of his right to remain silent before questioning him, but he did tell him that anything he said could be used *for or against* him.

The jury returned, and, over the objection of defendant, the court permitted Evans to testify that in the course of his investigation he found a billfold beside the building on the Godwin Realty Company premises. For the purpose of corroborating Yeatts, the court permitted Evans to testify that Yeatts had identified the billfold as being his.

Defendant offered no evidence. At the conclusion of the testimony, the court dismissed the charge of armed robbery, and instructed the jury as follows:

"Now, Officer Evans, while on the stand, testified as to finding a wallet, later identified by Mr. Yeatts, in the vicinity of Godwin Realty Company. So, as far as I am concerned, that evidence

would relate only to the armed robbery charge, which I have dismissed, and I am now directing you not to regard the evidence or to consider it for any purpose whatsoever in your deliberations and I am striking that out."

The jury returned a verdict of guilty as charged in the bill of indictment charging felonious assault. From a sentence of 5-7 years, defendant appeals.

T. W. Bruton, Attorney General; Ralph Moody, Deputy Attorney General, for the State.

J. Duane Gilliam for defendant.

SHARP, J. Defendant's first assignment of error is that the court erred in overruling defendant's plea of former jeopardy. This assignment is without merit. We have repeatedly held:

> "When, in either a post-conviction hearing or a *habeas corpus* proceeding, *at the prisoner's request,* the court vacates a judgment against him and directs a new trial, the prisoner waives his constitutional protection against double jeopardy, and he may be tried anew on the same indictment for the same offense. In such case, a plea of former jeopardy will avail him nothing. *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Gainey,* 265 N.C. 437, 144 S.E. 2d 249; *State v. Merritt,* 264 N.C. 716, 142 S.E. 2d 687; *State v. White,* 262 N.C. 52, 136 S.E. 2d 205."

State v. Case, 268 N.C. 330, 332, 150 S.E. 2d 509, 511.

By Assignment of Error No. 6, defendant challenges the admissibility of Detective Evans' statement to the jury that at Godwin Realty Company he found a billfold which Yeatts identified as his. Assignment of Error No. 7, based on Exceptions 11 and 12, is that the court erred in refusing to strike from the evidence Yeatts' statement that somebody had told him defendant had admitted taking his pocketbook. These assignments of error must be sustained.

Yeatts' statement was rank and admitted hearsay. *State v. Lassiter,* 191 N.C. 210, 131 S.E. 577; Stansbury, N. C. Evidence § 138 (2d Ed., 1963). When considered in conjunction with the evidence of Detective Evans, its prejudicial effect is apparent. Evans testified, without objection, that he first saw defendant at Godwin Realty Company early in the morning of 9 April 1964. Thereafter, over objection, he testified before the jury that at Godwin Realty Company he found a billfold which Yeatts later identified as his. Although the jury did not know that defendant had told Evans where to find

Yeatts' pocketbook, it is inconceivable that the jury did not attribute the finding of Yeatts' pocketbook at Godwin Realty Company to defendant's presence there. On cross-examination, Yeatts' positive identification of defendant as the man who had robbed him was considerably shaken. To reinstate the identification, the State had a pressing need to connect defendant with Yeatts' pocketbook. This was done — but unfortunately it was done by incompetent evidence.

The court properly excluded the statement which defendant made to Detective Evans, because the investigating officer failed to warn him of his constitutional rights prior to interrogating him. *State v. Ross,* 269 N.C. 739, 153 S.E. 2d 469; *Miranda v. Arizona,* 384 U.S. 436, 86A Sup. Ct. 1602, 16 L. Ed. 2d 694. By the same token, he should also have excluded the evidence that the officers found the pocketbook at Godwin Realty Company, because they found it in consequence of the incompetent statement. *Wong Sun v. United States,* 371 U.S. 471, 83 Sup. Ct. 407, 9 L. Ed. 2d 441; *Walder v. United States,* 347 U.S. 62, 74 Sup. Ct. 354, 98 L. Ed. 503; *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, 24 A.L.R. 1426. In *Miranda v. Arizona, supra,* the Supreme Court of the United States said with reference to an individual who had been taken into custody by law-enforcement officers:

> "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. . . . 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.)

Id. at 479, 86A Sup. Ct. at 1630, 16 L. Ed. 2d at 726.

The State argues that the error in admitting the incompetent evidence was cured by the judge's instruction to the jury not to consider it. We are constrained to hold, however, that the prejudicial effect of this evidence was not subject to withdrawal. It seems probable that the jury's verdict was based in substantial part on this evidence, notwithstanding the court's instruction that they should disregard it. *State v. Frizzelle,* 254 N.C. 457, 119 S.E. 2d 176; *State v.*

Aldridge, 254 N.C. 297, 118 S.E. 2d 766; *State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476; 1 Strong, N. C. Index, Criminal Law § 91 (1957).

For the errors indicated, there must be a

New trial.

RUSSELL L. CLAYTON, BY HIS NEXT FRIEND, HENRY L. CARTER, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

(Filed 20 June, 1967.)

Insurance § 26—

Plaintiff's evidence to the effect that his mother was insured under a group policy, that he was named beneficiary therein, and that his mother died in the employment, *held* to make out a *prima facie* case sufficient to overrule nonsuit in the son's action to recover upon the certificate issued to his mother, and the insurer's contention that it had paid the amount of the insurance to the estranged husband of insured in accordance with its obligations under the policy in effect at the time of insured's death is a matter of defense upon which insurer has the burden of proof.

APPEAL by plaintiff from *Riddle, S.J.,* November 1966 Session, CABARRUS Superior Court (from Judgment of Nonsuit by the Court at the close of plaintiff's evidence).

Mrs. Margie C. Clayton, then a widow, was employed by Eastern Air Lines 1 June 1959. She became insured under a group plan with Prudential Insurance Company and named her small son, who is the plaintiff herein, as her beneficiary. A certificate showing this was issued to her and was in her effects when she was killed in an automobile accident 25 November 1963. Meanwhile, she had stopped and later resumed her employment with Eastern Air Lines at least twice and was still so employed when she died. She had married Floyd B. Jones on 5 December 1959 but had separated from him in June 1962 and was still separated at the time of her death.

When she was first employed, group policy No. G-5918, issued by Prudential, was in effect and certificate 15291 was issued to her in the name of Margie C. Clayton, naming the infant plaintiff, Russell L. Clayton, as beneficiary. She voluntarily terminated this employment in June 1961, but re-entered employment with Eastern Air Lines 1 November 1961. At that time a different policy with Prudential (No. GO-13723) was in effect, and she signed an application in which she requested that her then husband, Floyd Bradley Jones, be named as beneficiary. The plaintiff's evidence is that no

certificate showing Jones as beneficiary was ever received by the insured.

In June 1962 the deceased again terminated her employment with Eastern Air Lines but returned to work a third time in April 1963, at which time she had been separated from Jones for some ten months. The separation occurred in June 1962, and the marriage was never resumed. Mrs. Jones' mother testified that when she returned to work in April 1963 her daughter came in the same day and said she had had her insurance reinstated, that she still had that for Russell, and that was all she had. The record does not show when she terminated this period of employment, or what was done about her insurance during it. Her mother testified that Mrs. Jones went to St. Petersburg in 1963 where she worked for Hill Travel Agency for a while, and that she had returned to Eastern's employment in the Tampa office about forty-five days before her death on 25 November 1963, from which it would appear that this was her fourth period of employment with Eastern, and that it began in October 1963. The record discloses nothing in relation to the deceased's insurance after her application in November 1961 in which she asked that Jones be named her beneficiary. She was re-employed once, or possibly twice, later, but if she signed a further application, the record does not show it.

Upon the trial plaintiff and defendant stipulated "that, at all times and in connection with all policies involved in this lawsuit, Eastern Airlines was acting as agent of The Prudential Insurance Company of America," and "that at the time of her death, Margie C. Jones was an employee of Eastern Airlines and enrolled in Eastern's Group Insurance Program with defendant and that her life was insured under the policy for the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars."

This action was instituted to obtain the benefits of the insurance for Mrs. Jones' infant son. The defendant denied liability, claiming it had discharged its obligation by paying Jones $12,500, presumably because Mrs. Jones had requested that he be named beneficiary at the time of her previous re-employment in November 1961. The record shows that Jones filed a sworn statement that the policy had been lost and made handwritten application for the payment of the proceeds of the policy, but does not show that any other claim, proof of death, or other formality was required by Prudential nor furnished by Jones.

Jones was made a party to the action upon motion of Prudential, who prayed judgment over against him.

Jones filed an answer in which he said Prudential voluntarily paid him and that it was estopped to recover against him.

At the conclusion of the plaintiff's evidence, Prudential moved for judgment as of nonsuit, which was allowed, and the plaintiff appealed.

Hartsell, Hartsell & Mills by William L. Mills, Jr., and K. Michael Koontz attorneys for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr., attorneys for defendant appellee.

PLESS, J. The plaintiff has offered in evidence a photostatic copy of Prudential's Group Insurance Policy No. G-5918 in which Margie C. Clayton is the insured, and Russell L. Clayton, son of the insured, is named beneficiary. The attorneys for the plaintiff and Prudential, as well as Eastern Airlines, engaged in considerable correspondence in regard to this claim, all of which related to the above numbered policy G-5918. Nowhere in the correspondence is there mention of any other policy number. But when Mrs. Clayton (then Jones) returned to the employment of Eastern Airlines in November 1961 another Prudential Group Policy, GO-13723, was in effect, and it was under it that she apparently requested that her husband be made beneficiary. However, he is not so designated in the policy itself, and the plaintiff's evidence is to the effect that she never received any certificate in which Jones was named beneficiary.

If the first policy, No. G-5918, was in effect at the time of Mrs. Jones' death, there is nothing in the record to indicate that any other beneficiary was named *under it* in lieu of the plaintiff herein. The record does not show that payment has been made to Jones, or anyone else, under the second policy, GO-13723. Moreover, upon the stipulation by the defendant that at the time of her death Mrs. Jones' life was insured for the sum of $12,500, and with the evidence, taken in the light most favorable to the plaintiff, that the policy in effect was G-5918, that the named beneficiary under that policy has not been paid, it appears that the rules so well recognized by this Court in many cases create a presumption that requires that the plaintiff's case be allowed to go to the jury.

In *Chavis v. Insurance Co.*, 251 N.C. 849, 112 S.E. 2d 574, Justice Higgins, speaking for the Court, said:

> "The defendant admitted the execution and delivery of the policy, the payment of the premium, and the death of the insured within the period of coverage. These admissions placed upon the defendant the burden of showing a legal excuse for re-

fusing payment according to the terms of the policy. The plaintiff introduced the policy in evidence. The admissions and the policy made out a case for the jury."

The Court also said, in *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E. 2d 614:

"By offering in evidence the policy of insurance and defendant's admission of its execution and delivery, the payment of premiums and the death of insured, plaintiff made out a *prima facie* case . . . When a plaintiff has made out a *prima facie* case, nonsuit is improper and it would constitute reversible error to sustain a motion therefor."

The plaintiff alleged that the only certificate of insurance issued by the defendant and delivered to Margie C. Jones prior to her death was certificate No. 15291 (which was based on policy No. G-5918). In answer to this allegation "The defendant expressly denies that it issued a certificate to Margie C. Jones at any time," and further said in the answer, "It is admitted that the life of Margie C. Jones was fully insured on the 25th day of November, 1963, under the provisions of a policy issued by the defendant Prudential Insurance Company to Eastern Air Lines, Inc., that said Margie C. Jones had fully complied with and duly performed all the terms, provisions and conditions in said policy to be performed by her." Further saying "that Prudential has made payment in the amount of $12,500 under the policy to the beneficiary of record Floyd Bradley Jones."

Payment of the amount due under the policy and to the right person are matters of defense, and the burden of establishing them is upon the Insurance Company after the plaintiff has made out a *prima facie* case.

"The burden of proof is on defendant to establish the facts in support of its defense that it had properly paid the amount due under the policy, or that it had been otherwise discharged or released from its liability thereunder." 46 C.J.S., Insurance § 1316(8).

If upon the trial Prudential can establish that it was justified in paying the estranged husband instead of the minor son of the deceased, it would, of course, absolve it from responsibility of the latter. However, the plaintiff is entitled to go to the jury.

Reversed.

R. E. L. JOHNSON, SR., AND WIFE, ADELL G. JOHNSON, v. J. ODELL DAUGHETY AND WIFE, LUCY HILL DAUGHETY; SUDIE KILPATRICK; AND W. O. McGIBONY, TRUSTEE FOR FEDERAL LAND BANK OF COLUMBIA.

(Filed 20 June, 1967.)

Pleadings § 18— Demurrer for misjoinder of parties and causes of action held properly sustained.

A complaint alleging that the male plaintiff is the owner in fee simple and is in possession of a described tract of land, that the dividing line between plaintiff's tract and two adjoining tracts extended to and from a common corner, and that the owner of one of the contiguous tracts and the owners of the other contiguous tract had trespassed upon plaintiff's tract, and praying that the male plaintiff be declared owner of the land within the boundaries contended by him, that defendants be enjoined from trespassing thereon, and that plaintiffs recover a specified sum from each as damages for their respective trespasses, *held* demurrable for misjoinder of parties and causes of action, since plaintiff seeks not only the establishment of the dividing lines between his tract and the respective contiguous tracts, but also damages for independent trespasses by the owners of the contiguous tracts, and therefore the causes united in the complaint do not affect all the parties to the action. G.S. 1-123.

APPEAL by plaintiffs from *Farthing, J.*, January 16, 1967 Civil Session of LENOIR.

The hearing below was on defendants' joint demurrer to the complaint.

The complaint, in substance, alleges: Plaintiff R. E. L. Johnson, Sr., (referred to hereafter as Johnson) owns in fee simple and is in possession of a described tract of land in Sandhill Township, Lenoir County, North Carolina, containing 368 acres, more or less. Defendants Daughety own a described tract of land adjoining and immediately south of Johnson's said 368-acre tract. Defendant Kilpatrick owns a described tract of land adjoining and immediately south and east of Johnson's said 368-acre tract. The land of defendant Kilpatrick is subject to a deed of trust to defendant McGibony, Trustee for Federal Land Bank of Columbia. The dividing line between the Johnson and Daughety tracts and the dividing line(s) between the Johnson and Kilpatrick tracts extend to and from a "common corner," this being a corner of each of these three tracts. Defendants Daughety and also defendant Kilpatrick have trespassed upon and damaged Johnson's said tract by attempting to cultivate portions thereof and by damage to or destruction of Johnson's fences.

Plaintiffs pray: That Johnson be adjudged the owner and entitled to the possession of the tract of land to which he asserts ownership; that defendants Daughety and defendant Kilpatrick be en-

joined from trespassing thereon; that Johnson recover from defendants Daughety the sum of $300.00 on account of damage caused by past trespasses; that Johnson recover from defendant Kilpatrick the sum of $300.00 on account of damage caused by past trespasses; and that a competent surveyor be appointed to survey and establish on the ground the true boundary lines between Johnson and defendants Daughety and also between Johnson and defendant Kilpatrick.

Plaintiffs obtained a temporary restraining order, which, by consent, was continued in effect pending the hearing on the demurrer.

Defendants demurred on two grounds, *viz.:* (1) That plaintiffs' action is in effect a processioning proceeding of which the clerk has *original* jurisdiction; and (2) that there is a misjoinder of parties and causes of action.

After hearing, the court entered judgment sustaining the demurrer and dismissing the action.

Plaintiffs excepted and appealed.

Whitaker, Jeffress & Morris and Aycock, LaRoque, Allen, Cheek & Hines for plaintiff appellants.

C. E. Gerrans and Thomas J. White for defendant appellees.

BOBBITT, J. "Questions of disputed boundaries may arise and be determined in various kinds of actions at law, such as an action of, or in the nature of, ejectment, where title is in dispute, or trespass, where there has been no dispossession of the plaintiff. . . . Apart from statute, courts of equity exercise jurisdiction to settle disputed boundaries only where there is some recognized ground for the interposition of equity and there is no adequate remedy at law. If the law furnishes an adequate remedy to one whose boundaries are in dispute, he must seek his relief at law." 12 Am. Jur. 2d, Boundaries § 91; *Hough v. Martin,* 22 N.C. 379; Tiffany on Real Property, Third Edition, § 652.

G.S. 38-1 provides that "(t)he owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated." G.S. 38-2 provides that "(t)he occupation of land constitutes sufficient ownership for the purposes" of such proceedings. G.S. 38-3 sets forth what must be alleged in the petition and in general describes the procedure before the clerk of the superior court in such proceedings. See *Pruden v. Keemer,* 262 N.C. 212, 136 S.E. 2d 604. The cited statutes are codifications of the provisions of Chapter 22, Public Laws of 1893, which repealed Chapter 48, The Code of 1883, a codification of prior statutes providing different procedures for processioning.

The procedure prescribed by G.S. 38-3 is applicable only in case of a dispute as to *the true location* of the boundary line between adjoining landowners. *McCanless v. Ballard,* 222 N.C. 701, 24 S.E. 2d 525. Whether this is the only permissible procedure where the true location of such dividing line is the only question involved need not be decided on this appeal. Suffice to say, plaintiffs chose to institute this civil action rather than a special proceeding under G.S. 38-3.

The establishment of the true location of the boundary lines between adjoining landowners is not the sole purpose of plaintiffs' action. Plaintiffs allege that Johnson *owns in fee simple* the 368-acre tract of land described in the complaint and that defendants Daughety and also defendant Kilpatrick have trespassed thereon. These allegations are appropriate in an action in trespass to try title. *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593. To maintain such action, proof of Johnson's title, including the location of his boundaries, and of the alleged trespasses, is required. Plaintiffs also allege that Johnson *is in possession of* said 368-acre tract and that defendants Daughety and also defendant Kilpatrick have trespassed thereon. These allegations are appropriate in an action in trespass for wrongful invasion of the possession of another. *Matthews v. Forrest,* 235 N.C. 281, 69 S.E. 2d 553. To maintain such action, proof of Johnson's lawful possession, actual or constructive, and of the alleged trespasses, is required.

Johnson seeks to recover from defendants Daughety the sum of $300.00 on account of damage caused by their past trespasses. He seeks to recover from defendant Kilpatrick the sum of $300.00 on account of damage caused by her past trespasses. In addition, he seeks injunctive relief, temporary and permanent.

The alleged cause of action for trespass and damage by defendants Daughety is separate and distinct from the alleged cause of action for trespass and damage by defendant Kilpatrick. Defendant Kilpatrick is not a necessary or proper party to Johnson's said action against defendants Daugherty; nor are defendants Daughety necessary or proper parties to Johnson's said action against defendant Kilpatrick. These causes of action, united in the same complaint, do not "affect all the parties to the action," as required by G.S. 1-123.

The complaint does not allege expressly or by implication that defendants Daughety and defendant Kilpatrick acted in concert in respect of any alleged trespass upon or damage to Johnson's property. The only reasonable inference to be drawn from plaintiffs' allegations is that the alleged trespass and damage by defendants Daughety was committed along or near the dividing line between the Johnson and Daughety tracts; that the alleged trespass and

damage by defendant Kilpatrick was committed along or near the dividing line between the Johnson and Kilpatrick tracts; and that the actions of defendants Daughety and of defendant Kilpatrick were independent of and unrelated to each other. We find nothing in plaintiffs' allegations suggesting that defendants Daughety and defendant Kilpatrick at any time participated in any way in any trespass or damage committed by the other. As stated succinctly by Rodman, J., in *Nye v. Oil Co.*, 257 N.C. 477, 479, 126 S.E. 2d 48, 49: "If the facts alleged are sufficient to warrant recoveries against each defendant for wrongs done only by that defendant, there is a misjoinder of parties and causes."

In this civil action, in which plaintiffs seek, *inter alia*, relief obtainable in a special proceeding under G.S. 38-3, additional causes of action have been joined in which plaintiffs seek to recover damages on account of alleged trespasses, one against defendants Daughety and the other against defendant Kilpatrick, which are separate and distinct. On account of such misjoinder of parties and causes of action, the court properly sustained the demurrer and dismissed the action. *Bannister & Sons, et al., v. Williams,* 261 N.C. 586, 588, 135 S.E. 2d 572, 574, and cases cited. Hence, the judgment of the court below is affirmed.

Affirmed.

IN THE MATTER OF: THE APPEAL OF CAROLINA QUALITY BLOCK COMPANY FROM THE VALUATION PLACED ON PROPERTY BY GUILFORD COUNTY.

(Filed 20 June, 1967.)

1. Taxation § 25—

A truck comes under the generic term of motor vehicle, and under the provisions of G.S. 105-428, the National Market Report's Blue Book for Trucks may be used as a guide in ascertaining the tax valuation of trucks, either upon the theory that the Statute's specification of "Automobile Blue Book" is sufficiently broad to include the "Truck Blue Book" or that the Truck Blue Book is a "standard of value" which is reasonable, equitable and just within the purview of the statute. G.S. 105-294.

2. Same—

When tax authorities use the "Truck Blue Book" as a guide in ascertaining the fair market value of a truck, they must assess the property for taxation at the same percentage of its fair value as is used in assessing all other property.

3. Same—

Tax authorities may not arbitrarily use the values set out in the "Truck Blue Book" in ascertaining the fair market value of trucks when the taxpayer introduces evidence of exceptional conditions affecting value. Therefore, where the taxpayer offers evidence that his trucks were constructed for a particular seasonal use and suffered depreciation equal to a full year in hard use during the season, such fact should be considered in ascertaining the fair market value of the trucks.

APPEAL by petitioner, Carolina Quality Block Company, from *Olive, E.J.*, 14 December 1966 Non-Jury Civil Term, GUILFORD County Superior Court, Greensboro Division.

On 1 April 1964 Carolina Quality Block Company bought six White trucks which were to be used as components of transit-mix concrete trucks. The cost of each truck was $16,000. For the tax year 1965, each of them was valued by the Guilford County Tax Department at $10,080. The trucks were not individually inspected and valued, but the figure used by the tax authorities was the finance value from the National Market Report (Truck Blue Book). The petitioner appealed this valuation in apt time to the Guilford County Board of Equalization and Review, then to the State Board of Assessment and to the Superior Court of Guilford County. Receiving no relief, the petitioner gave notice of appeal to the Supreme Court.

The petitioner alleges a nonobservance by the tax authorities of the following pertinent provisions of G.S. 105-294:

> "All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. The intent and purpose of this section is to have all property and subjects of taxation appraised at their true and actual value in money, in such manner as such property and subjects of taxation are usually sold, but not by forced sale thereof; and the words 'market value', 'true value', or 'cash value', whenever used in this chapter, shall be held to mean for the amount of cash or receivables the property and subjects can be transmuted into when sold in such manner as such property and subjects are usually sold.
>
> "In the year in which a revaluation of real property, conducted in a county under the provisions of G.S. 105-278, is to take effect, and annually thereafter, the board of county commissioners shall select and adopt some uniform percentage of the amount at which property has been appraised as the value to be used in taxing property.
>
> "The percentage or assessment ratio selected shall be applied to the appraised value of all real and personal property subject

to assessment in the county. The tax records of the county shall show for all property both the appraisal value and the assessed value for tax purposes. Taxes levied by all counties, municipalities, and other local taxing authorities shall be levied uniformly on assessments so determined."

The petitioner alleges that the statute is mandatory, and that in failing to give an individual valuation and appraisal to each of its trucks, its property has been taken without due process of law. It further contends that under this procedure it has not had the benefit of the "assessment ratio" provided by the statute, and that under proper procedure the assessed value of its trucks should not exceed $8,176 each.

The position of Guilford County is that the statute is merely directory and that the use of the Blue Book is practical, convenient and tends to uniformity. It further says that to require the taxing authorities to inspect and value each truck in Guilford County would be an impossible and burdensome task, and that since all trucks are valued under the Truck Blue Book, there has been no discrimination or disadvantage to the petitioner.

York, Boyd & Flynn by David I. Smith, Attorneys for Carolina Quality Block Company, Appealing Taxpayer-Petitioner.

Ralph A. Walker, Attorney for Guilford County, Respondent-Appellee.

PLESS, J. Although no reference is made to it in the briefs, we find that there has been in existence since 1931 the following statute:

"G.S. § 105-428. *Basis of tax valuation.* — All motor vehicles shall be valued or appraised for purposes of taxation upon the rule or standard of valuation established by "The Automobile Blue Book," or any other standard of value which may be reasonable, equitable and just."

The succeeding statute provides that it shall apply to many counties, including Guilford. Apparently this statute was not known to the Tax Department of Guilford County since in the testimony of Mr. C. R. Brooks, Tax Supervisor of Guilford County, he stated "The statute neither authorizes any blue book or red book or anything as set out in any blue book or red book, neither does it prohibit the use of any blue book or red book."

Throughout the record and the evidence, the articles in question are described as "White trucks" which were to be used as com-

ponents of transit-mix concrete trucks. The "all motor vehicles" referred to in the statute includes trucks.

Ervin, J., speaking for the Court, in *Jernigan v. Insurance Co.*, 235 N.C. 334, 69 S.E. 2d 847, stated:

> "Common usage has made the words motor vehicle a generic term for all classes of self-propelled vehicles not operating on stationary rails or tracks. As a result, all automobiles are motor vehicles. *Motors Corp. v. Flynt,* 178 N.C. 399, 100 S.E. 693. But the contrary proposition is not true. The term motor vehicle is much broader than the word automobile, and includes various vehicles which cannot be classified as automobiles. 60 C.J.S., Motor Vehicles, section 1."

And when the statute provides that they shall be valued "upon the rule or standard of valuation established by 'The Automobile Blue Book,' *or any other standard of value* which may be reasonable, equitable and just," it would follow, at least by analogy, that the use of the "Truck Blue Book" would be permissible-either upon the theory that the term "Automobile Blue Book" is sufficiently broad to include the Truck Blue Book or that the Truck Blue Book is "a standard of value" which may be reasonable, equitable and just.

The evidence of Mr. Brooks was that the Truck Blue Book gave three figures as to each model and type of truck. The first was the cost, the second was the retail value, and the third was the finance value. The retail value was just a few percentage points less than the cost, but the finance value was approximately two-thirds of the cost.

He further said that "When a person lists his taxes (for cars), the appraised value is the average retail price published in National Market Report's red book for cars. The blue book is for trucks. We do not then set a ratio at 70%. We use the average finance value from the book, which is 66⅔% of that average retail value."

He said that before the County had obtained positive identification of the model trucks they had assessed them at 70% of the purchase price, which is $11,200. The taxpayer complained and furnished information as to the exact model, and the County then turned to the Blue Book in which a retail value was given of $15,120. The finance value was shown as two-thirds of that amount, which is $10,080, and this is the figure from which the petitioner appealed.

The evidence of the petitioner was to the effect that these trucks had been purchased on April 1, 1964 and put into immediate use; that the nine months of 1964 which comprised the building period was approximately the same as twelve months' use. During the

winter months there is little occasion for their operation. It also offered evidence tending to show by one witness that their value after this use would be 73% of the purchase price; while another fixed it at 60%. As a practical matter, had the valuation been based upon the finance value of the Blue Book at two-thirds of their cost, or of 73% or 60% as stated by the petitioner's witness, it would have little cause to complain. However, the County did not apply the 70% assessment ratio as required by G.S. 105-294.

The task of examining and appraising each of the thousands of trucks and cars in Guilford County would be almost impossible. To avoid this, the County is justified in using some recognized dependable and uniform method of valuing them. There is no "the" Blue Book nor a "the" Red Book, any more than there is a "the" Almanac, but the authorities may use this type publication as a guide, and in the absence of merited complaint adopt figures given by the publication as valuations which would be subject to the assessment ratio. But we know that not all 1964 Buicks, for instance, are of the same value. One may have been driven 200,000 miles and be almost worn out while another had been carefully driven for only 6,000 or 8,000 miles. One may be wrecked and damaged almost to the extent of uselessness, in which event the taxpayer would be entitled to some consideration. And the owner making such a showing should not be taxed upon the arbitrary valuation placed in a publication giving no consideration to the condition of the article.

For the reasons stated, the judgment of the court below is vacated. The cause is remanded with direction that an order be entered setting aside the valuations made by the State Board of Assessment and remanding the proceeding to said Board for hearing *de novo* and findings on the basis of evidence then offered as provided in G.S. 105-294.

Error and remanded.

STATE v. WILLIE PRINCE, JR.

(Filed 20 June, 1967.)

1. Criminal Law § 100—

By introducing evidence after the State has rested its case, defendant waives his motion to nonsuit made prior to the introduction of his evidence, and on appeal the correctness of the nonsuit must be determined upon consideration of all of the evidence favorable to the State. G.S. 15-173.

2. Criminal Law § 152—

Where none of the evidence is set out in the record, the appeal must be dismissed in the absence of error appearing on the face of the record proper. Rule of Practice in the Supreme Court No. 19(4).

3. Constitutional Law § 31; Criminal Law § 40—

Where a trial is terminated prior to verdict at the instance of defendant, the testimony of a witness at such trial, with full cross-examination, taken in open court and properly attested, is properly admitted in evidence at the subsequent trial when the witness is then on military duty outside the boundaries of the United States. The admission of such testimony does not violate defendant's right of confrontation. Constitution of North Carolina, Art. I, § 11; Sixth and Fourteenth Amendments to the Constitution of the United States.

APPEAL by defendant from *Mintz, J.*, January 1967 Session of ONSLOW.

At the July 1966 Session of the Superior Court of Onslow, the grand jury returned a true bill of indictment in which it was charged that on 5 June 1966 defendant, with the use of a knife and a pistol whereby the lives of Frank Sanderson and Paul Kelch were threatened and endangered, did unlawfully and feloniously take from their persons clothing, money, and other personal property. (G.S. 14-87.) At the same session, defendant appeared for trial with his attorney, Max Godwin, Esquire, whom he himself had chosen and employed. The trial was begun, and the State offered its evidence, which included the testimony of Frank Sanderson, a member of the United States Marine Corps — one of the victims of the alleged robbery.

At the close of the State's evidence, Mr. Godwin recommended to defendant that he change his plea of not guilty to one of guilty. As a result of this advice, defendant became dissatisfied with Mr. Godwin's services. He requested the presiding judge, Honorable Henry L. Stevens, Jr., to declare a mistrial and to continue the case so that "he might get another attorney of his own choice." Judge Stevens, being of the opinion "that under the maze of decisions in this day and time existing, there is just no telling what position some appellate court might take upon a denial of the motion," in his discretion, withdrew a juror, declared a mistrial, and set the case for trial at the September Session. Recognizing the possibility that Sanderson, a member of the U. S. Marine Corps stationed at Camp Lejeune, might then be unavailable, he directed the court reporter to transcribe his testimony. At the September Session, defendant having secured no attorney, the court appointed his present counsel to represent him and continued the case.

The case was next called for trial at the January 1967 Session. The State offered in evidence the transcript of Sanderson's testi-

mony at the first trial in July 1966. Defendant objected to its introduction, and the court conducted a preliminary hearing in the absence of the jury. A chief warrant officer of the United States Marine Corps and a criminal investigator who had investigated this case both testified that after the July Session, Sanderson had been transferred from Camp Lejeune to Vietnam. After hearing their testimony, counsel for defendant stipulated that Sanderson was then "outside the confines of the United States." The solicitor for the State, Honorable Walter T. Britt, testified that at the time of the mistrial in July 1966, the State had completed its examination of Sanderson. Mr. Godwin, defendant's former attorney, testified that he also had completed his cross-examination of Sanderson at the time Judge Stevens had allowed defendant's motion for a mistrial.

At the conclusion of the hearing, Judge Mintz found as a fact that Mr. Godwin had completed his cross-examination of Sanderson before the mistrial was ordered. Defendant's objection was overruled, and the testimony of Sanderson as given at the former trial was read to the jury.

Both the State and defendant offered evidence, and defendant testified in his own behalf. None of the testimony, however, has been included in the case on appeal. The jury's verdict was "guilty as charged in the bill of indictment." From a sentence of not less than fifteen nor more than eighteen years, defendant appeals.

T. Wade Bruton, Attorney General, and Ralph A. White, Jr., Staff Attorney, for the State.

Carl V. Venters for defendant.

SHARP, J. Defendant brings forward only two assignments of error: that the court erred (1) in admitting the transcript of the testimony which Sanderson gave at the former trial, and (2) in overruling his motion of nonsuit *at the close of the State's evidence.* He specifically abandoned his assignment of error based on his exception to the denial of his motion for nonsuit made at the close of all the evidence.

By introducing evidence after the denial of his motion for judgment of nonsuit made when the State had rested its case, defendant waived the motion for dismissal which he made prior to the introduction of his evidence. G.S. 15-173. In no event, therefore, would defendant be entitled to have his motion for nonsuit considered *only* in the light of the State's evidence. *State v. Earp,* 196 N.C. 164, 145 S.E. 23. But neither the evidence for the State nor that of defendant has been included in the case on appeal.

"When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. Rule 19(4), Rules of Practice in the Supreme Court, 221 N.C. at page 556. *S. v. Griffin,* 246 N.C. 680, 100 S.E. 2d 49; *S. v. Powell,* 238 N.C. 550, 78 S.E. 2d 343; *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560; *S. v. Tyson,* 133 N.C. 692, 46 S.E. 838." *State v. Womack,* 251 N.C. 342, 343, 111 S.E. 2d 332, 334.

Defendant's appeal must be dismissed, but we deem it appropriate to say his assignments disclose no error in the trial below. It is obvious that defendant's attempt to overturn his conviction is not based upon any lack of evidence to establish his guilt of the crime charged. His complaint is that the admission of the transcript of Sanderson's evidence at his first trial violated the rights guaranteed to him by the North Carolina Constitution, Article I, Section 11, and by the Sixth Amendment to the U. S. Constitution. The latter, which gives an accused the right "to be confronted with the witnesses against him," is now held to have been made obligatory on the states by the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 85A Sup. Ct. 1065, 13 L. Ed. 2d 923 (1965). The North Carolina Constitution, Article I, Section 11, gives every person charged with crime the right "to confront the accusers and witnesses with other testimony."

Always in a criminal action, "the witness himself, if available, must be produced and testify *de novo.*" *State v. Cope,* 240 N.C. 244, 249, 81 S.E. 2d 773, 777. The constitutional right of confrontation, however, is not denied an accused by the introduction at a subsequent trial of the transcribed testimony given at a former trial of the same action by a witness who has since died, become insane, left the State permanently or for an indefinite absence, become incapacitated to testify in court as a result of a permanent or indefinite illness, or absented himself by procurement of, or connivance with, the accused. The accuracy of the transcription, of course, must be attested and it must appear that the defendant had a reasonable opportunity to cross-examine the witness. *State v. Ham,* 224 N.C. 128, 29 S.E. 2d 449; *State v. Casey,* 204 N.C. 411, 168 S.E. 512; *State v. Maynard,* 184 N.C. 653, 113 S.E. 682; *State v. Behrman,* 114 N.C. 797, 19 S.E. 220; Stansbury, N. C. Evidence § 145 (2d Ed., 1963); McCormick, Evidence § 231 (1954); 29 Am. Jur. 2d, Evidence § 739 (1967); 5 Wigmore, Evidence §§ 1396, 1397 (3d Ed., 1940); Annot., Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial, 15 A.L.R. 495; 79 A.L.R. 1392; 122 A.L.R. 425; 159 A.L.R. 1240. See

also *Settee v. Electric Railway,* 171 N.C. 440, 441-443, 88 S.E. 734, 735-36; *Pointer v. Texas, supra* at 407, 85A Sup. Ct. at 1069, 13 L. Ed. 2d at 928.

The testimony of Sanderson, to which defendant objected, was taken in open court, in the presence of the parties and witnesses, and under the supervision of the trial judge. Defendant had the opportunity to cross-examine the witness, and his counsel fully availed himself of the right. The court reporter who took and transcribed the evidence attested to its accuracy, which defendant does not controvert. At the time of the second trial, Sanderson, a member of the U. S. Marine Corps who had been temporarily stationed at Camp Lejeune when the alleged crime was committed and the first trial held, was outside the borders of the United States. He was in Asia, fighting his country's battle in Vietnam. In all probability, he was never domiciled in North Carolina, but — if he were — his absence from the State at the time of the second trial could not have been considered a mere temporary absence. His return was contingent and uncertain. In any event, he would be away for a prolonged and indefinite period. For all practical purposes he could fairly be considered a nonresident, beyond the jurisdiction of the court. Defendant was in jail in default of bond; the State was required to try him. There was no error in admitting the transcript of Sanderson's testimony at the first trial, which was prematurely concluded at the instance of defendant.

Appeal dismissed.

STATE OF NORTH CAROLINA v. DORIS JEAN JACKSON.

(Filed 20 June, 1967.)

1. Criminal Law § 24—

Defendant's plea of not guilty places the burden upon the State to prove every essential element of the crime charged.

2. Constitutional Law § 31; Criminal Law § 74—

In a prosecution for aiding and abetting, the admission of the record showing that the co-defendants had pleaded guilty to the offense deprives the defendant of her right of confrontation, since defendant is not bound by her co-defendant's pleas and is entitled to cross-examine them, the burden being upon the State to prove that the co-defendants had committed the offense and that defendant had aided and abetted them therein. Constitution of North Carolina, Art. I, § 11; Sixth and Fourteenth Amendments to the Constitution of the United States.

APPEAL by defendant from *McLean, J.*, at 4 April 1966, Criminal Term of MECKLENBURG Superior Court.

The facts are sufficiently stated in the opinion.

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

T. O. Stennett, Attorney for defendant appellant.

PLESS, J. The defendant, with Franklin Lee McClure and John Lee Barnes, was charged in a bill of indictment with robbing one Frank Woodward with a pistol. McClure and Barnes pleaded guilty. Then the defendant Doris Jean Jackson was put on trial for aiding and abetting them, being represented by court appointed counsel. The evidence against her, as contained in her written admission, was that Frank told her before the robbery that he was going to get some money and that she knew he was going to steal it or rob the store. She parked her car, a 1962 Buick, near the store and Frank told her to wait for him. In about twenty minutes Frank came back "walking real fast and he looked like he had been running." As they passed the store he kept telling her to hurry — that he had got some money. When they got home Frank counted out the money, then called her in the room and gave her thirty dollars.

Upon her trial the defendant claimed violation of her rights under the *Miranda* case, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d, 694, but it was not applicable, since her trial occurred several weeks before it became effective. We must allow a new trial for the reasons stated later, and at that time the *Miranda* case will be applicable. Under these circumstances, we see no reason to discuss this feature of the previous trial.

The defendant excepted to the admission of records that McClure and Barnes had plead guilty to armed robbery in the same case. The bill of indictment charged them and the defendant with the crime of armed robbery of Frank Woodward. She was put on trial on this bill and entered a plea of not guilty. The judge began his charge with the statement "The defendant, Doris Jean Jackson, is charged in a bill of indictment with what we commonly denominate an armed robbery. Now, to the charge contained in this bill of indictment she has entered a plea of not guilty." She was found guilty as charged in the bill of indictment, and the minutes show "the jury herein recorded find the defendant guilty of the charge as charged in the bill of indictment."

In his instructions the judge defined principal in the second degree and aiding and abetting. We assume that it was upon the theory of aiding and abetting that the evidence of her codefendants' guilt

was admitted. However, our Court has held that the plea of guilty of a codefendant is not competent evidence against the defendant on trial, and that where one defendant had been separately tried and convicted, or had pleaded guilty prior to the defendant then on trial, the record of the codefendant's prior conviction or plea is not admissible, and the fact that the codefendant had been convicted or had pleaded guilty to the same charge is not competent. Where two persons are indicted jointly, the crime is several in nature. The guilt of one is not dependent upon the guilt of the other. If one is convicted or pleads guilty, this is not evidence of the guilt of the other. *State v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876; 21 Am. Jur. 2d, Criminal Law § 127.

In *State v. Kerley, supra,* an excerpt from *United States v. Toner,* 173 F. 2d 140, is quoted: " 'The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else.' "

Defendant, by her plea of not guilty, put in issue every essential element of the crime charged. *S. v. Courtney,* 248 N.C. 447, 451, 103 S.E. 2d 861, 864; *S. v. McLamb,* 235 N.C. 251, 256, 69 S.E. 2d 537, 540, and cases cited; 21 Am. Jur. 2d, Criminal Law § 467; 22 C.J.S., Criminal Law § 454.

It was incumbent upon the State in the separate trial of defendant to prove by competent evidence that McClure and Barnes had committed the alleged armed robbery and were guilty as principals in the first degree before defendant could be convicted as a principal in the second degree with reference thereto. Evidence as to declarations by McClure and Barnes, whether in the form of extra-judicial admissions or in the form of pleas of guilty, is not competent for that purpose. Neither McClure nor Barnes testified. Defendant had no opportunity to cross-examine them or either of them.

If the three persons indicted for armed robbery, namely, McClure, Barnes and defendant, were being tried jointly, defendant would be entitled to deny and contest the guilt of McClure and Barnes as principals in the first degree; and in so doing defendant would be confronted by and could cross-examine all witnesses who gave testimony as to the guilt of McClure and Barnes as principals in the first degree. In our opinion, she was entitled to the right of confrontation and cross-examination in respect of *all* evidence offered in her separate trial tending to establish the guilt of McClure and Barnes as principals in the first degree.

In *Kirby v. United States,* 174 U.S. 47, 43 L. Ed. 890, 19 S. Ct. 574, the prosecution in a Federal District Court was based upon an

Act providing for the punishment of larceny and receiving stolen goods in respect of property of the United States. The defendant was tried separately for receiving goods allegedly stolen by three named persons. The Government offered in evidence pleas of guilty of larceny by two of these persons and of the conviction of the third. This was held incompetent on the ground it denied the defendant a fundamental right guaranteed by the Sixth Amendment to the Constitution of the United States providing that "in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him." Accord: *Hammond v. State,* 293 S.W. 714 (Ark.); *Jackson v. State,* 220 S.W. 2d 800 (Ark.). It is noteworthy that *Kirby v. United States, supra,* was cited by this Court with approval in *S. v. Kerley, supra.*

In *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065, it was held that the Sixth Amendment guaranty protecting an accused's right to confront the witnesses against him was made obligatory on the States by the Fourteenth Amendment.

The admission of the record of her codefendants' guilt constituted error for which she is entitled to a

New trial.

STATE v. CALVIN FOSTER McBRYDE.

(Filed 20 June, 1967.)

Criminal Law § 94—

As one of defendant's chief witnesses stepped down from the witness stand, the court audibly told the witness in the presence of the jury not to leave the courtroom, and shortly thereafter the witness was placed in custody in the prisoner's box in plain view of the jury. *Held:* The incident must have resulted in weakening the testimony of the witness in the eyes of the jury and constitutes a violation of G.S. 1-180.

APPEAL by defendant from *Bailey, J.,* 21 November 1966 Criminal Session of HOKE.

Defendant was charged with driving a motor vehicle upon the public highways of North Carolina while under the influence of intoxicating liquors.

At trial, the evidence for the State tended to show that on 27 January 1966, at approximately 8:20 P.M., Highway Patrolman Joe Stanley was driving north on U. S. 401 in Hoke County and saw a 1965 Ford pickup truck approaching him from the opposite direc-

tion. Patrolman Stanley testified that he observed the truck cross the center line into his lane of traffic, then swerve back to the right, go off the shoulder and into a ditch, so that the right side of the truck was leaning against the ditch in such a manner that the right-hand door could not be opened. He testified that he stopped parallel to the truck, and at that time defendant came out of the driver's side of the truck and was staggering. Thereafter, the patrolman took defendant to jail where he administered certain tests on defendant to determine whether defendant was intoxicated. He then advised defendant of his rights and asked him certain questions contained on the back of a test form. Patrolman Stanley testified that in his opinion defendant was under the influence of some intoxicating liquor.

Allen Parker testified for defendant. His testimony tended to show that at the time in question he was driving the truck, and that defendant was riding as a passenger and had not driven since 5:00 P.M. that day. He stated that he was driving down the road, which was icy and slick, making driving difficult, and that a chain on one of the tires came off, causing the truck to swerve into the ditch. Immediately thereafter, he went back up the road to his brother's house to awaken him, and while on the way he noticed a highway patrol car come down the road, turn around in his brother's driveway, and go back to the truck. When he left his brother's house and went back to the truck, no one was in it.

Mrs. Calvin Foster McBryde, a witness for defendant, testified that when she left her driveway on U. S. 401 she observed Patrolman Stanley, and that she followed him in her car as he passed her husband's truck lying in the ditch. She stated she saw Mr. Stanley drive into Mr. Parker's brother's driveway and then turn around and head back towards the truck. She further testified that she did not see the patrolman park his car parallel to the truck.

The jury returned a verdict of guilty, and from judgment imposed thereon defendant appealed.

Attorney General Bruton, Assistant Attorney General Melvin, and Staff Attorney Costen for the State.

Seawell & Seawell & Van Camp for defendant.

BRANCH, J. Defendant contends that the court gave an expression of opinion as to the credibility of defendant's witness Allen Parker. This assignment of error is based on facts which appear in the record, as follows: As Mr. Parker was stepping down from the witness stand, having completed his testimony, the court stated to

him, "Don't leave the room, Mr. Parker." The following also appears in the record:

> "During the argument of counsel for the defendant to the jury, the Judge, while sitting upon the bench and while Court was in session, had a short conversation with the Sheriff of Hoke County, which conversation was heard only by the Sheriff and the Judge, and immediately thereafter the Sheriff of Hoke County left the courtroom and took said Allen Parker into custody outside the courtroom, and walked the said Allen Parker back to the courtroom under custody and placed him in the prisoner's box, all in the presence of the jury. That the prisoner's box is located on the opposite side of the courtroom and directly in front of the jury."

This Court has long recognized the strong influence which a judge may wield over a jury. "The Judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855. See also *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481.

"It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial. The statute forbids an 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." *State v. Hart,* 186 N.C. 582, 120 S.E. 345.

In the case of *State v. McNeill,* 231 N.C. 666, 58 S.E. 2d 366, the defendant was prosecuted for wilful failure to support his illegitimate child, and as a part of his defense offered a witness who testified that he had on several occasions had intercourse with the prosecuting witness. Immediately after he had testified, the court ordered the sheriff to take the witness into custody. Holding that this was prejudicial error as impeaching the credibility of the witness in the eyes of the jury, the Court, speaking through Stacy, C.J., stated:

> "Undoubtedly, the jury must have concluded that the court thought the witness was guilty of perjury or of criminal relations with a female juvenile, either of which, we apprehend, was calculated to weaken his testimony in the eyes of the jury. *S.*

v. Swink, 151 N.C. 726, 66 S.E. 448, 19 Ann. Cas. 422. There is no suggestion of any contumacy on the part of the witness. *S. v. Slagle,* 182 N.C. 894, 109 S.E. 844; *Seawell v. R. R.,* 132 N.C. 856, 44 S.E. 610; 53 Am. Jur. 82. Nor do we think the later instruction to the jury to banish the incident from their minds cured the defect."

In the case of *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568, two of defendant's witnesses were arrested in the presence of some members of the jury during noon recess of court. When court resumed, the witnesses were brought into court in custody. The Court held that this was prejudicial error and ordered a new trial. See also *State v. Wagstaff,* 235 N.C. 69, 68 S.E. 2d 858.

The State contends that since the court did not audibly order the witness into custody in the presence of the jury, there was no prejudicial error.

The State correctly contends that the circumstances of the case determine whether it is prejudicial to defendant for the trial court to order a witness into custody in the presence of the jury. *State v. Wagstaff, supra.* It is not necessary that the trial judge audibly in so many words order the witness into custody. Here, the witness Parker was told by the trial judge not to leave the courtroom, and shortly thereafter he was placed in custody in the prisoner's box in plain view of the jury. Parker was defendant's chief witness as to his principal defense. The words of the trial judge, coupled with his conference with the sheriff and the ensuing action by the sheriff in placing the prisoner in custody would unerringly lead the jury to the conclusion that the witness was guilty of perjury or of some other crime, which could only result in weakening his testimony in the eyes of the jury.

The able and conscientious trial judge has inadvertently violated the provisions of G.S. 1-180, and we do not think his later instructions removed the prejudicial error. *State v. McNeill, supra.*

Since there must be a new trial, we do not deem it necessary to discuss the other assignments of error as they may not arise on another trial.

New trial.

STATE v. WILLIE FIKES.

(Filed 20 June, 1967.)

1. Criminal Law § 100—

Failure of defendant to renew his motion for judgment of compulsory nonsuit at the close of all the evidence waives his motion made at the close of the State's evidence, and the sufficiency of the evidence is not presented on appeal. G.S. 15-173.

2. Criminal Law § 50—

A witness' testimony to the effect that he thought the pistol, identified as the one used in the perpetration of the offense, was the one taken from his home, but that he could not positively identify it, is competent, the witness' lack of positive identification affecting the weight of his testimony but not its admissibility.

3. Burglary and Unlawful Breakings §§ 2, 4— Evidence held sufficient to support verdict of nonburglarious entry.

Evidence tending to show that defendant, apprehended in a home at night by the owner of the home, fired two shots from a pistol and fled, that a pistol which had been in a closet of the house was missing after the incident, that defendant later sold a pistol to another, which pistol looked like the one taken from the house, together with expert ballistics testimony that at least one of the spent bullets in the house was fired from the pistol which defendant later sold, *held* sufficient to sustain a verdict of guilty of felonious entry otherwise than burglariously with intent to commit larceny, notwithstanding the absence of evidence of any breaking, since under the statute it is unlawful to enter a dwelling with intent to commit a felony therein either with or without a breaking. G.S. 14-54.

4. Criminal Law § 97—

The record in this case *held* not to support defendant's contention that the solicitor commented in his argument upon defendant's failure to testify.

5. Criminal Law § 118—

The jury's verdict of guilty of feloniously entering the dwelling of a named person *held* sufficient to support judgment for felonious entry into the dwelling otherwise than burglariously with intent to commit larceny, the verdict being interpreted in the light of the indictment, the evidence, and the charge of the court.

APPEAL by defendant from *Hobgood, J.*, December 1966 Regular Criminal Session of ORANGE.

Criminal prosecution upon an indictment charging defendant about 11:50 p.m. on 21 April 1966 with feloniously committing the felony of burglary in the first degree.

Defendant, who was represented by his court-appointed counsel, James R. Farlow, because he was an indigent, entered a plea of not

guilty. Verdict: "Guilty of felonious entering the dwelling of Lyman Cotton."

From a judgment of imprisonment, defendant appealed to the Supreme Court.

Attorney General T. W. Bruton and Deputy Attorney General James F. Bullock for the State.

James R. Farlow for defendant appellant.

PER CURIAM. When the State had completed its evidence, defendant moved for a judgment of compulsory nonsuit. The court ruled that it would not submit the case to the jury on the charge of burglary in the first degree, but would submit to the jury the charge of a felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of G.S. 14-54, which is a less degree of the felony of burglary in the first degree as charged in the indictment. G.S. 15-170. The court overruled the motion and defendant excepted.

Defendant then offered the testimony of his mother in his own behalf.

Defendant did not renew at the close of all the evidence his motion for judgment of compulsory nonsuit.

The failure of defendant to renew his motion for judgment of compulsory nonsuit at the close of all the evidence constituted a waiver of his right to insist upon his first motion, and is not subject to review in this Court. G.S. 15-173; *S. v. Howell,* 261 N.C. 657, 135 S.E. 2d 625, and cases therein cited.

Although defendant has waived his right to insist upon a review of the State's evidence by this Court to determine whether it is sufficient to carry the case to the jury, we have decided to set it forth.

The State's evidence, considered in the light most favorable to it, tends to show the following facts: Lyman Cotton lives in Chapel Hill, and is a teacher of English at the University of North Carolina. He went to bed in his house about 11 p.m. on 21 April 1966. He was alone in his bedroom. The room had twin beds in it. The only light in his bedroom was between the twin beds. He awakened about midnight, and decided he would go downstairs and drink a glass of milk. He got out of bed on the floor between the twin beds. He saw something that looked like a stuffed duffle bag sticking out from under his bed. He reached down and touched it, it was warm and moist, and he knew it was the back of a man. He saw only the back of the person under his bed, and he could not tell whether this person was white or a Negro. As he stepped out into a very small

upstairs hall, a shot rang out and a light in his bedroom went off. Immediately following, two more shots were fired, one of which shattered the hanging light in the hall. He went downstairs as rapidly as possible, went out the back door, around to the front of his house, across the street, and asked them to call the police. The police came quickly. When he went to bed, two of his shoes were at the foot of his dresser in his bedroom. When he first found the shoes, after the shots were fired, one of them had a lead slug in the heel. He gave that shoe, which is marked State's Exhibit No. 1, to Detective Sergeant Pendergraft of the Chapel Hill police force with the slug still in it. He examined the pistol, marked for identification as State's Exhibit No. 2. He could not absolutely identify it as his pistol, but it looked like his pistol, which is a Smith and Wesson. He could not be altogether certain that it is his pistol, because he had not seen it in some weeks. He kept his pistol in the closet of his bedroom. After the shooting that night, the pistol was not there.

Lindbergh Taylor lives in Durham, North Carolina. He has known defendant five years and saw him at Mason's Motel in Chapel Hill, North Carolina, on 21 April 1966. He (Taylor) had gone to Mason's Motel to get his brother-in-law's clothes as he was checking out of the motel. His brother-in-law, Jesse Wright, and a bunch of boys were there at the time. Defendant wanted to ride back to Durham with them. In Durham he told defendant where he could get a room. Defendant said he wanted him to keep a .38 caliber pistol for him. State's Exhibit No. 2 was handed to Taylor, and he answered upon inquiry, "It was a pistol like this one." He took the pistol and kept it for a while. Later, defendant wanted to borrow some money from him. He had no money, but agreed to try to pawn the pistol for him. Defendant told him he went to a doctor's house in Chapel Hill, and shot at him with the gun. Jesse Wright and Peggy Mitchell were present when defendant made this statement. Peggy Mitchell has a newborn child and could not come to court. Defendant told Peggy to take the pistol. After defendant told about shooting somebody with it, he told him the best thing to do was to throw it away. The pistol had two bullets in it, and Peggy took the two bullets out and threw them away. Defendant got mad at Peggy for doing this and took the pistol back.

Charles Thompson testified to this effect: He lives in Durham. He has seen defendant play pool two or three times in the poolroom he runs. On a date he does not recall, defendant and two boys came in his poolroom. Defendant gave him a .38 caliber pistol. He later carried the pistol home and put it in his trunk, where it stayed until the officers came for it. He went home, got the pistol out, and gave

it to the officers. The pistol was a .38 caliber pistol, and if the State's Exhibit No. 2 is not it, it is just like the pistol defendant gave him. He gave defendant $10 for the pistol. He saw defendant some three or four weeks later in the poolroom one morning, and defendant asked him if he still had the pistol and if he still wanted to keep it. He replied, yes, he wanted to keep it.

Howard Pendergraft testified in substance: He is a detective sergeant on the police force of the town of Chapel Hill. Late on the evening of 21 April 1966 or early the next morning, he went to the home of Lyman Cotton. He made an investigation around his dwelling house, and found two bullets. One was recovered from the molding around the hall at the head of the steps outside Mr. Cotton's bedroom. This bullet is State's Exhibit No. 3. The other bullet, which is marked State's Exhibit No. 4, was in the heel of a black loafer shoe Mr. Cotton gave to him. He turned over to John Boyd of the State Bureau of Investigation the two bullets, a .38 caliber Smith and Wesson pistol, and a black loafer shoe which had the slug in its heel. He had got the pistol from Charles Thompson at his poolroom in Durham. The pistol was kept by and under the control of the Chapel Hill police department until it was turned over to the State Bureau of Investigation's laboratory for examination. He talked with defendant, and defendant denied any knowledge of this pistol.

Lindbergh Taylor, recalled as a State's witness, testified in substance: He visited defendant in jail at Chapel Hill. He had a conversation with defendant about the pistol, and defendant told him he had pawned it to a boy called "Buck Shot" in a poolroom in Haiti. He does not know "Buck Shot's" real name, but he is the boy who was on the witness stand a while ago by the name of Charles Thompson.

John Boyd is a special agent with the State Bureau of Investigation in charge of the firearms section of the crime laboratory, and has been so employed for nearly fifteen years. He has had training and experience. The court ruled that he was an expert in the field of firearms and ballistics. To this ruling there was no exception. He testified in substance: He examined the pistol, State's Exhibit No. 2, and the bullets marked State's Exhibits Nos. 3 and 4. These exhibits were given to him by Detective Sergeant Pendergraft of the Chapel Hill police department on 25 April 1966. State's Exhibit No. 3 was fired from the pistol, State's Exhibit No. 2. State's Exhibit No. 4 (the bullet from the heel of the shoe of Mr. Cotton) was fired from a weapon of this exact type, kind and description. His opinion that State's Exhibit No. 3 was fired from the pistol, State's Exhibit No. 2, was based on a microscopic comparison under a variable

magnification of two to twenty-two diameters. State's Exhibit No. 3 is a lead alloy. He fired the same type and kind of bullet. The markings from the pistol will be the same for any projectile fired through it so long as the metallic composition thereof is softer than the alloy steel barrel of the gun fired. He does not purport to say the bullet from the heel of the shoe of Mr. Cotton was fired from State's Exhibit No. 2, the pistol.

Charles Thompson, recalled as a witness by the State, testified in substance: He took the pistol from a boy named Robert, Junior, and gave him $10 for it. Defendant told him to keep the pistol until Friday. Defendant was with Robert, Junior. Robert, Junior, had the gun. He has never seen defendant with the gun. Defendant told him it was his gun when he gave the money to Robert, Junior.

Defendant offered the testimony of his mother, Gladys Fikes, who testified in substance: Defendant is her son. He was 20 years of age on 21 April 1966. The police came to her home about 12 o'clock at night. Her son went to Mason's Motel about 11:30 p.m., and she saw him no more that night. She works for Mr. Lyman Cotton, and has been working for him over eleven years, and still works for him. She remembers it was the night of 21 April 1966 when the police came to her house because she marked it on her calendar.

Defendant assigns as error that Lyman Cotton was permitted to testify over his objection and exception as follows: "I cannot absolutely identify it as my pistol, but it looks exactly like mine. Mine was a Smith and Wesson. . . . I cannot be altogether certain because I had not seen the pistol in some weeks. . . . It (the pistol) was kept in the closet of my bedroom." He was then asked the question: "After the events described, was the pistol in the closet of your bedroom?" He replied, over defendant's objection and exception: "No, it was not in the closet. I heard two (2) shots fired."

The State's evidence tends to show that the bullet taken from the molding around the hall at the head of the steps outside Lyman Cotton's bedroom was fired from the pistol defendant gave to Charles Thompson. This pistol was taken by Howard Pendergraft, a detective sergeant of the town of Chapel Hill, from Charles Thompson at his poolroom in Durham, and kept under his control until he turned it over to the SBI laboratory in Raleigh. It was not necessary that Lyman Cotton should positively identify this pistol. His lack of positive identification affects the weight of his testimony rather than its admissibility. This assignment of error is overruled. 2 Wharton's Criminal Evidence, 12th Ed., by Anderson, § 675.

Defendant assigns as error that the court permitted the State, over his objection and exception, to introduce in evidence the pistol

and the bullet in the heel of the shoe. This assignment of error is overruled. *S. v. Macklin,* 210 N.C. 496, 187 S.E. 785.

The jury could reasonably find from the evidence that defendant entered Lyman Cotton's house with intent to commit larceny. "Non-burglarious breaking or entering is a statutory offense. (G.S. 14-54). Under the statute it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking. Therefore, while evidence of a breaking is competent, it is not required." 1 Strong's N. C. Index, Burglary and Unlawful Breakings, § 2. Upon authority of *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, it is clear that the State's evidence adduced in the trial below, considered in the light most favorable to it, was sufficient to carry the case to the jury on the charge of a felonious entry otherwise than burglariously into the home of Lyman Cotton with intent to commit larceny, and to support the verdict.

Defendant assigns as error this part of the speech of the solicitor for the State: "That you (the jury) have not been allowed to hear all the truth of this case, and they (you) might wonder why." We have in the record before us only this one sentence of the solicitor's argument to the jury. It is difficult, if not impossible, to ascertain from this one sentence what the solicitor meant. We can only conjecture as to what he meant. It seems clear that this one sentence was not a reference to the defendant's failure to testify in his own behalf. We do not approve of this argument by the solicitor, but in our opinion it does not justify disturbing the verdict and judgment below. This assignment of error is overruled.

The other assignments of error have been carefully examined and all are overruled. There are no assignments of error to the charge.

The court instructed the jury that it could return one of three verdicts as they found the facts to be from the evidence and the charge of the court: (1) Guilty of a felonious entry into a house otherwise than burglariously with intent to commit larceny, or (2) guilty of unlawfully entering the house of Lyman Cotton without an intent to commit larceny or other infamous crime therein, or (3) not guilty. *S. v. Chambers,* 218 N.C. 442, 11 S.E. 2d 280; *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278. Interpreting the verdict in the light of the indictment, the evidence, and the charge of the court, it is sufficient to support the judgment. 1 Strong's N. C. Index, Criminal Law, § 118.

In the trial below we find

No error.

STATE v. HAMPTON R. LAKEY.

(Filed 20 June, 1967.)

1. Burglary and Unlawful Breakings § 4—

Evidence that a specified building was feloniously broken and entered and a safe located therein damaged, with testimony of an eyewitness that he saw defendant running from the vicinity of the building shortly after a police car arrived on the premises, and that the fingerprints of another who was seen by another witness running from the vicinity of the building at the same time were found on defendant's automobile, *held* sufficient to overrule defendant's motion for nonsuit.

2. Criminal Law § 101—

If there is circumstantial evidence tending to prove each essential element of the offense charged as a logical and legitimate deduction, it is sufficient to be submitted to the jury.

3. Criminal Law § 33—

The State's evidence tended to show the felonious breaking and entering of a building, and that defendant was seen running from the vicinity of the building shortly after a police car arrived on the premises. Another witness at a different vantage point testified that he saw an escapee running from the vicinity of the building and there was testimony that the escapee's fingerprints were found on defendant's parked car. *Held:* It was competent for the State to show as relevant circumstances that the escapee was seen running from the building and that his fingerprints were found on defendant's parked car.

APPEAL by defendant from *Hobgood, J.*, November 1966 Criminal Session of CHATHAM.

Defendant, along with one Douglas Brady, was charged in a bill of indictment with attempting to force open a safe by the use of tools, and by separate bill of indictment defendant, along with Douglas Brady, was charged with felonious breaking and entering. The evidence for the State was substantially as follows:

John Talton Crutchfield testified that he was the manager of Central Carolina Farmers Cooperative, a corporation owned by the people who buy from and sell to it. The corporation owns a building in Pittsboro. On 12 August 1966 at closing time he locked the office, display room, and outer building doors. In response to a call received by him, he returned to the building around 4:00 A.M. and found that the outer door on the south side of the building had been pried open, that the office safe had marks on the back side of the hinges, and the dial of the safe was sprung so that the safe could not be opened.

Reese Coble testified that he was a police officer for the Town of Pittsboro on 13 August 1966, and in response to a call from the jail, he went to Central Carolina Farmers Exchange building around

3:50 A.M. He drove up to the premises with his car lights off and sat there for several minutes. When he turned his lights on and started to back up, he noticed a man running from the vicinity of the building. Mr. Coble identified this man as Douglas Brady. He further testified that Sam Polston's house is situated approximately 250 feet from the building, and that a mercury vapor light, which gives adequate light, is situated between the two buildings.

Sam Polston testified that on 12 and 13 August 1966 he was living in a house a short distance from Central Carolina Farmers Exchange. During the early morning of the 13th he heard banging and knocking noises coming from the direction of the company building. He twice called and reported this to the jail and then went outside and stood under a tree in his mother's yard. "Pretty quick after I called the jail again a car pulled up in front of Farmers Exchange and I saw a man coming running across the Farmers Exchange yard. . . . I saw him full face. . . . Mr. Lakey the defendant is the man I saw. . . . Mr. Lakey come across the back of the Farmers Exchange yard." He further stated that he was able to see defendant because defendant ran under the vapor light and looked straight at the witness.

Sheriff John Emerson, Jr., testified that he investigated the premises of Central Carolina Farmers Exchange on the morning of 13 August 1966 and observed that an outer door to the building had been forced open and the door lock was sprung. Later that morning defendant Lakey's automobile was found parked approximately three miles by road, and approximately one mile by railroad tracks, from Central Carolina Farmers Exchange. The car was fingerprinted, and the prints of Douglas Brady, an escapee, were found on the car.

Other evidence offered by the State is not pertinent to this opinion. The defendant offered no evidence.

The jury returned a verdict of guilty of felonious breaking and entering and safe robbery. Upon motion of defendant, the verdict was set aside as to safe robbery. On the verdict of guilty of felonious breaking and entering, the court entered judgment confining defendant to the State's Prison for a term of not less than five nor more than seven years. Defendant appealed.

Attorney General Bruton and Staff Attorney Vanore for the State.
Buford T. Henderson for defendant.

PER CURIAM. Defendant contends the trial court erred in denying his motion for judgment of nonsuit. The State relies on circumstantial evidence to prove there was a felonious breaking and enter-

ing by defendant. There was sufficient evidence to show that the building of Central Carolina Farmers Exchange was feloniously broken and entered on the morning of 13 August 1966, and that the safe located therein was damaged. There was also ample evidence to identify defendant and one Douglas Brady as the persons seen running across the premises from the direction of the building shortly after a witness had heard banging and knocking noises coming from the direction of the building and a few minutes after a police car drove on the premises. Further, there was evidence that Brady's fingerprints were found on defendant's parked automobile.

These facts present substantial evidence of all the material elements of felonious breaking and entering. " '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." *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728.

Defendant further contends the trial court erred in admitting evidence that Douglas Brady was seen running from the building that had been broken and entered, and that his fingerprints were found on defendant's parked automobile. These were circumstances calculated to throw light upon the supposed crime, and their introduction into evidence was permissible. *State v. Payne,* 213 N.C. 719, 197 S.E. 573.

We have carefully examined all other exceptions and find no reversible error.

No error.

STATE v. ESAU SAMUEL McCASKILL.

(Filed 20 June, 1967.)

1. Arrest and Bail § 3—

An officer may arrest without a warrant a motorist whom the officer actually sees violating the statutory speed limit, and has the right to follow the motorist and enter the motorist's home in order to make such arrest. G.S. 15-41(1).

2. Arrest and Bail § 5—

An officer attempting to make a lawful arrest may use such force as reasonably appears necessary to take the accused into custody.

3. Assault and Battery § 15—

An instruction that if defendant intentionally and without legal justification of self-defense did shoot his victim, and had at the time the intent to kill his victim, and that he inflicted serious injury, defendant would be guilty of a felonious assault, *held* without error.

4. Criminal Law § 164—

Where the jury convicts defendant of a lesser degree of the crime charged, any error relating solely to a higher degree of the offense cannot be prejudicial.

5. Criminal Law § 156—

A contention that the court failed to charge the jury as required by G.S. 1-180 is broadside and ineffectual.

6. Criminal Law § 112—

If a party desires a fuller statement of his contentions or a charge on a subordinate feature, he must aptly tender request therefor.

APPEAL by defendant from *McKinnon, J.*, December Mixed Session, 1966, SCOTLAND Superior Court.

The defendant was charged with a felonious assault upon Willie McNair, a patrolman for the City of Laurinburg.

The evidence for the State tended to show that McNair observed the defendant driving 55 miles per hour in a 25-mile zone, that he followed him to the Teacherage where the defendant lived, called to him that he was under arrest for speeding, that the defendant refused to submit and entered the Teacherage. The officer followed; they got into a scuffle; and he then called police headquarters for help. Upon turning from the phone, he found that the hall was dark, then a shotgun was fired, and he was struck in the lower part of his stomach, that he was later shot again and struck in his right arm. The officer sustained serious injuries from both shots, requiring that he be hospitalized for a total of more than three months.

The defendant denied that the officer had ever informed him that he was under arrest, but told him he was going to take him dead or alive. He testified that the officer had a grudge against him and had annoyed him by minor charges to the extent that he had previously complained to the Chief of Police about McNair's conduct. He said that in the first scuffle he received a blow on the head, and that McNair had shot at him twice before he got his shotgun, loaded it, and fired. He pleaded the lack of authority of the officer to arrest him under these circumstances, denied that he was ever told he was under arrest, and pleaded self-defense.

The jury returned a verdict of guilty of assault with a deadly weapon, a misdemeanor; and from judgment that he be imprisoned for not less than twenty nor more than twenty-four months, with a recommendation that he be placed on work release, the defendant appealed.

L. J. Britt & Son by L. J. Britt, Jr.; and Robert Weinstein, Attorneys for defendant appellant.

T. W. Bruton, Attorney General; George A. Goodwyn, Assistant Attorney General, for the State.

PER CURIAM: The defendant noted some sixty-six exceptions, most of them being to the charge of the Court. In fact, he excepted to the entire charge, bracketing each paragraph and taking an exception thereto. However, in his brief he brings forth only four exceptions, all of which relate to the charge of the Court. The first of these concerns a statement by the Court that an officer has a right to make an arrest without a warrant if a violation of the Motor Vehicles Act is actually committed in his presence, and if the officer saw the commission of the misdemeanor that he would have the right to enter the premises where the defendant lived in order to make an arrest. This is in accordance with G.S. 15-41(1). See also *S. v. Avent*, 253 N.C. 580, 118 S.E. 2d 47, and *S. v. Fenner*, 263 N.C. 694, 140 S.E. 2d 349.

The second exception is a further statement along the lines of the first exception, stating the requirements for an arrest without warrant, and upon the failure to submit to an arrest, or resistance, that the officer may use such force as appears necessary to take the accused into custody. This exception is overruled upon authority of *S. v. Fain*, 229 N.C. 644, 50 S.E. 2d 904, which holds an officer, having a right to arrest an offender, or preventing an escape, may use such force as is necessary to effect the purpose.

The third exception relates to the statement of a contention of the defendant, but is not supported by any citations, and is without merit. The fourth exception is to the instruction of the Court that if the jury found beyond a reasonable doubt that the defendant "did intentionally and without legal justification of self-defense, shoot Willie McNair with a shotgun, and had in his mind at the time intent to kill him and that serious injury was inflicted by such shooting," that it would be the duty of the jury to find the defendant guilty as charged. We perceive no error in this, and the defendant could not complain if there were, since he was not found "guilty as charged," but of a misdemeanor. Upon examination of each of the exceptions, we find them without merit.

Although supported by no exceptions, the defendant argues in his brief that the Court failed to charge "as to the contentions of the defendant in accordance with G.S. 1-180." This is a broadside exception which is not sufficient. *S. v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364. Further, the record shows no request by the defendant for a further statement of his contentions or of the law. His failure to do so renders the exception invalid. 4 Strong's N. C. Index, Trial, § 37.

For the purposes of this decision, it is unnecessary to go into further description of the horrible injuries sustained by the officer. The jury, having found that the defendant was not acting in self-defense, was most charitable to him when it did not convict him of a felonious assault. The judge, too, was considerate in recommending that the defendant be placed on work release. He has no cause to complain, as his rights have been fully protected throughout the trial, and his exceptions are without merit.

No error.

STATE v. WILBURN KING.

(Filed 20 June, 1967.)

Criminal Law § 19—

Where a cause is transferred from the recorder's court to the Superior Court upon defendant's demand for a trial by jury, defendant may not be tried in the Superior Court upon the original warrant, but must be tried upon an indictment.

APPEAL by defendant from *Falls, J.,* January-February 1967 Regular Criminal Session of HAYWOOD.

On 24 November 1966, L. H. Cagle, a justice of the peace of Haywood County, issued a warrant which charged that defendant, on that date, operated a motor vehicle upon a public highway of North Carolina while under the influence of intoxicating liquor. Defendant was arrested and bound over for trial in the Recorder's Court of Haywood County on 30 November 1966. At that time, defendant moved for a trial by jury. Whereupon, the recorder transferred the case to the Superior Court of Haywood County.

Upon a plea of not guilty, defendant was tried in the Superior Court *upon the warrant* on 31 January 1967. Both the State and defendant offered evidence. The verdict of the jury was "guilty as charged in the *bill of indictment.*" (Italics ours.) From judgment of imprisonment, defendant appealed.

T. W. Bruton, Attorney General; William W. Melvin, Assistant Attorney General; T. Buie Costen, Staff Attorney, for the State.

Frank D. Ferguson, Jr.; R. Phillip Haire for defendant.

PER CURIAM. The record affirmatively discloses that, despite the wording of the jury's verdict, no bill of indictment has been returned against defendant charging him with the crime for which he was tried. "(A) person charged with the commission of a misdemeanor cannot be put on trial in the Superior Court upon the warrant of an inferior court unless he has been tried upon such warrant in the inferior court and has appealed from that court to the Superior Court." *State v. Thomas,* 236 N.C. 454, 462, 73 S.E. 2d 283, 288. *Accord, State v. Smith,* 264 N.C. 575, 142 S.E. 2d 149; *State v. Evans,* 262 N.C. 492, 137 S.E. 2d 811; *State v. Johnson,* 251 N.C. 339, 111 S.E. 2d 297; *State v. Ferguson,* 243 N.C. 766, 92 S.E. 2d 197. The Superior Court of Haywood County, therefore, lacked jurisdiction of the action; defendant's conviction and sentence are void. The judgment is arrested. The solicitor for the district may yet prosecute the defendant for the offense charged in the warrant upon the return of a true bill of indictment.

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL.

§ 8. Identity of Actions.

After institution by the wife of an action for alimony without divorce the husband instituted an action for absolute divorce on the ground of separation. *Held:* The issues involved and the relief demanded in the respective actions are not the same, and the wife's plea in abatement in the husband's subsequent action for absolute divorce is properly denied. *Fullwood v. Fullwood*, 421.

§ 10. Actions for Negligent Injury Causing Death.

The statement in an application for extension of time to file complaint that the nature and purpose of the action was to recover damages for wrongful death of plaintiff's intestate resulting from defendant's negligence in the care and treatment of intestate, *held* sufficient to entitle plaintiff to allege both an action for wrongful death and an action for pain and suffering endured by intestate from the time of injury until death, since defendant could not have been taken by surprise by the assertion of the separate claim for pain and suffering. *Sharpe v. Pugh*, 598.

§ 14. Actions Arising out of Legal or Domestic Relationships.

The trustee of an incompetent failed to collect sums due from a third person for the support of the incompetent, and, as a result, was able to furnish the incompetent with the bare necessities of life only, instead of reasonable comforts under the circumstances. *Held:* Upon the death of the incompetent, the right of action for the amount by which the incompetent's estate was decreased by failure to collect such funds, and the right of action for the wrong done the incompetent in failing to provide her with reasonable comforts, survive to the incompetent's personal representative. *Kuykendall v Proctor*, 510.

ACTIONS.

§ 3. Moot Questions.

Proceedings against an insurance agent for revocation of licenses do not become moot upon the surrender by the agent of his licenses or their expiration, since adjudication of the question of the agent's wrongdoing would affect subsequent issuance of license to him. *Elmore v. Lanier, Comr. of Insurance*, 674.

ADMINISTRATIVE LAW.

§ 1. Creation of Administrative Boards and Agencies.

Initial determination of civil controversies by administrative boards, with right of appeal to the courts, is an expeditious method for the adjudication of such questions, and such procedure is particularly efficient when the subject of inquiry is of a very technical nature, and administrative procedure has become necessary in many fields in the proper administration of justice. *Elmore v. Lanier, Comr. of Insurance*, 674.

§ 2. Exclusiveness of Statutory Remedy.

An owner of land in an area annexed by a municipality may attack the validity of the annexation ordinance only by filing a petition within 30 days

ADMINISTRATIVE LAW—*Continued.*

following the passage of the ordinance seeking a review of the action of the municipal board of commissioners, in accordance with the procedure provided by the statute, and an independent action instituted some 22 months after the adoption of the ordinance and seeking to have it declared void *ab initio*, should be dismissed. *Gaskill v. Costlow*, 686.

§ 3.1. Procedure, Hearings and Orders of Administrative Boards.

Injunction will not lie for the purpose of interfering with valid and regular statutory procedure before an administrative board, there being ample opportunity for a party to redress any injustice by appeal from the final order of such board. *Elmore v. Lanier, Comr. of Insurance*, 674.

In a hearing before the Insurance Commissioner of charges against an agent in proceedings for the revocation of the agent's license, the agent having been given more than the 10 day statutory notice, motion for a continuance and motion for a bill of particulars are addressed to the sound discretion of the Commissioner, and the denial of the motions will not be disturbed in the absence of a showing of abuse. *Ibid.*

AGRICULTURE.

§ 14. Validity of Statutes Regulating Production, Sale and Distribution of Milk.

The State Milk Commission has statutory authority to fix a uniform rate for the transportation of milk from farm to the processing plant and to maintain a fair price to the producer, and such statutory provisions have reasonable relationship to the assurance of an adequate supply of wholesome milk, and are constitutional. *Milk Commission v. Food Stores*, 323.

G.S. 106-266.1 *et seq.*, including amendments, must be construed in the light of its purpose to protect the public interest in a sufficient, regularly flowing supply of wholesome milk and, to this end, to provide a fair price to the milk producer, and the act is not for the purpose of regulating competition among retail grocery stores *per se*. *Ibid.*

In this action to restrain a retail grocery chain from selling milk below cost, affidavits of the Commissioner of Agriculture and others, to the effect that the purpose of the Milk Act was to prevent the use of milk by grocery stores as a "loss leader," are incompetent, since the legislative purpose cannot be established by such evidence. *Ibid.*

G.S. 106-266.21 prohibits the sale of milk below cost with the purpose on the part of the seller to injure, harass or destroy competition in the marketing of milk, and the statute does not make the sale of milk below cost a violation in the absence of such illegal purpose. *Ibid.*

The provisions of G.S. 106-266.21 making proof of the sale of milk by a retailer below cost *prima facie* evidence of the purpose of such retailer to injure, harass or destroy competition in the marketing of milk, is not beyond the constitutional power of the Legislature. *Ibid.*

The illegal purpose proscribed by G.S. 106-266.21 is more than a mere intent to attract customers from those who are actual or potential customers of a rival, since all successful competition necessarily harasses to some degree others engaged in the same business activity in the same territory, and our economic system is built upon the theory that such competition is desirable; the illegal purpose constituting a violation of the statute is a malevolent purpose to eliminate a rival or so hamper him as to achieve, or approach, a monopoly, and thus control prices to the harm of the public. *Ibid.*

AGRICULTURE—*Continued.*

§ 15. Powers of the Milk Commission.

The State Milk Commission has not fixed a price to be charged by retail grocery stores in the sale of milk to consumers, and therefore the authority of the Commission to do so is not involved in an action to restrain a grocery chain from selling milk below cost. *Milk Commission v. Food Stores*, 323.

§ 17. Violation and Enforcement.

The enumeration by G.S. 106-266.21 of the facts which may be shown by a retailer selling milk below cost in order to rebut the presumption that such sale was made for the purpose of injuring, harassing or destroying competition, *held* not exclusive, and the *prima facie* case arising from sale below cost may be rebutted by proof of any circumstances which would tend to disprove an intent on the part of the retailer to injure, harass or destroy competition. To construe the statute otherwise would raise grave question as to its constitutionality. *Milk Commission v. Food Stores*, 323.

In this suit to enjoin defendant retailer from selling milk below cost, allegations that defendant was so selling milk for the purpose of destroying competition *is held* sufficient as against demurrer. *Ibid.*

Evidence held not to sustain finding that defendant was selling milk below cost to create monopoly. *Ibid.*

APPEAL AND ERROR.

§ 1. In General — Theory of Trial.

The verdict of the jury in a trial free from error of law is conclusive on appeal. *Bank v. Hackney*, 437; *Durham v. Realty Co.*, 631.

Where appeal is taken from an order striking an entire cause of action, the appeal brings up the entire case for review, and appellant should bring forward for consideration his exceptions then appearing in the record relating to the striking of other portions of the complaint, even though the order striking such other portions of the complaint is not immediately appealable. *Sharpe v. Pugh*, 598.

§ 2. Supervisory Jurisdiction and Matters Cognizable Ex Mero Motu.

The Supreme Court has the power to issue any remedial writ necessary to give it general supervision and control over proceedings of the lower courts, and to this end will grant *certiorari* to review an order of the Superior Court which involves a question of public importance. *S. v. Davis*, 1.

The Supreme Court may exercise its constitutional supervisory jurisdiction to clarify an important question of practice, even though the question is not properly presented by exception duly entered and an assignment of error properly set out. *S. v. Hewett*, 348.

The Supreme Court will take notice *ex mero motu* of the absence of a necessary party to an action and remand the cause for joinder of such necessary party. *Underwood v. Stafford*, 700.

§ 3. Right to Appeal and Judgments Appealable.

In an action against the purchasers of the remaining undeveloped lots in a subdivision to recover damages and to restrain further violation of a restrictive covenant specifying the minimum square feet of heated floor area for each dwelling in the subdivision, order dissolving the temporary restraining order theretofore entered in the cause is not reviewable in the absence of a showing of abuse of discretion, since it is an interlocutory order which does not affect a substantial right of plaintiffs in view of the fact that in the event

APPEAL AND ERROR—*Continued.*

plaintiffs prevail upon the final hearing and it should be determined that they are entitled to equitable relief in addition to damages, they would have the remedy of mandatory injunction. *Currin v. Smith*, 108.

Where plaintiff alleges a cause of action for wrongful death and a cause of action to recover damages for the pain and suffering endured by his intestate from the time of injury to the date of death, an allowance of a motion to strike all the allegations stating the cause of action for pain and suffering amounts to a demurrer dismissing that cause of action, and the order is immediately appealable. *Sharpe v. Pugh*, 598.

In an action for wrongful death for negligence of defendant physician in prescribing a dangerous drug for a purpose for which it was not recommended by its manufacturer, and in failing to warn intestate's parents of the dangerous character of the drug before administering it, the striking of the allegations relating to failure of defendant physician to warn intestate's parents involves only one specification of negligence and does not amount to a striking of a cause of action in its entirety, and is not immediately appealable. *Ibid.*

Where appeal is taken from an order striking an entire cause of action, the appeal brings up the entire case for review, and appellant should bring forward for consideration his exceptions then appearing in the record relating to the striking of other portions of the complaint, even though the order striking such other portions of the complaint is not immediately appealable. *Ibid.*

§ 4. Parties who may Appeal — "Party Aggrieved."

Where the complaint states a cause of action against each of two defendants as joint tort-feasors, one defendant cannot be the party aggrieved by error in the court's instruction to the jury as to the negligence of the other defendant, since defendants' rights *inter se* in regard to contribution are not precluded by plaintiff's judgment. *Childers v. Seay*, 721.

§ 20. Parties Entitled to Object and Take Exception.

When the court's limitation of the amount of damages is technically inexact in unduly restricting the purchaser's recovery, such technical error cannot be prejudicial to the seller, and, the purchaser not having appealed, the seller may not complain. *Rubber Co. v. Tire Co.*, 50.

A party is not entitled to except to matters relating to an issue answered in his own favor. *Watson v. Stallings*, 187.

In this action against both drivers involved in a collision, each driver attempted to get his version of the accident in evidence by cross-examination over plaintiff's objection of plaintiff's witness, the investigating patrolman. *Held:* Plaintiff may not be charged for responsibility by one defendant for any error made by the other defendant in this respect. *Wands v. Cauble*, 311.

A defendant may not complain on appeal of an error favorable to himself, or matter prejudicial solely to a co-defendant. *Durham v. Realty Co.*, 631.

Where the complaint states a cause of action against each of two defendants as joint tort-feasors, one defendant cannot be the party aggrieved by error in the court's instruction to the jury as to the negligence of the other defendant, since defendants' rights *inter se* in regard to contribution are not precluded by plaintiff's judgment. *Childers v. Seay*, 721.

§ 21. Exception and Assignment of Error to Judgment or to Signing of Judgment.

An exception to the judgment presents for review only whether error of law appears on the face of the record. *MacKay v. McIntosh*, 69.

APPEAL AND ERROR—*Continued.*

§ 22. Exceptions and Assignments of Error to the Findings of Fact.

An exception that the findings of fact by the trial court are not supported by evidence, without an exception to any particular finding, is broadside and ineffectual. *MacKay v. McIntosh*, 69.

§ 24. Exceptions and Assignments of Error to the Charge.

An exception to the failure of the court to charge sufficiently on an aspect of the law presented by the evidence should set forth, in substance at least, what appellant contends the court should have charged. *Bank v. Hackney*, 437.

§ 31. Settlement of Case on Appeal.

Statement of what the witness would have answered had he been permitted to testify cannot be supplied at a later date by the attorney's information or deduction, or by the witness, when such matter is entered in the record without any supervision of the trial court. *Electro Lift v. Equipment Co.*, 433.

§ 34. Form and Requisites of Transcript.

The requirement of the amendment to Rule of Practice in the Supreme Court No. 19(1) is again brought to the attention of the Bar. *Miller v. Miller*, 140.

§ 41. Harmless and Prejudicial Error in Admission of Evidence.

Exception to the admission of certain testimony cannot be sustained when the same witness has theretofore testified to substantially the same effect without objection. *Durham v. Realty Co.*, 631.

§ 41.2. Harmless and Prejudicial Error in Exclusion of Evidence.

Where the answer which the witness would have given if permitted to testify is not shown in the record it cannot be ascertained that its exclusion was prejudicial. *Gower v. Raleigh*, 149.

Where plaintiff's evidence is insufficient to be submitted to the jury, even if testimony excluded had been admitted, the exclusion of the testimony cannot be prejudicial. *Ibid.*

§ 42. Harmless and Prejudicial Error in Instructions.

Conflicting instructions on a material point, one correct and the other incorrect, must be held for prejudicial error when the incorrect instruction is given in the final summation of what the jury must find in order to answer the issue in the affirmative, so that the jury may have followed the incorrect charge in answering the issue. *Barefoot v. Joyner*, 388.

A statement in the charge which could not have possibly misled the jury will not be held for prejudicial error. *Durham v. Realty Co.*, 631.

§ 46. Review of Discretionary Matters.

An order of the court directing the husband to make specified payments to his wife until the birth of their child, without any provision for payments thereafter, expires upon the birth of the child, and upon the hearing of a motion for subsistence and counsel fees *pendente lite* made after the birth of the child it is error for the court to hold that the prior order should not be modified, and the discretionary order of the court that the matter should be continued under the prior order will be vacated and the cause remanded, since such discretion was not exercised with respect to the controlling factual conditions. *Garner v. Garner*, 293.

APPEAL AND ERROR—*Continued.*

§ 47. Review of Orders Relating to Pleadings.

Upon appeal from an order allowing a motion to strike, the facts alleged, as distinguished from the conclusions of law, must be taken as true, and the question determined on the basis of whether the allegations are germane. *Bouligny, Inc., v. Steelworkers*, 160.

§ 49. Review of Findings or Judgments on Findings of Fact.

Where the findings of fact by the court, in a trial by the court under agreement of the parties, support the judgment, an exception to the judgment cannot be sustained. *MacKay v. McIntosh*, 69.

The judge's findings of fact upon waiver of trial by jury are conclusive when supported by competent evidence. *Grant v. Banks*, 473.

Findings of fact and conclusions of law relating to matters not presented for decision by the lower court will be stricken on appeal in order that possible future proceedings bringing such matters in issue may not be prejudiced. *Estridge v. Denson*, 556.

A conclusion of law of the Superior Court in regard to matters not presented for decision will be stricken on appeal in order that subsequent proceedings may not be prejudiced thereby. *Dale v. Morganton*, 567.

§ 50. Review of Equity Proceedings.

Upon appeal from an order granting an interlocutory injunction, the Supreme Court is not bound by the findings of fact made by the court below, but may review the evidence and find facts for itself. *Milk Commission v. Food Stores*, 323.

On appeal from an order granting or refusing an interlocutory injunction, the Supreme Court is not bound by the findings of fact of the trial court, but may review the evidence and find facts for itself. *Dale v. Morganton*, 567.

§ 54. New Trial and Partial New Trial.

Where an error is found which relates solely to one issue, the Supreme Court may grant a partial new trial limited to such issue. *Belmany v. Overton*, 400.

§ 55. Remand.

Where it is apparent from the record that an order was entered under misapprehension of the applicable law, the cause must be remanded. *Myers v. Myers*, 263.

Where the record discloses that the second issue submitted in a negligence action was whether defendant by his own negligence contributed to his injuries, the judgment must be vacated and the cause remanded for a new trial, notwithstanding stipulations of the parties that the second issue should correctly read whether plaintiff by his own negligence contributed to his injuries, since whether the jury understood that the second issue used the word "defendant" where it should have used "plaintiff" is not certain, and in any event judgment could not be rendered for plaintiff upon the verdict of record. *Bittle v. Jarrell*, 266.

The court awarded the custody of the children of the marriage in accordance with the prior order entered in the cause under the mistaken belief that he had to do so in view of the verdict of the jury in the divorce action. *Held:* A new trial having been awarded in the divorce action, the order of custody will not be altered prior to trial unless for good cause shown earlier consideration should become necessary, but after retrial the court must consider the question of custody *de novo*. *Stanback v. Stanback*, 497.

APPEAL AND ERROR—*Continued.*

§ 60. Law of the Case and Subsequent Proceedings.

Where it is determined on appeal that a certain state of facts does not constitute a defense to plaintiff's action, and the cause is remanded, defendant's allegation thereafter of the same state of facts as a defense is properly stricken. *Bryant v. Dougherty,* 748.

ARREST AND BAIL.

§ 3. Right of Officer to Arrest Without Warrant.

Where officer has reasonable ground to believe that a suspect had committed a felony he may arrest such suspect without warrant. *S. v. Bell,* 25.

Some two hours after a felonious breaking, officers apprehended a person, answering the description of the perpetrator, hiding behind a bush two blocks from the scene of the crime. *Held:* Under the circumstances it was lawful for the officer to arrest such person without a warrant and, as an incident to the arrest, to search him and take from him any property which might be competent as evidence in proving his guilt. *S. v. Tippett,* 588.

Where the circumstances are such as to authorize a police officer to arrest defendant without a warrant, it is not required, as a prerequisite to a search incidental to the arrest, that the officer make a formal declaration of arrest, and it is sufficient if the officer tells defendant upon apprehending the defendant near the scene of the crime to get into the police car and advises him to take his hands out of his pockets. Fourth and Fourteenth Amendments to the Constitution of the United States. *Ibid.*

An officer may arrest without a warrant a motorist whom the officer actually sees violating the statutory speed limit, and has the right to follow the motorist and enter the motorist's home in order to make such arrest. *S. v. McCaskill,* 788.

§ 5. Method of Making Arrest and Force Permissible.

An officer attempting to make a lawful arrest may use such force as reasonably appears necessary to take the accused into custody. *S. v. McCaskill,* 788.

ASSAULT AND BATTERY.

§ 4. Criminal Assault in General.

A battery always includes an assault, and where there is a battery by the application of force, directly or indirectly, to the person of another, there is an assault and battery. *S. v. Britt,* 416.

Criminal assault is governed by the common law rules in this State, and G.S. 14-33 merely provides different punishments for various types of assault. *S. v. Roberts,* 655.

A criminal assault may be accomplished either by an overt act or by a show of violence which causes the person assailed reasonably to apprehend immediate bodily harm or injury so that he engages in a course of conduct which he would not otherwise have followed. *Ibid.*

A criminal intent not expressed by an overt act or an intentional atttempt to do violence or injury to the person of another cannot constitute an assault, since a person may not be convicted of a criminal offense solely for what may have been in his mind. *Ibid.*

§ 7. Assault on Female by Man or Boy Over Eighteen Years of Age.

Testimony of a witness that she saw defendant, a male over 18 years of age, talking to a four year old child and her companion, that she then saw

ASSAULT AND BATTERY—*Continued.*

the female child in defendant's arms, that defendant put the child down after the witness had hollered at him twice to do so, without any evidence that defendant made any movement to leave with the child, do any thing indicative of force or violence, or that the child was threatened, or that defendant molested or improperly held the child, *held* insufficient to be submitted to the jury on a charge of assault upon a female by a man or boy over 18 years of age. *S. v. Roberts*, 655.

§ 14. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant committed an apparently unprovoked assault upon the prosecuting witness, using a knife some seven inches long, inflicting wounds about the head, face and neck, one of which extended from the back of the neck to the point of his chin and was some one-half inch deep at places, *is held* sufficient to show that the knife was a deadly weapon, notwithstanding the absence of evidence of the length of the blade, and to show that the knife was used with intent to kill, and that defendant inflicted serious injury not resulting in death, G.S. 14-32, and nonsuit of the felony charge was properly denied. *S. v. White*, 78.

Testimony of one witness to the effect that he saw defendant and his victim fighting, of another that he saw defendant chasing his victim with a knife, of a third that after defendant was subdued the victim was bleeding profusely, with medical testimony that the wounds were extensive and would have caused death but for prompt medical treatment, *held* sufficient to be submitted to the jury, notwithstanding testimony of the victim tending to exculpate defendant. *S. v. Smith*, 289.

Evidence that the 16 year old prosecutrix resisted the amorous advances of defendant, a 26 year old man, whereupon defendant hit her on her neck and slapped her when she screamed, *held* sufficient to sustain verdict of defendant's guilt of an assault upon a female, he being a male person over 18 years of age, and defendant's contention that the prosecutrix encouraged defendant in his advances prior to resisting him, is no defense, and the principle of a constructive assult, where a person, through fear, is forced to go where she would not otherwise have gone, or leave a place she had a right to be, is inapposite. *S. v. Britt*, 416.

Testimony of a witness that she saw defendant, a male over 18 years of age, talking to a four year old child and her companion, that she then saw the female child in defendant's arms, that defendant put the child down after the witness had hollered at him twice to do so, without any evidence that defendant made any movement to leave with the child, do any thing indicative of force or violence, or that the child was threatened, or that defendant molested or improperly held the child, *held* insufficient to be submitted to the jury on a charge of assault upon a female by a man or boy over 18 years of age. *S. v. Roberts*, 655.

§ 15. Instructions in Criminal Prosecutions.

An instruction that if defendant intentionally and without legal justification of self-defense did shoot his victim, and had at the time the intent to kill his victim, and that he inflicted serious injury, defendant would be guilty of a felonious assault, *held* without error. *S. v. McCaskill*, 788.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

§ 1. Transactions Operating as Assignment.

An assignment by a debtor of property to a new corporation without obligations of its own, in exchange for stock in the corporation, even though

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Continued.*

such corporation is formed for the purpose of satisfying creditors, *held* not to constitute a voidable assignment even though at the time the debtor was insolvent, since the debtor obtained full value for his property in the form of stock, and it is not unlawful for an insolvent debtor to transfer his property for other property of a different form. *Estridge v. Denson* and *Paving Co. v. Denson* and *Wilson v. Denson*, 556.

ASSOCIATIONS.

§ 5. Right to Sue and be Sued.

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members, G.S. 1-69.1, G.S. 1-97(6), and may be held liable in damages for torts committed by its employees or agents while acting in the course of their employment. *Bouligny, Inc., v. Steelworkers*, 160.

ATTACHMENT.

§ 1. Nature and Grounds of Remedy in General.

Where the allegations of the complaint affirmatively disclose that the cause of action attempted to be alleged is fatally defective, the incidental attachment of plaintiff's property must be dissolved. *Tyndall v. Tyndall*, 106.

ATTORNEY AND CLIENT.

§ 1. Office of Attorney.

An attorney is an officer of the court and takes his office *cum onere*, including the duty of rendering gratuitous service to a poor person when appointed by the court to do so. *S. v. Davis*, 1.

§ 7. Compensation and Fees.

The language of G.S. 15-5 is clear and unambiguous and provides for the payment of fees to lawyers who are appointed to represent indigent defendants in the courts of this State but does not authorize the payment of fees to lawyers appearing for indigent defendants in the courts of the United States; therefore an order of the Superior Court that attorneys representing an indigent should be paid a fee out of State funds for services in representing their client in the Federal Courts, in addition to the sum theretofore paid them for their services in representing the indigent in the State courts, must be reversed. *S. v. Davis*, 1.

No constitutional right of attorney is violated by requiring him to represent indigent defendant with no or inadequate compensation. *Ibid.*

AUTOMOBILES.

§ 3. Driving Without License or During Period of Revocation or Suspension of License.

A warrant charging that the named defendant did unlawfully and wilfully operate a motor vehicle on public streets or highways while his license was suspended, sufficiently charges defendant's violation of G.S. 20-28 without specific reference to the statute. *S. v. Blacknell*, 105.

§ 11. Lights.

The failure to provide motor vehicles operating at night with the lights prescribed by statute is negligence *per se*. *White v. Mote*, 544.

AUTOMOBILES—*Continued.*

§ 16. Entering Highway from Driveway or Filling Station.

The requirement that a person entering a public highway from a private road or drive must yield the right of way to vehicles on the public highway applies to a person riding an animal as well as to a person driving a motor vehicle. *Watson v. Stallings*, 187.

§ 17. Right of Way at Intersections.

Evidence that right turns were permitted at the intersection in question only from the right lane, that one defendant, at the last moment, undertook a right turn from the middle lane, and that the other defendant sideswiped him on the right, continued across the street, broke down a power pole in the utility strip beyond the opposite corner, and killed testator, who was standing near the pole, *is held* to require the court to charge the jury on the question of the negligence of the one driver in attempting to switch traffic lanes at the intersection without seeing that the movement could be made in safety, and of the other defendant in attempting to speed through the intersection. *Wands v. Cauble*, 311.

§ 21. Brakes and Defects in Vehicles.

The court's charge on the duty of a motorist traveling on a wet and slippery highway with worn and smooth tires to exercise due care under the circumstances and not to travel at a speed in excess of that which was reasonable and prudent under the circumstances, *held* sufficient. *Bank v. Hackney*, 437.

§ 33. Pedestrians.

A pedestrian has the same rights and responsibilities as a motorist in regard to the right of way at an intersection controlled by automatic traffic signals. *Miller v. Henry*, 97.

§ 35. Pleadings and Parties in Actions for Negligence.

In this action by a passenger in one vehicle against the drivers of both vehicles involved in the collision, plaintiff's allegations were to the effect that the driver of the car in which she was riding was traveling in an easterly direction and turned left across the highway to enter a filling station on the north side of the highway, directly in the path of the vehicle traveling in a westerly direction and operated by the other defendant, without allegation of any facts or circumstances disclosing that the operator of the other vehicle had timely notice that the vehicle in which plaintiff was riding intended to make a left turn directly in front of her. *Held:* Demurrer on the part of the driver of the other vehicle was properly sustained, notwithstanding allegations that such driver was negligent in operating her vehicle at excessive speed and in failing to keep a proper lookout, since under the allegations the sole proximate cause of the accident was the negligence of the driver of the car in which plaintiff was riding. *Hout v. Harvell*, 274.

Allegations *held* to show that sole proximate cause of accident was negligence of one defendant in making left turn across line of travel of second defendant. *Mabe v. Green*, 276.

Plaintiff's allegations were to the effect that he was struck by the car driven by defendant as he was standing on the shoulder of the road on defendant's left side of the highway. Defendant alleged in the answer that plaintiff was lying motionless on the hard surface and that defendant, suddenly confronted with the emergency, was unable to avoid striking plaintiff. *Held:* The answer does not allege contributory negligence, since it does not allege

any negligence on the part of plaintiff concurring with the negligence of defendant as alleged in the complaint, and refusal to submit the issue of contributory negligence was not error. *Jackson v. McBride*, 367.

A passenger in one vehicle involved in a collision sued the driver and the owner of the other vehicle involved in the collision, and defendants filed a cross-action for contribution against the driver of the vehicle in which plaintiff was riding. The driver of the car in which plaintiff was riding pleaded a covenant not to sue theretofore executed by the owner of his vehicle in favor of the owner and the driver of the other vehicle involved in the collision. *Held:* The covenant not to sue does not bar the cross-action for contribution, since the driver of the car in which plaintiff was riding was not a party to the covenant. *Autry v. Jones*, 705.

A covenant not to sue executed by the owner of one car involved in a collision in favor of the owner and the driver of the other car involved in the collision precludes litigation *inter se* by either party to the agreement, but does not bar the owner and the driver of the second car from asserting a claim against the driver of the first car, who was not a party to the covenant, notwithstanding a settlement embodied in a consent judgment would constitute *res judicata* barring such claim. *Ibid.*

§ 38. Opinion Evidence as to Speed and Other Facts at Scene.

Plaintiff's statement that he was traveling 35 to 40 miles per hour in a 35 mile per hour speed zone cannot be considered an admission of excessive speed upon defendant's motion to nonsuit on the ground of contributory negligence, since the evidence must be taken in the light most favorable to plaintiff. *White v. Mote*, 544.

§ 39. Physical Facts at Scene of Accident.

The distance traveled by a truck after being impelled forward by a vehicle colliding with its rear does not establish that the vehicle striking the truck was traveling at excessive speed when the driver of the truck testifies that after the collision the truck was running full throttle for a good distance before the driver regained control; an impact at a speed of 35 miles per hour is reasonably sufficient to bend the wheel of a truck. *White v. Mote*, 544.

§ 41g. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Exceeding Reasonable Speed at Intersections and Failing to Yield Right of Way.

Plaintiff's evidence was to the effect that he attempted to cross a street at an intersection controlled by automatic traffic signals when the light was red for traffic along the street he was crossing. Defendant's evidence was to the effect that she drove into the intersection with the green traffic light when traffic along the street plaintiff was attempting to cross was in motion. *Held:* The conflicting evidence raises an issue for the jury, and in the absence of error in the trial, the verdict of the jury is final. *Miller v. Henry*, 97.

Evidence that defendant along servient highway entered intersection without stopping held to take issue of negligence to jury. *Tunstall v. Raines*, 153.

§ 41h. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Turning.

Evidence held sufficient to be submitted to jury on question of concurring negligence causing intersection accident. *Childers v. Seay*, 721.

§ 41i. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Entering Highway.

AUTOMOBILES—*Continued.*

Evidence of defendant's negligence in entering highway from private driveway held for jury. *Barefoot v. Joyner*, 388.

§ 41l. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Striking Pedestrians.

Plaintiff's evidence to the effect that he was struck by the car driven by defendant as he was standing on the shoulder of the road on defendant's left side of the highway is sufficient to be submitted to the jury on the question of defendant's negligence. Nor does plaintiff's further testimony that he had "flagged" defendant down for a ride and momentarily looked away while defendant's car was angling over toward him compel nonsuit, since it does not compel the conclusion that plaintiff's failure to continue to watch the car contributed to his own injury. Further, in this case, such act was not alleged as contributory negligence in the answer. *Jackson v. McBride*, 367.

§ 41t. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Creating Dangerous Condition on Highway.

Evidence held to raise issue of negligence for jury in operating chemical fogging machine at nighttime without adequate warning or signals and in failing to provide the rear of the vehicle with lights as required by statute. *White v. Mote*, 544.

§ 42d. Nonsuit on Ground of Contributory Negligence in Hitting Stopped or Parked Vehicle.

The failure of a driver to see a chemical fogging machine in time to avoid running into the rear of such machine on a dark night cannot constitute contributory negligence as a matter of law when plaintiff was not exceeding the statutory speed limit. *White v. Mote*, 544.

Where plaintiff testifies that immediately he saw the vehicle upon which defendant's chemical fogging machine was being operated he took his foot off the gas but struck the rear of the vehicle before he could put his foot on the brake, the question of contributory negligence in following too closely does not arise, and the evidence does not establish contributory negligence as a matter of law in failing to keep a proper lookout, since a motorist will not be held to the duty of bringing his vehicle to an immediate stop on the sudden arising of a dangerous situation which he could not have reasonably anticipated. *Ibid.*

§ 42g. Nonsuit on Ground of Contributory Negligence in Failing to Yield Right of Way at Intersection.

Allegations and evidence tending to show that plaintiff was operating his vehicle in a lawful manner on a dominant highway and that defendant attempted to cross the dominant highway from a private driveway in the path of plaintiff's car, *held* to preclude nonsuit on the ground of contributory negligence, notwithstanding other evidence of plaintiff which would permit an inference that plaintiff failed to keep a proper and careful lookout and did not decrease his speed and keep his vehicle under proper control under the existing conditions. *Barefoot v. Joyner*, 388.

§ 42m. Nonsuit on Ground of Contributory Negligence of Children.

Instruction on contributory negligence of minor held without error in this case. *Watson v. Stallings*, 187.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

AUTOMOBILES—*Continued.*

In this action by a passenger in one vehicle against the drivers of both vehicles involved in the collision, plaintiff's allegations were to the effect that the driver of the car in which she was riding was traveling in an easterly direction and turned left across the highway to enter a filling station on the north side of the highway, directly in the path of the vehicle traveling in a westerly direction and operated by the other defendant, without allegation of any facts or circumstances disclosing that the operator of the other vehicle had timely notice that the vehicle in which plaintiff was riding intended to make a left turn directly in front of her. *Held:* Demurrer on the part of the driver of the other vehicle was properly sustained, notwithstanding allegations that such driver was negligent in operating her vehicle at excessive speed and in failing to keep a proper lookout, since under the allegations the sole proximate cause of the accident was the negligence of the driver of the car in which plaintiff was riding. *Hout v. Harvell*, 274.

Allegations *held* to show that sole proximate cause of accident was negligence of one defendant in making left turn across line of travel of second defendant. *Mabe v. Green*, 276.

Evidence that right turns were permitted at the intersection in question only from the right lane, that one defendant, at the last moment, undertook a right turn from the middle lane, and that the other defendant sideswiped him on the right, continued across the street, broke down a power pole in the utility strip beyond the opposite corner, and killed testator, who was standing near the pole, *is held* to require the court to charge the jury on the question of the negligence of the one driver in attempting to switch traffic lanes at the intersection without seeing that the movement could be made in safety, and of the other defendant in attempting to speed through the intersection. *Wands v. Cauble*, 311.

Evidence held sufficient to be submitted to jury on question of concurring negligence causing intersection accident. *Childers v. Seay*, 721.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

Defendant's evidence was to the effect that the car he was following suddenly stopped without warning, that he unavoidably collided with the rear of this car and knocked it into the rear of plaintiff's car. Defendant alleged plaintiff was following too closely the vehicle in front of her and that plaintiff suddenly reduced speed and attempted to stop without first seeing that such movement could be made in safety and without giving the statutory signal, but defendant's testimony was to the effect that the allegations of contributory negligence were predicated upon mere assumptions, since defendant could not see plaintiff's car because of the intervening vehicle. *Held:* The evidence is insufficient to raise the issue of contributory negligence and the court committed error in submitting such issue. *Tamboles v. Antonelli*, 74.

§ 46. Instructions in Automobile Accident Cases.

Instruction on contributory negligence of minor held without error in this case. *Watson v. Stallings*, 187.

An instruction to the effect that if plaintiff had satisfied the jury by the greater weight of the evidence that he was struck by the car driven by defendant as he was standing on the shoulder of the road on defendant's left side of the highway to answer the issue of negligence in the affirmative, without any instruction or explanation of the meaning of negligence or proximate cause, does not satisfy the requirements of G.S. 1-180. *Jackson v. McBride*, 367.

AUTOMOBILES—*Continued.*

An instruction that the proximate cause of the injury is one that produces the result in continuous sequence and without which it would not have occurred, and one from which injury was reasonably foreseeable under the circumstances, is not erroneous, but it is erroneous to give such instruction without charging upon the element of foreseeability. *Barefoot v. Joyner*, 388.

§ 49. Contributory Negligence of Guest or Passenger.

Evidence that intestate continued to ride with an intoxicated and reckless driver for a number of hours although intestate had opportunity to alight from the car with safety at a filling station after the recklessness of the driver had become abundantly apparent, *held* sufficient to raise the issue of intestate's contributory negligence for the determination of the jury in plaintiff's action to recover for intestate's death in an accident resulting from the driver's recklessness. *Weatherman v. Weatherman*, 130.

§ 52. Liability of Owner for Driver's Negligence — In General.

The driver of one vehicle involved in a collision obtained judgment against the other driver. In another action instituted in another county, the first driver and his employer obtained judgment in a smaller amount against the owner of the second vehicle under the doctrine of *respondeat superior*, and this judgment was satisfied by payment into court of the amount of the recovery. *Held:* The payment by the employer of the second judgment extinguished the liability of its employee under the first judgment, particularly when the first driver rejected a settlement of the first judgment and elected to pursue his action against the employer. *Bowen v. Insurance Co.*, 486.

§ 54d. Pleadings in Actions to Recover Under Doctrine of Respondeat Superior.

In an action seeking to hold the owner of a motor vehicle liable for the alleged negligence of the driver, a complaint alleging that the driver at the time and on the occasion of plaintiff's injury was operating defendant's car as the agent of defendant held sufficient to withstand demurrer, notwithstanding the absence of allegation that the driver was then and there acting within the course and scope of the said agency. *Belmany v. Overton*, 400.

§ 54f. Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.

The admission of ownership of the vehicle involved in the collision is sufficient to take the issue of *respondeat superior* to the jury by virtue of G.S. 20-71.1, and the owner's motion for nonsuit on the issue is properly denied. *Belmany v. Overton*, 400.

Plaintiff relied solely on G.S. 20-71.1 to take the issue of agency to the jury. Defendant's evidence tended to show that the driver was on a purely personal mission at the time of the accident in suit. *Held:* Defendant, without request therefor, was entitled to a peremptory instruction related directly to the particular facts shown by defendant's positive evidence to answer the issue in the negative, and a general instruction to so answer the issue if the jury believed the facts to be as defendant's evidence tended to show, without relating such instruction directly to defendant's evidence in the particular case, is insufficient. *Ibid.*

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for Driving Under the Influence of Intoxicating Liquor.

Testimony tending to show that defendant was intoxicated 15 to 20 minutes after an accident occurring while defendant was driving on a public

highway, is sufficient to overrule motion for nonsuit in a prosecution for driving while intoxicated. *S. v. Cooke*, 644.

A Breathalyzer test of defendant made by a person meeting the qualifications of the statute and making the test in the manner required by the statute, is competent in a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, but for the test to cast any light on defendant's condition at the time of the offense it must have been timely made and the defendant must not have consumed alcohol between the occurrence in question and the time of the test, since the Breathalyzer can measure the amount of alcohol in a person's bloodstream only as of the time the test is given. G.S. 20-138, G.S. 20-139.1. *Ibid.*

The provision of G.S. 20-139.1 that a competent Breathalyzer test showing .1 per cent or more by weight of alcohol in a person's blood should raise the "presumption" that such person was under the influence of intoxicating liquor does not create a conclusive presumption or compel the jury to find the fact of intoxication in the absence of evidence that such person was not intoxicated but merely creates a permissible inference or a *prima facie* case authorizing the jury to find the fact of intoxication. *Ibid.*

Presumption created by G.S. 20-139.1 merely authorizes, but does not compel, an affirmative finding. *Ibid.*

The State's evidence held amply sufficient to be submitted to the jury upon the charge that defendant operated a motor vehicle on a public highway while under the influence of intoxicating liquor, even without testimony of the results of a Breathalyzer test given defendant. *S. v. Jent*, 652.

The provisions of G.S. 20-139.1 that a competent Breathalyzer test showing a concentration of .1 per cent or more by weight of alcohol in a person's bloodstream should create a presumption that a person was under the influence of intoxicating liquor, merely authorize, but do not compel, a jury to find that the person in question was intoxicated, and it is error for the court to charge the jury that the presumption created by the statute places the burden upon defendant to rebut the presumption. *Ibid.*

§ 74. Instructions in Prosecutions for Driving Under the Influence of Intoxicating Liquor.

Defendant's testimony was to the effect that he had drunk a small quantity of intoxicating liquor shortly before the accident in question and that between the time of the accident and the making of a Breathalyzer test he drank a quantity of intoxicating liquor. The State introduced in evidence the result of a Breathalyzer test made within an hour of the collision showing a concentration of .2 per cent of alcohol in defendant's bloodstream. *Held:* An instruction as to the presumption created by the statute, without charging the jury that such presumption does not preclude them from finding that defendant was not intoxicated, and without applying the law to defendant's evidence by instructing the jury that if they found that defendant had drunk a quantity of intoxicants after the collision the Breathalyzer test would create no presumption that he was under the influence of intoxicants at the time of the collision, is prejudicial error. *S. v. Cooke*, 644.

The provisions of G.S. 20-139.1 that a competent Breathalyzer test showing a concentration of .1 per cent or more by weight of alcohol in a person's bloodstream should create a presumption that a person was under the influence of intoxicating liquor, merely authorize, but do not compel, a jury to find that the person in question was intoxicated, and it is error for the court to charge the jury that the presumption created by the statute places the burden upon defendant to rebut the presumption. *S. v. Jent*, 652.

AUTOMOBILES—*Continued.*

§ 76. Failing to Stop After Accident — "Hit and Run Driving."

Knowledge by a motorist that he had struck a pedestrian is an essential element of the offense of failing to stop and give such pedestrian aid. *S. v. Glover*, 319.

Testimony of a motorist that he had been drinking rather heavily, that, when he ran off the road in passing another vehicle with blinding lights, he looked up and saw a pedestrian in the vicinity of his truck or out in front of him, but that after he overturned he did not see the pedestrian, together with evidence that the pedestrian was seriously injured and that defendant fled the scene, *is held* sufficient to be submitted to the jury in a prosecution under G.S. 20-166(a)(c). *Ibid.*

BAILMENT.

§ 1. Nature and Requisites of the Relationship.

An agreement under which one party stores the boat of another and looks after it during the winter creates a bailment. *Pennington v. Styron*, 80.

§ 3. Liabilities of Bailee to Bailor.

A party keeping and looking after a boat during the winter months under agreement with the owner is not an insurer but is liable for injury to the chattel as a result of ordinary negligence; but the fact that he does not return the boat to the owner at the end of the term or returns it in damaged condition makes out a *prima facie* case of actionable negligence. *Pennington v. Styron*, 80.

If the bailee agrees to store the chattel in a definite place and breaches the agreement by moving the chattel to some other place, the bailee assumes absolute liability for damage to the chattel occurring at the place he removed it, irrespective of the question of negligence. *Ibid.*

The evidence tended to show that plaintiff left his boat with defendant under an agreement that defendant would keep it and look after it during the winter months. There was conflicting evidence as to whether defendant had the right under the agreement to remove the boat from one of defendant's slips to another, and the evidence disclosed damage to the boat while it was in a slip to which defendant had removed it. *Held:* The bailee was absolutely liable, regardless of negligence, if the removal of the boat was in breach of contract, and an instruction making defendant's liability in such instance dependent on negligence to any degree, must be held for error. *Ibid.*

BILL OF DISCOVERY.

§ 4. Introduction of Evidence Elicited on Examination.

Where plaintiff examines defendant adversely prior to trial, the defendant is entitled to introduce the record of his own examination at the trial. *Watson v. Stallings*, 187.

BOATING.

A party keeping and looking after a boat during the winter months under agreement with the owner is not an insurer but is liable for injury to the chattel as a result of ordinary negligence; but the fact that he does not return the boat to the owner at the end of the term or returns it in damaged condition makes out a *prima facie* case of actionable negligence. *Pennington v. Styron*, 80.

The evidence tended to show that plaintiff left his boat with defendant

BOATING—*Continued.*

under an agreement that defendant would keep it and look after it during the winter months. There was conflicting evidence as to whether defendant had the right under the agreement to remove the boat from one of defendant's slips to another, and the evidence disclosed damage to the boat while it was in a slip to which defendant had removed it. *Held:* The bailee was absolutely liable, regardless of negligence, if the removal of the boat was in breach of contract, and an instruction making defendant's liability in such instance dependent on negligence to any degree, must be held for error. *Ibid.*

An agreement under which one party stores the boat of another and looks after it during the winter creates a bailment. *Ibid.*

BROKERS AND FACTORS.

§ 3. Powers and Authority of Broker or Factor.

Defendant's evidence was to the effect that he signed the contract for the purchase of the property in question in reliance upon the representation of plaintiff's real estate agent that the property was zoned for business purposes, and that both defendant and the agent acted pursuant to their mistaken belief that this representation was true when in fact it was false. *Held:* The evidence supports rescission of the contract for mutual mistake, since it would be unconscionable to allow plaintiff to profit by defendant's reasonable reliance upon the unintentional false representations made by plaintiff's agent in her negotiations in his behalf with defendant. Whether the unauthorized representation of the broker could be the basis of an action for damages against plaintiff is not presented. *MacKay v. McIntosh*, 69.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 1. Burglary.

In order to constitute burglary it is not necessary to show physical damage to a door or window, but it is sufficient to show a mere opening of an unlocked door or the raising or lowering of an unlocked window. *S. v. Tippett*, 588.

§ 2. Breaking and Entering Otherwise Than Burglariously.

Evidence held sufficient to support verdict of nonburglarious entry. *S. v. Fikes*, 780.

§ 4. Sufficiency of Evidence and Nonsuit.

The evidence *held* sufficient to overrule nonsuit in this prosecution of defendant for felonious breaking and entering. G. S. 14-54. *S. v. Worthey*, 444.

Nonsuit *held* correctly denied in this prosecution for burglary in the first degree upon evidence sufficient to support a finding that the dwelling house in question was broken and entered into at nighttime with the intent to commit a felony specified in the bill of indictment, together with ample circumstantial evidence tending to identify defendant as the perpetrator of the offense. *S. v. Tippett*, 588.

The State must prove that defendant, at the time of breaking, had the intent of committing a felony specified in the indictment, and defendant's commission of a felony conceived after the breaking will not support conviction of burglary; nevertheless, defendant's intent may be found by the jury from evidence as to what defendant did within the house after breaking, and evidence that defendant actually committed after the breaking the felonies speci-

fied in the indictment, while not conclusive of the requisite intent, is evidence from which such intent may be inferred. *Ibid.*

Stipulations by defendant that he owned keys found upon the floor of the dwelling immediately after an intruder had fled therefrom upon being apprehended after feloniously breaking and entering, is alone sufficient to support a finding that defendant was the intruder. *Ibid.*

In order to establish that the breaking and entering occurred at nighttime it is not required that the actual entry be observed by an eye witness, but it is sufficient, in the absence of evidence to the contrary, that his presence in the building was first discovered during hours of darkness. *Ibid.*

Evidence held sufficient to support verdict of nonburglarious entry. *S. v. Fikes*, 780.

Evidence that a specified building was feloniously broken and entered and a safe located therein damaged, with testimony of an eyewitness that he saw defendant running from the vicinity of the building shortly after a police car arrived on the premises, and that the fingerprints of another who was seen by another witness running from the vicinity of the building at the same time were found on defendant's automobile, *held* sufficient to overrule defendant's motion for nonsuit. *S. v. Lakey*, 786.

§ 6. Verdicts and Instructions as to Possible Verdicts.

The evidence tended to show that defendant was apprehended in a building containing personal property and that screens had been torn off two windows of the building. The evidence of defendant's intent to commit a felony was entirely circumstantial and was not conclusive on the point. *Held:* It was error for the court to fail to submit the question of defendant's guilt of the lesser degree of the crime of breaking and entering without intent to commit a felony or other infamous crime. *S. v. Worthey*, 444.

When all the evidence tends to show that the dwelling broken and entered during the nighttime was actually occupied at the time, the court is not authorized to submit the question of defendant's guilt of burglary in the second degree. *S. v. Tippett*, 588.

Evidence which tends to show that the occupants of the dwelling in question were present in the house during the evening and night except for a half hour period after 11:00 p.m. and retired without going into one of the bedrooms, and that defendant was in the house less than an hour thereafter, *held* to require the submission to the jury of the question of defendant's guilt of burglary in the second degree, since, under the evidence defendant might have entered the dwelling while it was unoccupied. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 4. Cancellation and Rescission for Mutual Mistake.

Defendant's evidence was to the effect that he signed the contract for the purchase of the property in question in reliance upon the representation of plaintiff's real estate agent that the property was zoned for business purposes, and that both defendant and the agent acted pursuant to their mistaken belief that this representation was true when in fact it was false. *Held:* The evidence supports rescission of the contract for mutual mistake, since it would be unconscionable to allow plaintiff to profit by defendant's reasonable reliance upon the unintentional false representations made by plaintiff's agent in her negotiations in his behalf with defendant. *MacKay v. McIntosh*, 69.

CARRIERS.

§ 18. Liability for Injury to Passengers.

A carrier is under duty to exercise the highest degree of care consistent with the practical operation of the business to provide for the safety of its passengers, and is under duty to protect a passenger from an assault by a fellow passenger when the carrier has knowledge, express or implied, of the danger of the assault; however only knowledge or notice to its employees may be imputed to the carrier, and the driver of a bus, whose attention is primarily demanded in operating the vehicle, can be charged with knowledge of acts of his passengers only when such acts are so unusual as to come to his attention under the exceptional circumstances. *Leake v. Coach Co.*, 669.

Evidence held insufficient to show that bus driver had reasonable ground to anticipate assault by one passenger on another. ***Ibid.***

CONSTITUTIONAL LAW.

§ 1. Supremacy of Federal Constitution.

The Fourth Amendment to the Federal Constitution is binding on the States by virtue of the Fourteenth Amendment to the Federal Constitution, and the limitations of the Fourth Amendment apply to warrants of arrest as well as to search warrants. *S. v. Matthews*, 35.

An act of Congress pursuant to the Constitution of the United States is the supreme law of the land, and in case of a conflict between such act and the laws of this State, the act of Congress and the decisions of the U. S. Supreme Court construing such act, control. *Bouligny, Inc., v. Steelworkers*, 160.

§ 6. Legislative Powers in General.

The legislative power is supreme over the public purse, and moneys paid into the hands of the State Treasurer by virtue of State law become public funds which may be disbursed only in accordance with legislative authority. *S. v. Davis*, 1.

The General Assembly may provide that the proof of one fact shall be deemed *prima facie* evidence of a second fact, provided there is such relation between the two facts in human experience that proof of the first may reasonably be deemed some evidence of the existence of the second. *Milk Commission v. Food Stores*, 323.

The use of a "loss leader" as a competitive device in the retail grocery business is not generally unlawful and may not generally be restrained unless in violation of a contract permitted under the Federal Fair Trade Act, and in this State the Legislature has not prohibited such practice as contrary to public policy, and such determination is as binding on the courts of this State as a contrary legislative determination is binding on the courts of other states having such legislative policy. ***Ibid.***

§ 10. Judicial Powers.

The primary purpose of the Amendment to Article IV of the State Constitution is to establish a unified judicial system, and the General Assembly has no power to establish or authorize any courts other than as permitted by this Article. Constitution of North Carolina, Art. IV, § 1. *S. v. Matthews*, 35.

While every presumption will be indulged in favor of the constitutionality of a statute, when a statute is clearly in excess of the authority vested in the General Assembly, it is the duty of the Court to declare the act unconstitutional. ***Ibid.***

G.S. 160-20.1 and Chapter 1093, Session Laws of 1963, purporting to confer judicial powers on persons who are not officers of the General Court of

Justice and who were not vested with judicial power on November 6, 1962, are void, and a "desk officer" appointed by the chief of police of a municipality may not issue a warrant of arrest, even in those instances in which the complainant is a private citizen and has no connection with any law enforcement agency, since these statutes exceed the limitations placed upon the power of the General Assembly by Article IV of the State Constitution. *Ibid.*

All officials authorized to issue warrants by statutes in force on November 6, 1962, may continue to issue warrants until district courts are established in the district. *Ibid.*

§ 18. Right of Free Press, Speech and Assemblage.

Even though the First Amendment to the Federal Constitution applies to state action by virtue of the Fourteenth Amendment, the constitutional guarantee of freedom of speech and of the press affords no protection against an action for libel or slander uttered with actual malice and resulting in actual damage. *Bouligny, Inc., v. Steelworkers*, 160.

§ 23. Rights and Interests Protected by Due Process Clause.

Since one of the burdens of an attorney is to render gratuitous services to an indigent when appointed by the court to do so, an attorney appointed to represent an indigent may not complain that his constitutional rights under the Equal Protection and Due Process Clauses of the Federal Constitution were violated because of the fact that he received no or inadequate compensation for services rendered to an indigent. *S. v. Davis*, 1.

The State Milk Commission has statutory authority to fix a uniform rate for the transportation of milk from farm to the processing plant and to maintain a fair price to the producer, and such statutory provisions have reasonable relationship to the assurance of an adequate supply of wholesome milk, and are constitutional. *Milk Commission v. Food Stores*, 323.

§ 24. Requisites of Due Process.

Requirement that insurer doing business in this State issue proportionate share of assigned risk policies is constitutional. *Jones v. Insurance Co.*, 454.

A judgment *in personam* against a defendant served by publication is void as violating due process, which requires actual notice and an opportunity to be heard. *Fleek v. Fleek*, 736.

§ 29. Right to Trial by Duly Constituted Jury.

The statutes permitting persons within the classifications enumerated to be excused from jury duty upon application for exemption are constitutional and valid. *S. v. Oxentine*, 412.

§ 30. Due Process in Trial in General.

Record held not to disclose violation of defendant's constitutional right to speedy trial. *S. v. Smith*, 289.

§ 31. Right of Confrontation and Time to Prepare Defense.

Where a trial is terminated prior to verdict at the instance of defendant, the testimony of a witness at such trial, with full cross-examination, taken in open court and properly attested, is properly admitted in evidence at the subsequent trial when the witness is then on military duty outside the boundaries of the United States. The admission of such testimony does not violate defendant's right of confrontation. *S. v. Prince*, 769.

In a prosecution for aiding and abetting, the admission of the record showing that the co-defendants had pleaded guilty to the offense deprives the

CONSTITUTIONAL LAW—*Continued.*

defendant of her right of confrontation, since defendant is not bound by her co-defendant's pleas and is entitled to cross-examine them, the burden being upon the State to prove that the co-defendants had committed the offense and that defendant had aided and abetted them therein. *S. v. Jackson*, 773.

§ 32. Right to Counsel.

A defendant has no constitutional right to be represented by counsel at a hearing to determine whether his probation should be revoked for his wilful violation of a lawful condition of probation, and G.S. 15-4.1 is not applicable. *S. v. Hewett*, 348.

§ 33. Right of Accused not to Incriminate Self.

The State may require defendant, under valid arrest, to change his clothes and to take from him the clothing which he wore at the time of his arrest immediately after the commission of the alleged offense, and introduce such clothing in evidence, the clothing being competent for the purpose of identification. *S. v. Tippett*, 588.

§ 36. Cruel and Unusual Punishment.

Sentences which do not exceed the limits fixed by the applicable statutes cannot be considered cruel or unusual in the constitutional sense. *S. v. Greer*, 143.

A sentence which does not exceed the maximum prescribed by the applicable statute cannot be considered cruel and unusual punishment in the constitutional sense. *S. v. LePard*, 157.

§ 37. Waiver of Constitutional Guarantees.

A person may consent to a search of his premises, and such consent will render competent evidence obtained by the search, but the presumption is against the waiver of the constitutional right to be free from unreasonable searches and seizures, and the burden is upon the State to establish unequivocally that the consent was voluntarily, freely and intelligently given, free from coercion, duress or fraud. *S. v. Little*, 234.

CONTEMPT OF COURT.

§ 2. Direct or Criminal Contempt.

Criminal contempt must be based on acts already accomplished, committed in the actual or constructive presence of the court which tended to interfere with the administration of justice; civil contempt must be based on acts constituting a wilful violation of a lawful order of the court, continuing in nature, so that punishment is for the purpose of preserving and enforcing the rights of private parties to suits and to compel obedience to orders and decrees made for their benefit. The distinction between civil and criminal contempt is material, since there is a difference in procedure, punishment and review. *Rose's Stores v. Tarrytown Center*, 206.

§ 3. Civil Contempt — Refusal to Obey Lawful Orders of the Court.

Where neither party appeals from a valid temporary restraining order issued in the cause, both parties are bound to respect the terms of the order. *Rose's Stores v. Tarrytown Center*, 206.

Criminal contempt must be based on acts already accomplished, committed in the actual or constructive presence of the court which tended to interfere with the administration of justice; civil contempt must be based on acts con-

CONTEMPT OF COURT—*Continued.*

stituting a wilful violation of a lawful order of the court, continuing in nature, so that punishment is for the purpose of preserving and enforcing the rights of private parties to suits and to compel obedience to orders and decrees made for their benefit. The distinction between civil and criminal contempt is material, since there is a difference in procedure, punishment and review. *Ibid.*

§ 6. Hearings on Orders to Show Cause, Findings and Judgment.

Evidence held sufficient to support finding that defendant wilfully violated terms of prior restraining order. *Rose's Stores v. Tarrytown Center*, 206.

Where a prior restraining order issued in the cause enjoins defendant from interfering with the use of a driveway to a service entrance of plaintiff's store, an order entered by the court, upon the hearing of an order to show cause, requiring a canopy constructed by defendant over the driveway to be raised from its constructed height and imposing a fine for each day defendant should fail to raise the canopy after the time limited, *held* erroneous in the absence of evidence that the canopy as constructed interfered in any way with the use of the driveway. *Ibid.*

Upon the hearing of an order to show cause why defendant should not be held in contempt for wilful violation of a valid court order theretofore entered in the cause, the sole question before the court is whether the terms of the prior order had been violated by defendant, and the court upon such hearing has no authority to modify the order or to exercise affirmative injunctive powers. *Ibid.*

§ 7. Punishment for Contempt.

A completed act in direct disobedience of a restraining order theretofore issued in the cause may be punished for criminal contempt by the imposition of a fine not exceeding $50; other acts existing and continuing at the time of the order which impede the rights of the parties under such order may be punished as civil contempt. *Rose's Stores v. Tarrytown Center*, 206.

§ 8. Appeal and Review.

The findings of fact by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence, and are reviewable only for the purpose of passing on their sufficiency to warrant judgment. *Rose's Stores v. Tarrytown Center*, 206.

An order entered in civil contempt to coerce respondent's obedience to a court order is appealable. *Ibid.*

CONTRACTS.

§ 13. Entire and Divisible Contracts.

An entire contract is one in which all material provisions are interdependent and the consideration is entire on both sides; a severable contract is one susceptible of division and apportionment and one capable of performance in part. *Lumber Co. v. Builders*, 337.

§ 26. Competency and Relevancy of Evidence.

The parol evidence rule does not preclude parol evidence that the parties entered into the contract because of a mutual mistake of fact, since such evidence does not seek to contradict the writing or to enforce a parol agreement but only to show the existence of a mutual mistake of fact precluding a meeting of the minds and the formation of a contract. *MacKay v. McIntosh*, 69.

CORPORATIONS.

§ 4. Authority and Duties of Stockholders and Directors.

Liabilities imposed by G.S. 55-32 upon the directors of a corporation are in addition to other liabilities imposed by law upon them, and officers and directors may be held liable in this State for breach of their fiduciary duties to the corporation in failing to preserve and to distribute properly the assets of the corporation. *Underwood v. Stafford*, 700.

§ 10. Estoppel of, and Ratification by Corporation of Acts of Officers and Agents.

Evidence tending to show that individuals formed a holding corporation which purchased all of the capital stock of an operating corporation shortly after such individuals had made a contract of employment on behalf of the operating corporation, and that after such acquisition of stock by the holding corporation the new board of directors of the operating corporation, with full knowledge of the contract of employment, accepted services rendered under the contract and by resolution of its new board of directors fixed the salary of the employee, is sufficient to support a finding that the operating corporation ratified the agreement so as to be bound thereby. *McCrillis v. Enterprises*, 637.

While a corporation may not ratify an agreement made in its name prior to its incorporation, if, after incorporation, it accepts the benefits of the agreement through action of its board of directors with full knowledge of the terms of the agreement, the corporation may be held to have adopted such contract so as to be bound thereby. *Ibid.*

§ 12. Liability of Officers and Agents to Third Persons for Neglect of Duties, Mismanagement, Fraud, Etc.

Plaintiff recovered judgment against a corporation and execution on the judgment was returned unsatisfied. Plaintiff instituted this action against the officers, directors and stockholders of the corporation alleging that they had committed a fraud upon the creditors of the corporation by wrongfully appropriating to themselves all of the assets of the corporation. *Held:* The breach of duty on the part of defendants alleged in the complaint was a duty owed primarily to the corporation, and the corporation is a necessary party to the suit, and in such suit appointment of a receiver would be appropriate. *Underwood v. Stafford*, 700.

COURTS.

§ 2. Jurisdiction of Courts in General.

The fact that a party does not appeal from a judgment does not preclude such party from thereafter attacking the judgment on the ground that the court was without jurisdiction to enter the judgment, since jurisdiction cannot be conferred upon a court by consent, waiver or estoppel. *In re Custody of Sauls*, 180.

Jurisdiction of a court over the subject matter may not be conferred by the parties by consent, waiver, or estoppel. *S. v. Fisher*, 315.

Subsequent to a void order of the Superior Court transferring the cause to the Industrial Commission, the plaintiff requested the Commission to hear the matter. *Held:* Plaintiff's request that the Commission hear the matter could not confer jurisdiction on the Commission, since jurisdiction may not be conferred on a court by consent, and the order of the Commission dismissing the action cannot constitute *res judicata* of the plaintiff's right to proceed with the action in the Superior Court. *Bryant v. Dougherty*, 748.

A void order purporting to transfer the cause from the Superior Court, which had jurisdiction, to the Industrial Commission, which had no jurisdic-

COURTS—*Continued.*

tion, does not take the cause out of the Superior Court, and the cause remains in the Superior Court so that when a voluntary nonsuit is thereafter entered in the Superior Court another action entered within a year is not barred. *Ibid.*

§ 3. Original Jurisdiction of Superior Courts in General.

The Superior Court has no jurisdiction to transfer to another tribunal a matter over which the Superior Court has jurisdiction and such other tribunal has none, and therefore an order of the Superior Court transferring a cause within its jurisdiction to the Industrial Commission is void, and such order, even though no appeal is entered therefrom, cannot constitute a bar, and allegations that such an order constituted *res judicata* are properly stricken on motion. *Bryant v. Dougherty*, 748.

§ 18. What Law Controls — Federal and State Courts.

The National Labor Relations Act, 29 U.S.C. 141 etc., and the Norris-LaGuardia Act, 29 U.S.C. 101, do not deprive the State courts of jurisdiction of an action for libel by an employer against a labor union for statements published during the course of a campaign by the union to solicit members and become the representative of the employees for collective bargaining; nevertheless, in such instance a State court may not apply the doctrine of libel *per se* and may render judgment only if the plaintiff alleges and proves not only actual malice but some actual damage resulting from the libelous publications. *Bouligny, Inc., v. Steelworkers*, 160.

§ 20. What Laws Control — Laws of This and Other States.

The proviso contained in the 1955 amendment to G.S. 1-21 has the effect of barring in this State a cause of action arising in another state if, at the time of the institution of the action here, the cause is barred in the state in which it arose, unless the action originally accrued in favor of a resident of this State. *Broadfoot v. Everett*, 429.

While an action for wrongful death must be brought by the personal representative, the personal representative is not the real party in interest, and therefore the fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute the action one accruing to a resident of this State within the meaning of the proviso to G.S. 1-21. *Ibid.*

CRIMINAL LAW.

§ 1. Nature and Elements of Crime in General.

A continuous series of acts by a defendant, occurring on the same date as parts of one entire plan of action, may constitute two or more separate criminal offenses, and if the offenses are separate and occur in different counties, the defendant may be tried for each in the county where it was committed. *S. v. Midyette*, 229.

§ 7. Entrapment, Compulsion and Governmental Authorization.

Entrapment is the inducing of a person to commit a crime he did not contemplate doing, and the setting of a trap to catch a person in the execution of a crime of his own conception is not entrapment and is not a defense except in those cases in which the victim consents to the commission of the offense and want of consent is an essential element of the offense. *S. v. Coleman*, 357.

Entrapment held not available to defendant charged with making indecent telephone calls. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 9. Principals in the First or Second Degree; Aiders and Abettors.

A person who aids and abets in the commission of a crime is guilty as an aider and abettor. *S. v. Bell*, 25.

§ 10. Accessories Before the Fact.

A person who counsels, procures or commands another to commit a felony is guilty as an accessory before the fact. *S. v. Bell*, 25.

§ 15. Venue.

A continuous series of acts by a defendant, occurring on the same date as parts of one entire plan of action, may constitute two or more separate criminal offenses, and if the offenses are separate and occur in different counties, the defendant may be tried for each in the county where it was committed. *S. v. Midyette*, 229.

§ 16. Jurisdiction and Venue — Degree of Crime.

In those counties in which the Superior Court has concurrent jurisdiction of misdemeanors, G.S. 7-64, the court first acquiring jurisdiction of a particular case retains jurisdiction thereof, subject to appellate review. *S. v. Fisher*, 315.

Warrant was issued in the Recorder's Court of Columbus County charging a misdemeanor. Defendant paid into that court the jury fee and demanded a jury trial. Through inadvertence the case was transferred to the Superior Court, and defendant moved that the cause be remanded to the Recorder's Court. *Held:* The motion to remand to the Recorder's Court should have been allowed. *Ibid.*

Upon poll of the jury, one juror stated he did not assent to the verdict. The court instructed the jury that he was going to ask that the jury again retire and "consider the case until you reach a unanimous verdict." *Held:* The instruction might reasonably be construed by a member of the jury that he should surrender his well-founded convictions conscientiously held or his free will and judgment in deference to the views of the majority, and constitutes prejudicial error. *S. v. Roberts*, 449.

§ 19. Transfer of Cause to Superior Court Upon Demand in Inferior Court for Trial by Jury.

Where a cause is transferred from the recorder's court to the Superior Court upon defendant's demand for a trial by jury, defendant may not be tried in the Superior Court upon the original warrant, but must be tried upon an indictment. *S. v. King*, 791.

§ 24. Plea of Not Guilty.

Defendant's plea of not guilty places the burden upon the State to prove every essential element of the crime charged. *S. v. Jackson*, 773.

§ 26. Plea of Former Jeopardy.

Where defendant is apprehended for speeding in one county and is pursued by the officer attempting to arrest him into another county where defendant assaults the officer attempting to arrest him, the offenses are separate, and the defendant may be tried upon indictment for violating the motor vehicle laws in the one county and indicted for resisting arrest in the other county, and the plea of double jeopardy is without merit. *S. v. Midyette*, 229.

Trial on an indictment for one offense precludes a subsequent indictment for the same offense or any offense included within the first of which defend-

ant might have been convicted under the first, or for any offense which the State, by averments in the indictment, elects to make in its entirety an essential element of the offense charged. *Ibid.*

Two indictments were returned against defendant, the first charging an assault with a deadly weapon, a .22 caliber pistol, upon a named person, a police officer, with intent to kill, inflicting serious injuries not resulting in death; the second charging defendant with resisting arrest by firing and hitting the same officer with bullets from the .22 caliber pistol. *Held:* The first indictment precludes the second, since the State elected to make the second an element of the first, and judgment entered upon the second indictment is arrested. *Ibid.*

The fact that an indictment for burglary in the first degree specifies that the felonies defendant intetnded to commit at the time of breaking were larceny and rape, does not warrant the deletion from the indictment of the charge of intent to commit rape, even though another indictment is pending against defendant charging the crime of rape, the question of double jeopardy not arising in the trial under the first indictment. *S. v. Tippett*, 588.

Defendant's plea of former jeopardy upon his second trial obtained as a result of a post-conviction hearing upon defendant's petition is untenable. *S. v. Mitchell*, 753.

§ 29. Suggestion of Mental Incapacity to Plead.

The fact that, four years prior to the offense with which defendant is charged, defendant had been a patient in a mental hospital, does not require the court to order a psychiatric examination of defendant in the absence of request therefor or any plea of insanity. *S. v. Midyette*, 229.

§ 31. Judicial Notice.

A court will take judicial notice of the names of streets, squares and public grounds of the municipality in which it is sitting. *S. v. Martin*, 286.

§ 32. Burden of Proof and Presumptions.

Defendant does not have the burden of proving his defense of an alibi, but the burden remains on the State to prove his guilt beyond a reasonable doubt. *S. v. Lentz*, 122.

The provision of G.S. 20-139.1 that a competent Breathalyzer test showing .1 per cent or more by weight of alcohol in a person's blood should raise the "presumption" that such person was under the influence of intoxicating liquor does not create a conclusive presumption or compel the jury to find the fact of intoxication unless sufficient evidence of its non-existence has been introduced, but merely creates a permissible inference or a *prima facie* case authorizing, but not compelling, the jury to find the fact of intoxication. *S. v. Cooke*, 644.

The provisions of G.S. 20-139.1 that a competent Breathalyzer test showing a concentration of .1 percent or more by weight of alcohol in a person's bloodstream should create a presumption that a person was under the influence of intoxicating liquor, merely authorize, but do not compel, a jury to find that the person in question was intoxicated, and it is error for the court to charge the jury that the presumption created by the statute places the burden upon defendant to rebut the presumption. *S. v. Jent*, 652.

§ 33. Facts in Issue and Relevant to Issues in General.

In this homicide prosecution, the evidence tended to show that deceased was fatally shot by defendant when deceased was some eight feet from de-

CRIMINAL LAW—*Continued.*

fendant, defendant contending that deceased was reaching for a pistol in the pocket of his trousers. *Held:* Testimony tending to show that deceased had suffered an injury while in service and was a partially disabled serviceman is immaterial and irrelevant, there being no contention of any physical combat between them, and such testimony is prejudicial as tending to incite the sympathy of the jury. *S. v. Johnson,* 215.

The use of a diode device to prevent the originator of a telephone call from breaking the connection so that the telephone from which the call originated can be identified is to protect the telephone system from abuse by a threatening or obscene caller, and use of such device in no way violates the prohibition against wiretapping, since it does not involve the interception of any communication and the divulgence of its contents by a third person. *S. v. Coleman,* 357.

The State's evidence tended to show the felonious breaking and entering of a building, and that defendant was seen running from the vicinity of the building shortly after a police car arrived on the premises. Another witness at a different vantage point testified that he saw an escapee running from the vicinity of the building and there was testimony that the escapee's fingerprints were found on defendant's parked car. *Held:* It was competent for the State to show as relevant circumstances that the escapee was seen running from the building and that his fingerprints were found on defendant's parked car. *S. v. Lakey,* 786.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

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. Aycoth,* 270.

In the cross-examination of a codefendant in this prosecution of defendants for armed robbery, the codefendant made an unresponsive answer disclosing that defendant had been indicted for murder. *Held:* Under the circumstances of the case withdrawal of the unresponsive answer by the court and the court's instruction to the jury not to consider it, were not sufficient to cure its prejudicial effect, and a new trial must be awarded. *Ibid.*

§ 40. Evidence and Record at Former Trial or Proceeding.

Where a trial is terminated prior to verdict at the instance of defendant, the testimony of a witness at such trial, with full cross-examination, taken in open court and properly attested, is properly admitted in evidence at the subsequent trial when the witness is then on military duty outside the boundaries of the United States. The admission of such testimony does not violate defendant's right of confrontation. *S. v. Prince,* 769.

§ 42. Articles and Clothing Found Near Scene of Crime or in Defendant's Possession.

A baseball bat, identified by an eye witness as the one used by defendant in striking deceased, is competent as an exhibit, and there is no requirement that the testimony of the witness be corroborated. *S. v. Fuller,* 710.

Articles of clothing worn by defendant at time of arrest immediately after commission of offense are competent in evidence for purpose of identification. *S. v. Tippett,* 588.

§ 43. Maps and Photographs.

Where the prosecuting witness testifies that she fought with defendant in resisting armed robbery, photographs showing bruises and injuries to her

CRIMINAL LAW—*Continued.*

face, even though made a week or so after the event, are competent for the purpose of corroboration, the time interval being explained to the jury. *S. v. Lentz*, 122.

§ 48. Silence of Defendant.

Defendant's silence in face of an accusation of guilt cannot be competent as an implied admission when the accusation is made during interrogation of defendant by officers of the law. To compel defendant to reply to an accusation under such circumstances on pain of having his silence considered against him would amount to an infringement of his constitutional right not to be compelled to incriminate himself. *S. v. Fuller*, 710.

§ 50. Expert and Opinion Testimony in General.

A witness' testimony to the effect that he thought the pistol, identified as the one used in the perpetration of the offense, was the one taken from his home, but that he could not positively identify it, is competent, the witness' lack of positive identification affecting the weight of his testimony but not its admissibility. *S. v. Fikes*, 780.

§ 53. Medical Expert Testimony.

Where a medical expert testifies from his examination of the body of the deceased as to the stab wound in the side of the body, it is competent for the expert to testify that such stab wound could have produced death. *S. v. Cole*, 382.

§ 55. Breath and Blood Tests.

A Breathalyzer test made by a person meeting the qualifications of the statute and making the test in the manner required by the statute, is competent in a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, but for the test to cast any light on defendant's condition at the time of the offense it must have been timely made and the subject must not have consumed alcohol between the occurrence in question and the time of the test, since the Breathalyzer can measure the amount of alcohol in a person's bloodstream only as of the time the test is given. *S. v. Cooke*, 644.

The provisions of G.S. 20-139.1 that a competent Breathalyzer test showing a concentration of .1 per cent or more by weight of alcohol in a person's bloodstream should create a presumption that a person was under the influence of intoxicating liquor, merely authorizes, but does not compel, a jury to find that the person in question was intoxicated, and it is error for the court to charge the jury that the presumption created by the statute places the burden upon defendant to rebut the presumption. *S. v. Jent*, 652.

§ 65. Evidence of Identity by Sight.

Ordinarily, the probative force of the testimony of a witness identifying defendant by sight is for the jury, but when the State's uncontradicted evidence as to the physical conditions makes the testimony of identity inherently incredible, the court may properly determine that such testimony has no probative force. *S. v. Miller*, 726.

§ 67. Testimony of Telephone Conversations.

The victim of a lewd telephone conversation may testify upon hearing the defendant speak at police headquarters after his arrest that the voice she had heard over the telephone was that of the defendant, and any lack of as-

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surance or uncertainty on the part of the witness affects the weight and credibility of the testimony but not its admissibility. *S. v. Coleman*, 357.

The admission in evidence of the tracing of the origin of a telephone call to the residence of defendant by use of a diode device preventing the breaking of the connection by the originator of the call, *held* not error, an employee of the telephone company having testified that he had supervised the installation and checked the device prior to the occasion in question, and there being testimony of witnesses that after the occasion in question the witnesses picked up the telephone and talked to the party called without dialing any number, the reliability of the diode device in this specific instance having been proven. *Ibid.*

§ 70. Hearsay Testimony in General.

Where defendant offers no evidence and the State introduces no evidence of any statement made by defendant, the exclusion of cross-examination by defendant of a State witness relative to a statement made by defendant to the witness cannot be competent for the purpose of corroboration of defendant or impeachment of any witness for the State, but must be for the purpose of eliciting a self-serving declaration by defendant, incompetent as hearsay, and the court's ruling sustaining objection to the cross-examination cannot be held an expression of opinion concerning defendant's credibility. *S. v. Tippett*, 588.

The victim's testimony that he knew defendant was the person who had taken his billfold because defendant had admitted taking the billfold *held* incompetent when the record discloses that defendant's asserted admission was made to an officer and that the victim was not even present at the time, and the identification of defendant as the culprit being the crucial question, the admission of the incompetent hearsay testimony must be held prejudicial. *S. v. Mitchell*, 753.

§ 71. Confessions.

A statement voluntarily made by defendant is competent when made after defendant had been advised of his constitutional right to remain silent, his right to have counsel present at the interrogation, and that, if he could not afford counsel, counsel would be appointed for him, and warned that anything he said could be used against him. *S. v. Lentz*, 122.

Evidence tending to show that defendant, while at the police station being booked for homicide during the change of shifts while officers of his acquaintance were entering, leaving and standing in the lobby of the station, volunteered to several of the officers, without any questioning whatsoever, statements to the effect that he shot a named person and hoped that his victim died, *held* to support findings of the court upon the *voir dire* that the statements were freely and voluntarily made, and the admission of the statements in evidence was not error. *S. v. Barber*, 222.

The evidence tended to show that while the investigating officer was interrogating a person in the room in which the deceased was lying dead, the officer asked such person who had shot deceased, and she named defendant, whereupon defendant, who was standing at the doorway, stated that he had shot deceased. *Held:* The incriminating statement of the defendant was a voluntary and spontaneous statement made before anyone had been taken into custody and prior to any questioning of defendant, and was competent in evidence. *S. v. Oxentine*, 412.

Testimony on the *voir dire* to the effect that an eye witness accused defendant of inflicting a mortal injury on the unarmed deceased, and that de-

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fendant was advised that anything he said or did not say in response could be used for or against him, *held* to render incompetent defendant's incriminating statement in reply, since such statement could not be voluntary in view of the fact that defendant was advised that the failure to make a statement might be used against him. *S. v. Fuller*, 710.

Defendant's incriminating statement made upon interrogation by an officer is erroneously admitted when the evidence upon the *voir dire* discloses that the statement was made without defendant having been advised of his right to remain silent, his right to the presence of an attorney, and his right to have counsel appointed for him if he is unable to employ an attorney, and any evidence obtained as a result of such admission is also incompetent. *S. v. Mitchell*, 753.

§ 74. Acts and Declarations of Companions, Codefendants and Coconspirators.

In a prosecution for aiding and abetting, the admission of the record showing that the co-defendants had pleaded guilty to the offense deprives the defendant of her right of confrontation, since defendant is not bound by her co-defendant's pleas and is entitled to cross-examine them, the burden being upon the State to prove that the co-defendants had committed the offense and that defendant had aided and abetted them therein. *S. v. Jackson*, 773.

§ 79. Evidence Obtained by Unlawful Means.

Where warrant is not required for search, evidence obtained by search without warrant is competent. *S. v. Bell*, 25.

The search with the free assent of the owner of a house in which defendant lived, as established by the owner's testimony, and the seizure of a gun belonging to the owner of the house from a part of the house not assigned to defendant, *held* not to require a search warrant, and the gun was properly admitted in evidence upon ballistics identification of it as the one used in the commission of the offenses, and defendant's motion to suppress the evidence was properly denied. *S. v. Bumpers*, 521.

Defendant's incriminating statement made upon interrogation by an officer is erroneously admitted when the evidence upon the *voir dire* discloses that the statement was made without defendant having been advised of his right to remain silent, his right to the presence of an attorney, and his right to have counsel appointed for him if he is unable to employ an attorney, and any evidence obtained as a result of such admission is also incompetent. *S. v. Mitchell*, 753.

§ 81. Credibility of Defendant and Parties Interested.

Where defendant offers no evidence and the State introduces no evidence of any statement made by defendant, the exclusion of cross-examination by defendant of a State witness relative to a statement made by defendant to the witness cannot be competent for the purpose of corroboration of defendant or impeachment of any witness for the State, but must be for the purpose of eliciting a self-serving declaration by defendant, incompetent as hearsay, and the court's ruling sustaining objection to the cross-examination cannot be held an expression of opinion concerning defendant's credibility. *S. v. Tippett*, 588.

§ 82. Direct Examination of Witnesses.

A witness who had identified defendant in her testimony may testify that she had told a third person that she was sure she was right in the identi-

fication, the testimony being of what the witness herself had said and therefore not hearsay, and it being competent for a witness to corroborate herself by testifying that she had made the same statement to another and as laying the foundation for corroborating evidence from such third party, even though the third party is not later called as a witness for the purpose of corroboration. *S. v. Lentz*, 122.

§ 84. Credibility of Witnesses, Corroboration and Impeachment.

Even in the absence of impeachment of the credibility of prosecutrix as a witness, the State is entitled to introduce, for the purpose of corroboration, evidence of prior consistent statements made by her, and, to corroborate her statement that defendant assaulted her with a pistol, testimony of a witness that defendant had a pistol in his possession very soon after the attempted assault. *S. v. Rose*, 406.

A State's witness testified to the effect that, as a police officer was attempting to lock defendant in a cell, defendant threw the officer down, took his gun, forced the officer into a cell and shot the officer without saying anything. Another witness, for the purpose of corroboration, was permitted to testify to prior consistent statements of the first witness, but testified further that the first witness stated that defendant, before firing the shot, said that he "was sorry but he had to do this." *Held:* The further testimony did not corroborate the first witness and was therefore incompetent for this purpose, and was highly prejudicial as tending to establish premeditation and deliberation. *S. v. Fowler*, 468.

It is competent for the State to introduce testimony that its witness had previously made substantially the same statement as he had given in his testimony at the trial for the purpose of corroborating the witness. The fact that the statement made to corroborate the witness was not made in the presence of defendant and that the witness had not first testified that he had talked with the corroborating witness is immaterial. *S. v. McLawhorn*, 622.

Where corroborating evidence includes incompetent and prejudicial testimony of a fact independent of and unrelated to the corroboration, the testimony is incompetent. *S. v. Fuller*, 710.

§ 85. Rule That Party may not Discredit own Witness.

The introduction by the State of the testimony of a defendant which includes an exculpatory statement does not prevent the State from introducing other evidence tending to show the facts to be to the contrary in regard to the exculpatory statement, and on motion to nonsuit only the evidence favorable to the State will be considered. *S. v. Glover*, 319.

§ 86. Time of Trial and Continuance.

A defendant who is a prisoner and against whom a detainer had been filed requesting that he be held to answer the pending charge is entitled under the provisions of G.S. 15-10.2, to trial within eight months after he has sent written notice to the solicitor of the place of his confinement and request for final disposition of the criminal charge, but defendant may not claim the benefit of this statute when defendant gives notice to the clerk of the Superior Court and not to the solicitor, and the solicitor receives no notice of defendant's request. *S. v. White*, 78.

§ 87. Consolidation and Severance of Counts for Trial.

The consolidation of indictments against defendants charged with committing like offenses at the same time and place is addressed to the sound discretion of the trial court. *S. v. Wright*, 158.

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Defendant's motion to consolidate the indictment upon which he was being tried with another indictment pending against him, is addressed to the discretion of the trial court, and the denial of the motion will not be disturbed. *S. v. Tippett*, 588.

§ 91. Withdrawal of Evidence.

Whether the admission of incompetent evidence, including an unresponsive answer of a witness containing incompetent matter, may be cured by the withdrawal of such evidence by the court with instruction to the jury not to consider it, depends upon the nature of the evidence and the circumstances of each particular case. *S. v. Aycoth*, 270.

Where testimony admitted over objection is of such an incriminating nature that its prejudicial effect cannot be erased from the minds of the jury, the court's subsequent instruction to the jury that the jury should not consider such evidence cannot be held to have cured the error. *S. v. Mitchell*, 753.

§ 93. Custody of Defendant or Witnesses.

Upon the argument of the solicitor to the effect that defendant's brother, who had testified as to the relationship between the prosecutrix and defendant prior to the alleged criminal assault, would be less likely to tell the truth than prosecutrix, the witness jumped up and left the courtroom. The solicitor made a comment susceptible to the interpretation that the incident reflected upon the witness' credibility. The court instructed the jury that it should not consider matters outside the evidence, and the fact that any person either came into or left the courtroom during the argument of counsel should be disregarded. *Held:* The incident is not ground for new trial. *S. v. Rose*, 406.

Motion to sequester the State's witnesses is addressed to the sound discretion of the trial court, and the refusal of the motion will not be disturbed in the absence of a showing of abuse of discretion. *S. v. Oxentine*, 412.

§ 94. Conduct and Action of the Court and Expression of Opinion on Evidence by Court During Progress of the Trial.

When the conduct of a witness so requires, the court may admonish him not to argue with the solicitor but to answer the questions propounded by the solicitor. *S. v. Lentz*, 122.

As one of defendant's chief witnesses stepped down from the witness stand, the court audibly told the witness in the presence of the jury not to leave the courtroom, and shortly thereafter the witness was placed in custody in the prisoner's box in plain view of the jury. *Held:* The incident must have resulted in weakening the testimony of the witness in the eyes of the jury and constitutes a violation of G.S. 1-180. *S. v. McBryde*, 776.

§ 97. Argument and Conduct of Counsel and Solicitor.

Where, upon defendant's objection to the argument of the solicitor that he would not believe anything defendant said, the court instructs the jury that their beliefs, and not the beliefs or views of the solicitor or of defendant's counsel, were determinative, the argument will not be held for prejudicial error. *S. v. Rose*, 406.

Upon the argument of the solicitor to the effect that defendant's brother, who had testified as to the relationship between the prosecutrix and defendant prior to the alleged criminal assault, would be less likely to tell the truth than prosecutrix, the witness jumped up and left the courtroom. The solicitor made a comment susceptible to the interpretation that the incident reflected upon the witness' credibility. The court instructed the jury that it should not consider matters outside the evidence, and the fact that any person either

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came into or left the courtroom during the argument of counsel should be disregarded. *Held:* The incident is not ground for new trial. *Ibid.*

If the solicitor was guilty, in this case, of commenting in his argument upon defendant's failure to testify, such impropriety was cured by the court's explicit instruction that defendant's failure to testify created no presumption against him whatsoever, that there was no requirement that defendant testify, but that the State was required to prove defendant's guilt beyond a reasonable doubt. *S. v. Bumpers*, 521.

The record in this case *held* not to support defendant's contention that the solicitor commented in his argument upon defendant's failure to testify. *S. v. Fikes*, 780.

§ 99. Consideration of Evidence on Motion to Nonsuit.

Motion to nonsuit requires that the evidence be interpreted in the light most favorable to the State and all reasonable inferences favorable to the State must be drawn from it. *S. v. Miller*, 726.

On motion to nonsuit in a criminal, as well as in a civil, action the credibility of witnesses and the weight to be given their testimony is to be determined by the jury and not the court, and the court may not enter nonsuit on the ground that a witness is unworthy of belief; nevertheless, when the crucial testimony of a witness is irreconcilable with the physical facts established by the State's own uncontradicted evidence, nonsuit should be allowed. *Ibid.*

§ 100. Necessity for Motion to Nonsuit and Renewal.

By introducing evidence after the State has rested its case, defendant waives his motion to nonsuit made prior to the introduction of his evidence, and on appeal the correctness of the nonsuit must be determined upon consideration of all of the evidence favorable to the State. G.S. 15-173. *S. v. Prince*, 769.

Failure of defendant to renew his motion for judgment of compulsory nonsuit at the close of all the evidence waives his motion made at the close of the State's evidence, and the sufficiency of the evidence is not presented on appeal. *S. v. Fikes*, 780.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

If there be substantial evidence of defendant's guilt of each essential element of the offense charged, regardless of whether the evidence is direct, circumstantial, or a combination of both, defendant's motion to nonsuit is properly overruled, it being for the jury to determine whether the evidence convinces them of defendant's guilt beyond a reasonable doubt and whether the circumstantial evidence excludes every reasonable hypothesis of innocence. *S. v. Bell*, 25.

Circumstantial evidence of defendant's guilt of larceny held insufficient in this case to be submitted to the jury. *S. v. Barnes*, 146.

Circumstantial evidence held insufficient to show that defendant had marijuana in his possession. *S. v. Chavis*, 306.

Notwithstanding that the evidence must be considered in the light most favorable to the State on motion to nonsuit, there must be legal evidence of defendant's guilt of each essential element of the offense charged, amounting to more than a suspicion or conjecture, in order to overrule nonsuit. *S. v. Roberts*, 655.

Uncontradicted evidence of physical facts held to render testimony as to identity by sight without probative force. *S. v. Miller*, 726.

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If there is circumstantial evidence tending to prove each essential element of the offense charged as a logical and legitimate deduction, it is sufficient to be submitted to the jury. *S. v. Lakey*, 786.

§ 102. Nonsuit for Variance.

A fatal variance between indictment and proof may be raised by motion for nonsuit. *S. v. Bell*, 25.

§ 104. Directed Verdict and Peremptory Instructions.

When the evidence is sufficient to overrule defendant's motions for nonsuit, the evidence is also sufficient to overrule defendant's motion for a directed verdict of not guilty, since the motions have the same legal effect. *S. v. Glover*, 319.

§ 106. Instructions on Burden of Proof and Presumptions.

Where the evidence is direct and amply sufficient to support the verdict, there being no circumstantial evidence before the jury, the failure of the court to charge the jury that a reasonable doubt may arise out of the insufficiency of the evidence, will not be held prejudicial, the court having correctly defined reasonable doubt and charged the jury that the burden was on the State, and remained on the State throughout the trial, to prove each essential element of the offense beyond a reasonable doubt. *S. v. Britt*, 416.

§ 107. Statement of Evidence and Application of Law Thereto.

The charge of the court in this case is held to declare and explain the law arising on the evidence as required by G. S. 1-180, and not to contain prejudicial error. *S. v. Barber*, 222.

Where none of defendant's evidence located him at a place from which it would have been impossible for him to have committed the crime, the evidence does not raise the question of alibi, and it is not error for the court to fail to charge thereon. *S. v. McLawhorn*, 622.

§ 109. Instructions on Less Degrees of Crime and Possible Verdicts.

Where all of the evidence discloses that the offense committed was that of armed robbery and the sole question is the identity of defendants as the perpetrators of the crime, it is not required that the court submit the question of defendants' guilt of less degrees of the offense charged. *S. v. Lentz*, 122.

The court must submit the question of defendant's guilt of lesser degrees of the crime charged in the indictment when there is evidence which would support conviction of such lesser degrees. *S. v. Worthey*, 444.

§ 110. Charge on Failure of Defendant to Testify.

If the solicitor was guilty, in this case, of commenting in his argument upon defendant's failure to testify, such impropriety was cured by the court's explicit instruction that defendant's failure to testify created no presumption against him whatsoever, that there was no requirement that defendant testify, but that the State was required to prove defendant's guilt beyond a reasonable doubt. *S. v. Bumpers*, 521.

§ 112. Charge on Contentions of the Parties.

The solicitor is entitled to contend in his argument to the jury that the evidence would warrant an indictment for a graver offense and that defendant was fortunate that he was only charged with a lesser offense, and to contend that defendant was so intoxicated that soon after he committed the assault on prosecutrix he passed out, when such contentions arise on the

CRIMINAL LAW—*Continued.*

evidence, and it is not error for the court to repeat such contentions of the State in its charge to the jury. *S. v. Britt*, 416.

If a party desires a fuller statement of his contentions or a charge on a subordinate feature, he must aptly tender request therefor. *S. v. McCaskill*, 788.

§ 118. Sufficiency and Effect of Verdict in General.

The jury's verdict of guilty of feloniously entering the dwelling of a named person *held* sufficient to support judgment for felonious entry into the dwelling otherwise than burglariously with intent to commit larceny, the verdict being interpreted in the light of the indictment, the evidence, and the charge of the court. *S. v. Fikes*, 780.

§ 124. New Trial for Misconduct of or Affecting Jury.

Motion for a mistrial on the ground of prejudicial publicity in a newspaper, *held* properly denied when the evidence tends to show that no juror read or heard of such publicity. *S. v. Tippett*, 588.

§ 131. Severity of Sentence.

Sentences which do not exceed the limits fixed by the applicable statutes cannot be considered cruel or unusual in the constitutional sense. *S. v. Greer*, 143.

A sentence which does not exceed the maximum prescribed by the applicable statute cannot be considered cruel and unusual punishment in the constitutional sense. *S. v. LePard*, 157.

§ 135. Suspended Sentences and Judgments.

Probation or suspension of sentence is not a right granted by either the Federal or State Constitutions, but is a matter of grace conferred by statute in this State. *S. v. Hewett*, 348.

Probation relates to judicial action before imprisonment, while parole relates to executive action after imprisonment. *Ibid.*

§ 136. Revocation of Suspension of Judgment or Sentence.

In this State, a defendant on probation or under a suspended sentence is entitled to notice and an opportunity to be heard before the sentence is activated. *S. v. Duncan*, 241.

Probation or suspension of sentence is an act of grace to one convicted of, or pleading guilty to, a crime, and in a proceeding to revoke probation or activate a suspended sentence the court is not bound by the strict rules of evidence, and the alleged violation of a valid condition of suspension need not be proven beyond a reasonable doubt, all that is required being that there be competent evidence reasonably sufficient to satisfy the judge, in the exercise of his sound judicial discretion, that the defendant had violated a valid condition of probation or suspension of sentence. *Ibid.*

Where the record recites that defendant was present at a hearing by the court on the question of the revocation of probation for conditions broken, that the court had before it a verified report of the State probation officer stating in detail alleged violations by defendant of the conditions of probation, that the court made detailed findings of fact of violations of the conditions, and the record fails to show that defendant offered to testify or offered any witnesses, or was denied opportunity to cross-examine witnesses of the State, the order revoking the probation will not be disturbed. *Ibid.*

A proceeding to revoke probation is not a criminal prosecution but is a

CRIMINAL LAW—*Continued.*

proceeding solely for the determination by the court whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered, and while notice in writing to defendant and an opportunity for him to be heard are necessary, the court is not bound by strict rules of evidence, and all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the defendant had without lawful excuse wilfully violated a valid condition of probation. *S. v. Hewett*, 348.

A defendant has no constitutional right to be represented by counsel at a hearing to determine whether his probation should be revoked for his wilful violation of a lawful condition of probation, and G.S. 15-4.1 is not applicable. *Ibid.*

Where the record discloses that a bill of particulars setting forth defendant's alleged violation of condition of probation was duly served upon defendant, and that order revoking probation was not entered until the hearing after notice some four days thereafter, no abuse of discretion is shown in the refusal by the court of defendant's motion for continuance. *Ibid.*

Defendant was put on probation on condition that he not engage in injurious and vicious habits. Upon the hearing to revoke probation there was plenary competent evidence that on repeated occasions defendant had threatened law enforcement officers and had wilfully engaged in assaults upon specified persons, etc. *Held:* The evidence supports the court's finding that defendant had engaged in injurious or vicious habits in violation of the terms of probation and such finding supports the court's judgment revoking defendant's probation. *Ibid.*

In determining whether the evidence warrants revocation of probation, the credibility of the witnesses and the evaluation and weight of their testimony are for the judge, and, if there is competent evidence in the record to support the court's finding of violation of condition of probation, the fact that the court also admitted incompetent hearsay evidence is not fatal, the crucial findings being supported by competent evidence. *Ibid.*

§ 137. Modification and Correction of Judgment in Trial Court.

A plea of guilty of receiving stolen property knowing it to have been stolen is insufficient to support a felony sentence, even though the indictment charges defendant with receiving stolen goods having a value of more than $200. If there should be a correction of the record proper by appropriate proceedings so as to show that defendant pleaded guilty as charged, the court could then enter a felony sentence. *S. v. Wallace*, 155.

§ 139. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases in General.

Defendant's appeal from sentences imposed upon his pleas of guilty, entered by the court after interrogation disclosed that such pleas were intelligently, understandingly and intentionally entered, presents for review the one question whether error of law appears on the face of the record proper. *S. v. Greer*, 143.

The Supreme Court may take cognizance *ex mero motu* of a defect appearing on the face of the record proper. *S. v. Midyette*, 229.

The Supreme Court will review the record on appeal from a death sentence with minute care to the end that it may affirmatively appear that all proper safeguards have been vouchsafed the defendant. *S. v. Fowler*, 468.

In this homicide prosecution, a witness, in testifying to prior consistent statements of the witness for the purpose of corroboration, added incriminat-

CRIMINAL LAW—*Continued.*

ing statements which were not in corroboration of the witness but were in contradiction. The trial judge repeated the incompetent testimony in his charge. *Held:* Defendant having been convicted of a capital offense, the Supreme Court will take cognizance of the error *ex mero motu*, notwithstanding the absence of motion by defendant's counsel to strike the incompetent testimony. *Ibid.*

§ 151. Conclusiveness of Record and Presumption of Regularity as to Matters Omitted.

The record proper and not the case on appeal controls. *S. v. Wallace*, 155.

The record imports verity and the Supreme Court may judicially know only what appears of record, and when defendant does not include in the record any matter tending to support his ground of objection, he has failed to carry the burden of showing error and has failed to make irregularity manifest. *S. v. Duncan*, 241.

§ 152. Form and Requisites of Transcript.

Where none of the evidence is set out in the record, the appeal must be dismissed in the absence of error appearing on the face of the record proper. *S. v. Prince*, 769.

§ 154. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

In the absence of any assignment of error in the record, the judgment must be sustained when no error appears on the face of the record. *S. v. Higgs*, 111.

An exception which appears nowhere except under the assignments of error is ineffectual. *S. v. Hewett*, 348.

§ 155. Objections, Exceptions and Assignments of Error to Evidence and Motions to Strike.

An assignment of error to the exclusion of evidence should set forth the evidence excluded so as to disclose within itself the question sought to be presented. *S. v. Coleman*, 357.

§ 156. Exceptions and Assignments of Error to Charge.

A contention that the court failed to charge the jury as required by G.S. 1-180 is broadside and ineffectual. *S. v. McCaskill*, 788.

§ 159. The Brief.

Exceptions not brought forward in the brief are deemed abandoned. *S. v. Barber*, 222; *S. v. Midyette*, 229; *S. v. Little*, 234; *S. v. Cole*, 382; *S. v. Rose*, 406.

§ 160. Presumptions and Burden of Showing Error, and Harmless and Prejudicial Error in General.

The record imports verity and the Supreme Court may judicially know only what appears of record, and when defendant does not include in the record any matter tending to support his ground of objection, he has failed to carry the burden of showing error and has failed to make irregularity manifest. *S. v. Duncan*, 241.

§ 161. Harmless and Prejudicial Error in Instructions.

The charge of the court will not be held for error when the charge, construed contextually, is not prejudicial. *S. v. Wright*, 158.

CRIMINAL LAW—*Continued.*

The charge of the court will be construed contextually, and exceptions to excerpts therefrom will not be sustained when the charge is free from prejudicial error when so construed. *S. v. Blue*, 283.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

In the absence of objection or motion to strike, the incidental remark of a witness, after stating that he knew the defendant, that he had not seen him "since he got back from the County Home" will not be held prejudicial, since persons other than criminals are sent to the County Home, and such statement is not rendered prejudicial upon its repetition in response to further question of the solicitor. *S. v. Lentz*, 122.

Ordinarily, the admission of incompetent evidence will not be held prejudicial when evidence of the same import is theretofore admitted without objection. *S. v. Wright*, 158.

Where the record does not disclose what the answer of the witness would have been had the witness been permitted to testify, appellant has failed to show prejudicial error in the exclusion of the testimony, since the burden is upon appellant to show prejudicial error and it cannot be assumed that the answer of the witness would have been adverse to him. *S. v. Blue*, 283.

§ 164. Whether Error Relating to one Count Alone is Prejudicial.

Where sentences of defendant are made to run concurrently, any error relating to the shorter sentence alone cannot be prejudicial. *S. v. Hewett*, 348.

Where the jury convicts defendant of a lesser degree of the crime charged, any error relating solely to a higher degree of the offense cannot be prejudicial. *S. v. McCaskill*, 788.

CUSTOMS AND USAGES.

In order for evidence of a custom to be admissible in evidence, the party relying on the custom must show that the other party had actual knowledge of the custom or that the custom was so general that the other party is presumed to have had knowledge of it. *Pennington v. Styron*, 80.

DAMAGES.

§ 10. Punitive Damages.

Punitive damages may not be awarded merely for the giving of checks returned by the drawee bank marked insufficient funds, since punitive damages may not be allowed for simple fraud alone. *Nunn v. Smith*, 374.

§ 12. Competency and Relevancy of Evidence on Issue of Compensatory Damages.

Where plaintiff introduces evidence that he suffered permanently disfiguring scars from sulphuric acid burns resulting from defendant's negligence, the admission in evidence of the mortuary tables on the issue of damages is not error, and the court correctly charges on the question of permanent injury. *Chandler v. Chemical Co.*, 395.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

While an action for wrongful death must be brought by the personal representative, the personal representative is not the real party in interest, and

DEATH—*Continued.*

therefore the fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute the action one accruing to a resident of this State within the meaning of the proviso to G.S. 1-21. *Broadfoot v. Everett*, 429.

§ 6. Expectancy of Life and Damages.

Eligibility to share in retirement funds is in the nature of delayed compensation for former years of service and, in an action for wrongful death, deceased's right in a retirement fund is competent in evidence on the question of damages. *Wands v. Cauble*, 311.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Grounds of Remedy.

The Uniform Declaratory Judgment Act affords an appropriate method for the determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute. *Woodard v. Carteret County*, 55.

If the complaint in a proceeding under the Declaratory Judgment Act states a justiciable controversy and all persons who have a substantial and legal protectible interest in the subject matter of the litigation are made parties, a demurrer should not be sustained, even though plaintiffs may not be entitled to the relief sought, since in such instance the court is not concerned with whether plaintiffs have a right to the relief demanded but only whether plaintiffs are entitled to a declaration of their rights with respect to the matters alleged. *Ibid.*

DEEDS.

§ 19. Restrictive Covenants.

Since encroachments of businesses and changes in condition outside the development are irrelevant to the question of the validity and enforceability of restrictive covenants within the development, allegations of encroachments outside the area are properly stricken on motion. *Lamica v. Gerdes*, 85.

Restrictive covenants are in derogation of the fee and are to be strictly construed, but such covenants are not impolitic and may be enforced when reasonable and incidental to the enjoyment of the estate conveyed, are not contrary to public policy or in restraint of trade, and do not tend to create a monopoly. *Ibid.*

Whether restrictive covenants are personal to the grantor or are a servitude on the land, enforceable by owners of property in the development, is to be ascertained on the facts of each particular case in accordance with the intent of the grantor and grantee. *Ibid.*

When the deed expressly provides that the restrictive covenants therein contained should run with the land and should be enforceable by any person owning or purchasing real estate situate within the development, the covenants are enforceable by the owners of the lots in the development as third party beneficiaries, irrespective of the existence of a general scheme of development, the intent of the parties that the covenants should be a servitude on the land being clear. *Ibid.*

The presence of restrictive covenants in any deed constituting a link in a party's chain of title is notice to such party of the existence of such covenants, and the covenants are binding upon him even though the immediate deed to him does not contain the restrictions; therefore, where the developer sells a

DEEDS—*Continued.*

lot subject to restrictions and thereafter the lot is reconveyed to him, and, in turn, is conveyed by him by deed not containing the covenants, the land remains subject to the covenants. *Ibid.*

DIVORCE AND ALIMONY.

§ 1. Jurisdiction and Pleadings in General.

The courts of this State have jurisdiction of an action instituted by a resident plaintiff against a nonresident defendant for divorce, and have power in such action to award custody of the children of the marriage when the children are within the State, but service by publication cannot support a judgment *in personam* ordering defendant to pay a stipulated sum per month for the support of the children, and motion to quash the order for such payments is properly allowed upon defendant's motion upon special appearance. *Fleck v. Fleck*, 736.

§ 11. Divorce from Bed and Board on Grounds of Indignities to the Person.

The court, in its charge to the jury upon the nagging of the wife as constituting such indignities to the person of the husband as to warrant a divorce *a mensa et thoro*, quoting a picturesque philippic on nagging, capped by a quotation from Proverbs as to the difficulty of living with a brawling woman. *Held:* The excerpt from the charge must certainly have been considered by the jury as a description of the wife's behavior, and constitutes prejudicial error as an expression of opinion on the facts by the court. *Stanback v. Stanback*, 497.

§ 13. Absolute Divorce — Separation.

In this suit by the wife for divorce on the ground of separation, the husband's evidence is held insufficient to warrant the submission of the issue of the wife's wrongful abandonment of him, interposed by him as a defense to her action. *Campbell v. Campbell*, 298.

After institution by the wife of an action for alimony without divorce the husband instituted an action for absolute divorce on the ground of separation. *Held:* The issues involved and the relief demanded in the respective actions are not the same, and the wife's plea in abatement in the husband's subsequent action for absolute divorce is properly denied. *Fullwood v. Fullwood*, 421.

§ 16. Alimony Without Divorce.

Even though the court may not ordinarily award alimony in a gross sum, the court may, by and with the consent of the parties, direct the husband to make monthly payments in a specified sum for a period of ten years or until the wife remarries. *Mitchell v. Mitchell*, 253.

Order held to direct husband to make payments of alimony in accordance with agreement of parties. *Ibid.*

The wife's action for alimony without divorce, G.S. 50-16, does not abate upon the husband's subsequent institution of an action for absolute divorce, and upon determination of the issues in favor of the wife on conflicting evidence in her action for alimony, the award of alimony after investigation and findings of fact with respect to the financial conditions of both parties, will not be disturbed in the absence of error of law. *Fullwood v. Fullwood*, 421.

Decree for divorce may be held in abeyance pending determination of wife's action for alimony. *Ibid.*

DIVORCE AND ALIMONY—*Continued.*

§ 18. Alimony and Subsistence Pendente Lite.

In hearing a motion for alimony *pendente lite*, the court has the discretion to decide in what form he should receive evidence in his efforts to ascertain the truth, and the action of the court in limiting the evidence of both parties to affidavits is within his discretion and will not be disturbed in the absence of a showing of abuse. *Miller v. Miller*, 140.

Where plaintiff's complaint in a suit for alimony without divorce alleges that defendant had contributed nothing to her support since a specified date and that her earnings as a secretary are not sufficient to support her adequately and defray the costs of her suit, her complaint, treated as an affidavit, is sufficient to support the court's order for subsistence and counsel fees *pendente lite*, and defendant's contention that it affirmatively appeared from her allegations that she had ample income to meet her needs pending trial is not supported by the record. *Ibid.*

In a hearing by the court of plaintiff's motion for subsistence and counsel fees *pendente lite*, it will be presumed that the court found facts from the conflicting affidavits and allegations of the pleadings, treated as affidavits, sufficient to support its order awarding subsistence and counsel fees *pendente lite*. *Ibid.*

The amount of subsistence *pendente lite* is a matter resting in the sound discretion of the trial court. *Ibid.*

Affidavits that a married man visited plaintiff at her residence on two occasions for periods of less than two hours in the early evening, when considered with further evidence that the married man and his wife were both friends of the plaintiff, are insufficient to support a finding of adultery on the part of the plaintiff, and when it is apparent from the record that the judge denied plaintiff's application for subsistence and counsel fees *pendente lite* on the ground of adultery, the order denying the relief must be vacated and the cause remanded. *Myers v. Myers*, 263.

An order of the court directing the husband to make specified payments to his wife until the birth of their child, without any provision for payments thereafter, expires upon the birth of the child, and upon the hearing of a motion for subsistence and counsel fees *pendente lite* made after the birth of the child it is error for the court to hold that the prior order should not be modified, and the discretionary order of the court that the matter should be continued under the prior order will be vacated and the cause remanded, since such discretion was not exercised with respect to the controlling factual conditions. *Garner v. Garner*, 293.

The purpose of allowance of fees to the attorneys for the wife is to place her on substantially even terms with the husband in the litigation, and under the facts of this case the amount allowed to the wife's attorneys *is held* not to disclose abuse of discretion in view of the affluence of the husband and the wife's lack of funds, the amount of legal work required of the wife's attorneys, and other relevant circumstances. *Stanback v. Stanback*, 497.

§ 21. Enforcing Payment of Alimony.

Allegations that defendant had wilfully refused to make subsistence payments as directed by prior judgment of the court, G.S. 50-16, supports plaintiff's motion that defendant be attached for contempt, placing the burden on defendant to show facts constituting justification, and demurrer to the motion is improperly sustained when the motion does not allege facts affirmatively disclosing conduct relieving defendant of further obligations under the judgment, and its allegation of a temporary resumption of cohabitation induced by fraudulent misrepresentations *held* insufficient to establish such defense, which

DIVORCE AND ALIMONY—*Continued.*

should be determined upon plenary hearing on return of the order to show cause. *Ring v. Ring*, 113.

A contract under which the husband agrees to pay the wife specified sums for her support may not be enforced by contempt proceedings even though the agreement is approved by the court, but if the court not only approves the agreement but orders and directs the husband to make monthly payments for the support of the wife in accordance with the agreement, the judgment is enforceable by contempt proceedings, since failure to make the payments is in violation of the order of the court. *Mitchell v. Mitchell*, 253.

§ 22. Jurisdiction to Award Custody and Support.

The institution of an action for divorce in this State ousts the custody jurisdiction theretofore invoked by the filing of a writ of *habeas corpus* for the custody of the children as between the husband and wife, regardless of whether the writ of *habeas corpus* was entered under G.S. 17-39 or G.S. 17-39.1. *In re Custody of Sauls*, 180.

A judgment awarding the custody of a child under the provisions of G.S. 17-39 does not oust the jurisdiction of the court to hear and determine a motion in the cause for custody of the child in a subsequent divorce action between the parties, and the court entering the divorce decree has exclusive jurisdiction to enter such order respecting the care and custody of the child as may be proper. *Swicegood v. Swicegood*, 278.

The courts of this State have jurisdiction of an action instituted by a resident plaintiff against a nonresident defendant for divorce, and have power in such action to award custody of the children of the marriage when the children are within the State, but service by publication cannot support a judgment *in personam* ordering defendant to pay a stipulated sum per month for the support of the children, and motion to quash the order for such payments is properly allowed upon defendant's motion upon special appearance. *Fleek v. Fleek*, 736.

§ 23. Support and Custody.

Allegations that plaintiff husband paid certain sums to his wife under court order solely for the support of the children of the marriage, that the wife failed to use the money for the support of the children but used a part of it for her sole benefit and had deposited the balance in a savings account in her name, fails to state a cause of action, irrespective of allegations of fraud, since the facts alleged would give rise to a cause of action for the benefit of the children, but not a cause of action in favor of plaintiff to recover for his own benefit the moneys paid for the support of the children. *Tyndall v. Tyndall*, 106.

The welfare of the child is always the paramount consideration in determining the right to the child's custody, and while the courts are reluctant to deny either parent all visitation rights, visitation rights should not be permitted to jeopardize the child's welfare. *Swicegood v. Swicegood*, 278.

The court, after entering a decree of divorce, directed that the custody of the child of the marriage should remain in the father in accordance with a prior decree entered under G.S. 17-39, with visitation rights to the mother. *Held:* The court in the divorce action had jurisdiction to award the custody of the child unaffected by the prior order under G.S. 17-39, and it was error for the court granting the decree of divorce to award the custody of the child without findings of fact from which it could be determined that the order was adequately supported by competent evidence and was for the best interest of the child. *Ibid.*

DIVORCE AND ALIMONY—*Continued.*

Whether the husband should be required to continue to make payments for support of his employed son and, if so, the amount thereof, must be influenced by whether the son's employment is merely for a few weeks during school vacation or whether the employment is regular and the son is supporting himself, and the court should find the facts and then enter an appropriate order thereon. *Baucom v. Baucom*, 452.

Determination of the right to custody of minor children of the marriage is the province of the trial court and not the jury, and the court must decide the question upon the evidence before it, and while the verdict of the jury in the divorce action may be considered by the court with all other relevant factors in determining the question of custody in accordance with the best interest of the children, the verdict of the jury is not controlling, and it is error for the court to so consider it. *Stanback v. Stanback*, 497.

The court awarded the custody of the children of the marriage in accordance with the prior order entered in the cause under the mistaken belief that he had to do so in view of the verdict of the jury in the divorce action. *Held:* A new trial having been awarded in the divorce action, the order of custody will not be altered prior to trial unless for good cause shown earlier consideration should become necessary, but after retrial the court must consider the question of custody *de novo*. *Ibid.*

EJECTMENT.

§ 9. Competency and Relevancy of Evidence.

Where it appears that a surveyor had surveyed the property and tied in natural objects and well known corners found by him, with the description in plaintiff's deed, and had prepared a map of his survey, the testimony of the surveyor that plaintiff's land lay to the west of a line drawn on the map is based upon his personal knowledge gained from his survey and the natural objects and corners found by him, and is not merely a statement of plaintiff's contentions. *Gahagan v. Gosnell*, 117.

§ 10. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Where plaintiff introduces *mesne* conveyances from the State to him and introduces evidence tending to fit the land claimed by him to each of the descriptions in the deeds constituting his chain of title, nonsuit is improvidently entered. *Gahagan v. Gosnell*, 117.

ELECTIONS.

§ 2. Qualification of Electors and Registration.

Complaint held to state cause of action under Declaratory Judgment Act to determine validity of apportionment for election of county commissioners. *Woodard v. Carteret County*, 55.

EMINENT DOMAIN.

§ 11. Actions to Recover Compensation or Damages.

Where property subject to a leasehold estate is condemned and appeal from the appraisal of the commissioners is taken to the Superior Court, it is discretionary with the Superior Court whether to permit a separate trial to ascertain the compensation due lessees, and the action of the court in refusing to permit separate trials to ascertain the amount due the owners and the

EMINENT DOMAIN—*Continued.*

amount due the lessees will not be disturbed in the absence of a showing of abuse. *Durham v. Realty Co.*, 631.

§ 13. Time of Passage of Title.

Upon the filing of the complaint and the declaration of a taking, together with the making of a deposit in court, title and right to immediate possession of property condemned by the Highway Commission vests in the Commission. *Highway Commission v. Myers*, 258.

§ 14. Persons Entitled to Compensation Paid.

Where title to land held by the entirety is transferred to the State Highway Commission upon the payment into court of a sum estimated by the Commission to be just compensation, such involuntary transfer of title does not destroy the estate by the entirety, and the compensation paid by the Commission has the status of real property owned by the husband and wife as tenants by the entirety, and the wife is not entitled to any part thereof unless and until there is a change of status, and there can be no disbursement for any purpose unless specifically authorized by order of the court entered after hearing pursuant to notice to all interested parties. *Highway Commission v. Myers*, 258.

Where land subject to a leasehold estate is condemned, lessees are not entitled to recover their damage without regard to the owner's recovery, but it is proper for the jury to fix the total value of the property and then ascertain what part of such total value should be awarded the lessees for the condemnation of their leasehold estate, although the fact that the property is rented advantageously, or, on the other hand is unrented, is a factor to be considered in the determination of its fair market value. *Durham v. Realty Co.*, 631.

A charge that the amount lessees were entitled to recover for the condemnation of their leasehold estate would be the difference between the fair market value of the lease for the remainder of the term and the amount of rent stipulated in the lease, *held* not prejudicial error. *Ibid.*

EVIDENCE.

§ 4. Presumptions in General.

The General Assembly may provide that the proof of one fact shall be deemed *prima facie* evidence of a second fact, provided there is such relation between the two facts in human experience that proof of the first may reasonably be deemed some evidence of the existence of the second. *Milk Commission v. Food Stores*, 323.

§ 15. Relevancy and Competency of Evidence in General; Res Inter Alios Acta, Negative Evidence.

Intestate was killed while riding as a passenger in an automobile driven by his brother. *Held:* Testimony of intestate's aunt tending to show her knowledge of the driver's reputation for recklessness is incompetent to show that intestate knew of such reputation when he voluntarily rode as a passenger in the car driven by his brother. *Weatherman v. Weatherman*, 130.

§ 26. Best and Secondary Evidence Relating to Writings.

In an action based on the recklessness of the driver of an automobile, it is improper for counsel to ask a witness whether the witness had knowledge of previous convictions of the driver for violations of the motor vehicle stat-

EVIDENCE—*Continued.*

utes, since the questions put before the jury information or claims in violation of the best evidence rule. *Weatherman v. Weatherman*, 130.

§ 27. Parol or Extrinsic Evidence Affecting Writings.

The parol evidence rule does not preclude parol evidence that the parties entered into the contract because of a mutual mistake of fact, since such evidence does not seek to contradict the writing or to enforce a parol agreement but only to show the existence of a mutual mistake of fact precluding a meeting of the minds and the formation of a contract. *MacKay v. McIntosh*, 69.

§ 28. Hearsay Evidence in General.

Answers of a witness to questions as to whether the witness had heard about prior convictions of a driver for violations of the motor vehicle statutes are incompetent as hearsay. *Weatherman v. Weatherman*, 130.

§ 35. Opinion Evidence in General.

It is competent for a non-expert to testify as to the declivity between the unpaved and paved portions of a sidewalk, ascertained by the witness by laying one measuring rule upon the surface of the pavement with its end projecting over the unpaved walk, and with another rule, measuring the distance from the under edge of the first rule down to the surface of the dirt, since such measurement requires no greater skill than that possessed by any intelligent adult, and the testimony relates to facts within the knowledge of the witness and not opinions or conclusions drawn by him from the facts. *Waters v. Roanoke Rapids*, 43.

§ 42. Expert Testimony in General; Invasion of Province of Jury.

Where an expert testifies from his personal examination of the material sold by plaintiff and from tests run by the witness on the material just as it came from plaintiff, the facts testified to by such expert are based upon his personal knowledge and he may testify directly as to his opinion as to defects in the material, and is not restricted to testimony upon hypothetical questions as to such defects. *Rubber Co. v. Tire Co.*, 50.

§ 43. Competency and Qualification of Experts.

Where a court permits an expert to testify within the field of his competency as an expert, it will be assumed that the court found the witness to be an expert in such field, and the failure of the court to make a specific finding that the witness is an expert is not fatal. *Rubber Co. v. Tire Co.*, 50.

Even though the court states that he will not grant the request of the party that his witness be heard as an expert, the fact that the court thereafter permits the witness to testify fully within the field of his competency, amounts to a holding by the court that the witness is an expert in such field, and the prior statement of the court is not prejudicial. *Ibid.*

EXECUTION.

§ 16. Supplementary Proceedings.

Judgment creditors may not by supplemental proceedings reach funds which the judgment debtor had validly transferred prior to the institution of the judgment creditors' suits. *Estridge v. Denson*, 556.

§ 17. Execution Against the Person.

Execution against the person will lie, G.S. 1-311, only when defendant has been lawfully arrested, or the complaint or affidavit alleges facts which

EXECUTION—*Continued.*

would have justified an order of arrest, G.S. 1-410, and it is further necessary that such facts be judicially determined, since body execution will not lie solely upon plaintiff's allegations. *Nunn v. Smith*, 374.

Evidence held insufficient to support execution against the person. *Ibid.*

FOOD.

§ 1. Liability of Manufacturer to Consumer.

Negligence on the part of the bottler is not established by the showing that one bottle alone out of some eight million contained a deleterious substance. *Tedder v. Bottling Co.*, 301.

Evidence in this case held for jury on issue of bottler's liability to ultimate consumer on implied warranty. *Ibid.*

§ 2. Liability of Retailer to Consumer.

The retailer of food sells to the consumer under implied warranty of fitness for human consumption, and may be held liable by the consumer for damages resulting from breach of such warranty. *Tedder v. Bottling Co.*, 301.

§ 3. Liability of Manufacturer or Wholesaler to Retailer.

A retailer buying a product for human consumption in a sealed container may hold the jobber liable for breach of implied warranty of fitness, and the jobber, in turn, by showing loss, may hold the manufacturer, processor or bottler liable. *Tedder v. Bottling Co.*, 301.

FRAUDULENT CONVEYANCES.

§ 1. Nature and Scope of Remedy.

An assignment by a debtor of property to a new corporation without obligations of its own, in exchange for stock in the corporation, even though such corporation is formed for the purpose of satisfying creditors, *held* not to constitute a voidable assignment even though at the time the debtor was insolvent, since the debtor obtained full value for his property in the form of stock, and it is not unlawful for an insolvent debtor to transfer his property for other property of a different form. G.S. 23-1. *Estridge v. Denson*, 556.

GUARDIAN AND WARD.

§ 10. Liabilities of Guardian and Surety.

A guardian may not be held liable for use of funds of the estate to provide necessities of life for the incompetent, even though some other person is under legal duty to provide support for the incompetent, but the guardian is required to collect such funds from the third person and may be held liable to the incompetent's estate for the amount the estate of the incompetent is reduced by the failure to collect such funds, plus interest. *Kuykendall v. Proctor*, 510.

Where a third person is under legal duty to provide funds for the support of an incompetent, which would have provided for the reasonable comfort of the incompetent, and the guardian fails to collect such funds, and is able to provide the incompetent only with the bare necessities of life from the incompetent's own estate, *held*, upon the death of the incompetent, her estate may hold the guardian liable for the wrong done the incompetent in failing to provide the incompetent with reasonable comforts above the bare necessities of life. *Ibid.*

HABEAS CORPUS.

§ 3. To Determine Right to Custody of Infants.

The institution of an action for divorce in this State ousts the custody jurisdiction theretofore invoked by the filing of a writ of *habeas corpus* for the custody of the children as between the husband and wife, regardless of whether the writ of *habeas corpus* was entered under G.S. 17-39 or G.S. 17-39.1. *In re Custody of Sauls*, 180.

A judgment awarding the custody of a child under the provisions of G.S. 17-39 does not oust the jurisdiction of the court to hear and determine a motion in the cause for custody of the child in a subsequent divorce action between the parties, and the court entering the divorce decree has exclusive jurisdiction to enter such order respecting the care and custody of the child as may be proper. *Swicegood v. Swicegood*, 278.

The respective rights of the parents to the custody of their children is not absolute and must give way to the controlling consideration of the welfare of the children, and upon findings supported by evidence that neither parent is a fit and suitable person to have the custody of the children, the court may award their custody to a third person. *Brake v. Mills*, 441.

While the abilities of the respective claimants to provide material comforts and advantages to the child are relevant in determining the custody of such child, financial means is of minor significance in comparison with the intangible attributes and qualities which characterize a good home. *Ibid.*

Upon the mother's petition for the custody of her minor children after the award of their custody to their paternal aunt by the court of another state, a court of this State may deny the petition for insufficient evidence by petitioner that the welfare of the children would be promoted by the change in their custody, and may properly continue the custody in the aunt upon findings supported by evidence that such custody is in the best interest of the children. *Ibid.*

HIGHWAYS.

§ 9. Actions Against the Commission.

The State Highway Commission can be sued in tort for negligent injury only insofar as that right is conferred by the State Tort Claims Act, and that Act permits recovery only for injuries resulting from negligent acts of identified employees of the Commission and does not authorize recovery for injuries resulting from negligent omissions to act. *Ayscue v. Highway Commission*, 100.

Evidence held insufficient to show act of negligence so as to support recovery under Tort Claims Act. *Ibid.*

In a proceeding against the State Highway Commission under the Tort Claims Act it is required that the affidavit identify the employee of the Commission alleged to have committed the negligent act, and mere allegation that a named person was the Commission's road maintenance supervisor at the point of the accident, where the highway was allegedly defective, fails to meet this requirement. *Ibid.*

HOMICIDE.

§ 7. Defenses of Insanity and Passion.

The evidence tended to show that the proprietor of a motel ordered five Marines to leave the premises after a fight with a sailor, that, pursuant to the order, four of the Marines had pulled the fifth Marine to the gate when the fifth Marine broke away and started back, unarmed, that the proprietor of the motel shot him after he had gone three or four feet, notwithstanding there was no reason to believe his companions would not be able to control

HOMICIDE—*Continued.*

him. *Held:* The evidence does not raise the question of provocation sufficient to warrant the proprietor in slaying the trespasser. *S. v. McLawhorn*, 622.

§ 10. Defense of Others.

The right to kill in defense of another cannot exceed such other's right to kill in his own defense, including the requirement of reasonable apprehension of death or great bodily harm. *S. v. McLawhorn*, 622.

§ 17. Evidence of Premeditation and Deliberation.

A State's witness testified to the effect that, as a police officer was attempting to lock defendant in a cell, defendant threw the officer down, took his gun, forced the officer into a cell and shot the officer without saying anything. Another witness, for the purpose of corroboration, was permitted to testify to prior consistent statements of the first witness, but testified further that the first witness stated that defendant, before firing the shot, said that he "was sorry but he had to do this." *Held:* The further testimony did not corroborate the first witness and was therefore incompetent for this purpose, and was highly prejudicial as tending to establish premeditation and deliberation. *S. v. Fowler*, 468.

§ 18. Evidence Competent on Question of Self-Defense.

Where defendant in a homicide prosecution pleads self-defense, he is entitled to show the character of the deceased as a violent and dangerous man, and may testify as to incidents of violence in altercations between the deceased and himself, and may also testify as to specific acts of violence which occurred in defendant's presence or of which he had knowledge in altercations between the deceased and third parties, for the purpose of explaining and establishing defendant's reasonable apprehension when deceased advanced toward him. *S. v. Johnson*, 215.

Where, in support of defendant's plea of self-defense, he introduces evidence of the violent and dangerous character of the deceased, the State is limited in rebuttal to the general reputation of deceased for peace and quiet, and may not elicit evidence of the general good character of the deceased. *Ibid.*

In this homicide prosecution, the evidence tended to show that deceased was fatally shot by defendant when deceased was some eight feet from defendant, defendant contending that deceased was reaching for a pistol in the pocket of his trousers. *Held:* Testimony tending to show that deceased had suffered an injury while in service and was a partially disabled serviceman is immaterial and irrelevant, there being no contention of any physical combat between them, and such testimony is prejudicial as tending to incite the sympathy of the jury. *Ibid.*

§ 20. Sufficiency of Evidence and Nonsuit.

The State's evidence tended to show that deceased was stabbed in the stomach and a piece of his liver cut out, that the wound necessitated an emergency operation, that deceased went into a coma Monday night following the stabbing on Sunday, and that deceased remained in a coma with the exception of one day until his death some seven weeks thereafter. *Held:* A person of average intelligence would know of his own experience or knowledge that such a wound is mortal and it was not required that the State show by expert testimony that the wound caused death in order to convict defendant of manslaughter. *S. v. Cole*, 382.

The State's evidence tending to show that defendant shot and killed the

HOMICIDE—*Continued.*

deceased without justification or provocation, as deceased sat in a chair, *held* sufficient to deny defendant's motions for nonsuit. *S. v. Oxentine*, 412.

Testimony of two witnesses for the State that they saw defendant fire a pistol and that immediately thereafter deceased fell, mortally wounded, exclaiming that he had been hit, is clearly sufficient to make out a case for the jury. *S. v. McLawhorn*, 622.

Evidence tending to show that defendant, after an altercation, struck the unarmed deceased in the back of the head with a baseball bat, that deceased was standing with his back to defendant at the time, and that the blow caused death, *held* sufficient to overrule nonsuit in a prosecution for homicide. *S. v. Fuller*, 710.

§ 22. Instructions in General.

In a homicide prosecution resulting in defendant's conviction of voluntary manslaughter, the fact that the court in its instruction correctly defined both voluntary and involuntary manslaughter will not be held for prejudicial error, even though the definition of involuntary manslaughter may not have been required. *S. v. Cole*, 382.

Evidence held to establish conclusively that death resulted from wound inflicted by defendant. *Ibid.*

§ 27. Instruction on Defenses.

Defendant's evidence held not to raise questions of provocation or self-defense. *S. v. McLawhorn*, 622.

Where the State's evidence tends to show that defendant intentionally shot deceased with a deadly weapon, inflicting mortal injury, and defendant depends solely on his contention that he did not fire the shot which caused the death, the question of an accidental killing is not presented, and the court did not commit error in failing to charge upon defendant's contention of an accidental killing, the court having charged the jury that the burden was on the State to prove that defendant intentionally shot deceased in order to sustain conviction. *Ibid.*

§ 30. Verdict and Sentence.

Where, in a prosecution for murder in the first degree, the solicitor announces that he would not seek a verdict graver than murder in the second degree, a verdict of the jury of "guilty as charged" leaves the matter in conjecture, and the court should require the jury to be more specific. *S. v. Fuller*, 710.

HUSBAND AND WIFE.

§ 15. Nature and Incidents of Estates by the Entirety.

Even though rents and profits from an estate by the entirety are owned exclusively by the husband, such rents and profits, and even the actual possession of the land, may be made available for the support of the wife; nevertheless, sale of land owned by the entirety may not be ordered to procure funds to pay alimony to the wife or to pay her counsel fees. *Highway Commission v. Myers*, 258.

§ 17. Termination and Survivorship.

While an absolute divorce converts an estate by the entirety into a tenancy in common, a divorce *a mensa* does not do so; however, an estate by the entirety can be dissolved by the voluntary joint act of the husband and wife, as by conveyance. *Highway Commission v. Myers*, 258.

HUSBAND AND WIFE—*Continued.*

Where title to land held by the entirety is transferred to the State Highway Commission upon the payment into court of a sum estimated by the Commission to be just compensation, such involuntary transfer of title does not destroy the estate by the entirety, and the compensation paid by the Commission has the status of real property owned by the husband and wife as tenants by the entirety, and the wife is not entitled to any part thereof unless and until there is a change of status, and there can be no disbursement for any purpose unless specifically authorized by order of the court entered after hearing pursuant to notice to all interested parties. *Ibid.*

INDICTMENT AND WARRANT.

§ 2. Return by a Duly Constituted Grand Jury.

The statutes permitting persons within the classifications enumerated to be excused from jury duty upon application for exemption are constitutional and valid. *S. v. Oxentine*, 412.

§ 6. Issuance of Warrants.

The issuance of a warrant of arrest is a judicial act, and under the Fourth and Fourteenth Amendments to the Federal Constitution a warrant must be issued in the exercise of judicial power, and a "desk officer" appointed by the chief of police is not a neutral and detached magistrate within the requirement of the Fourteenth Amendment to the Federal Constitution in issuing a warrant of arrest on the affidavit of a fellow officer. *S. v. Matthews*, 35.

The Fourth Amendment to the Federal Constitution is binding on the States by virtue of the Fourteenth Amendment to the Federal Constitution, and the limitations of the Fourth Amendment apply to warrants of arrest as well as to search warrants. *Ibid.*

G.S. 160-20.1 and Chapter 1093, Session Laws of 1963, purporting to confer judicial powers on persons who are not officers of the General Court of Justice and who were not vested with judicial power on November 6, 1962, are void, and a "desk officer" appointed by the chief of police of a municipality may not issue a warrant of arrest, even in those instances in which the complainant is a private citizen and has no connection with any law enforcement agency, since these statutes exceed the limitations placed upon the power of the General Assembly by Article IV of the State Constitution. *Ibid.*

§ 7. Nature, Requisites and Sufficiency of Indictment and Warrant in General.

An order and its supporting affidavit must be considered a single document and constitutes the warrant of arrest, and a fatal defect in the order of arrest constitute a fatal defect in the warrant. *S. v. Matthews*, 35.

§ 9. Charge of Crime.

A blank left in the indictment as to the year the offense was committed should be filled in prior to the submission of the indictment to the grand jury. *S. v. Roberts*, 449.

§ 10. Identification of Accused.

A difference between the spelling of defendant's given names in the indictment and in defendant's birth certificate is not fatal, the names coming within the doctrine of *idem sonans* and there being no question of identity, and defendant having made no objection or challenge during the trial. *S. v. Higgs*, 111.

INDICTMENT AND WARRANT—*Continued.*

§ 12. Amendment and Waiver of Defects.

Where fatal defect in the warrant is corrected prior to delivery to the officer for service, defendant has no ground for objection. *S. v. Fetters*, 453.

§ 14. Time of Making of Motions to Quash and Waiver of Defects.

While a plea of not guilty in a municipal court having jurisdiction waives defects with reference to the authority of the person who issues the warrant, a motion to quash the warrant made for the first time in the Superior Court on appeal may be determined by the judge of the Superior Court in his discretion, and when the trial judge hears the motion in his discretion, the motion has the same legal effect as if timely made first in the municipal court and later in the Superior Court. *S. v. Matthews*, 35.

By pleading to a warrant in a court having jurisdiction of the offense, defendant waives any defect incident to the authority of the person issuing the warrant, and motion to quash thereafter made is addressed to the discretion of the trial court. *S. v. Blacknell*, 105.

§ 17. Variance Between Averment and Proof.

Discrepancies in the appellation given by the witnesses to a commercial establishment do not constitute a fatal variance when it is apparent that the names were used interchangeably by the witnesses to identify the same establishment named in the bill of indictment. *S. v. Martin*, 286.

Defendants were charged with breaking and entering and larceny from a building located at "1720 North Boulevard." The witnesses referred to the location as "1720 Louisburg Road." *Held:* Averments in the indictment as to the address were not descriptive of the offenses, and the bill of indictment being specific in describing the property taken, there was no fatal variance, the possibility of double jeopardy being obviated by the right to offer extrinsic evidence showing that both names were used for the same street. *Ibid.*

INJUNCTIONS.

§ 11. Enforcing Institution or Prosecution of Civil Action or Proceedings.

Injunction will not lie for the purpose of interfering with valid and regular statutory procedure before an administrative board, there being ample opportunity for a party to redress any injustice by appeal from the final order of such board. *Elmore v. Lanier, Comr. of Insurance*, 674.

§ 13. Issuance of Temporary Orders Upon a Hearing; Continuance and Dissolution of Temporary Orders.

In an action against the purchasers of the remaining undeveloped lots in a subdivision to recover damages and to restrain further violation of a restrictive covenant specifying the minimum square feet of heated floor area for each dwelling in the subdivision, order dissolving the temporary restraining order theretofore entered in the cause is not reviewable in the absence of a showing of abuse of discretion, since it is an interlocutory order which does not affect a substantial right of plaintiffs in view of the fact that in the event plaintiffs prevail upon the final hearing and it should be determined that they are entitled to equitable relief in addition to damages, they would have the remedy of mandatory injunction. *Currin v. Smith*, 108.

INSANE PERSONS.

§ 4. Control and Management of Estate by Guardian or Trustee.

The trustee appointed for an incompetent is merely the custodian, manager or conservator of the incompetent's estate, and the legal title to the property remains in the incompetent, and upon sale of the property under order of court the doctrine of equitable conversion will be applied to funds remaining after the death of the incompetent. *Grant v. Banks*, 473.

A guardian may not be held liable for use of funds of the estate to provide necessities of life for the incompetent, even though some other person is under legal duty to provide support for the incompetent, but the guardian is required to collect such funds from the third person and may be held liable to the incompetent's estate for the amount the estate of the incompetent is reduced by the failure to collect such funds, plus interest. *Kuykendall v. Proctor*, 510.

Where a third person is under legal duty to provide funds for the support of an incompetent, which would have provided for the reasonable comfort of the incompetent, and the guardian fails to collect such funds, and is able to provide the incompetent only with the bare necessities of life from the incompetent's own estate, *held*, upon the death of the incompetent, her estate may hold the guardian liable for the wrong done the incompetent in failing to provide the incompetent with reasonable comforts above the bare necessities of life. *Ibid.*

INSURANCE.

§ 2. Brokers and Agents.

Evidence that insurer sent the assigned risk policy in suit ot the producer of record of the policy for delivery to the insured and instructed such producer of record to collect from insured the balance due on the annual premium, is sufficient to support a finding by the jury that the producer of record was a special agent of insurer, and payment by insured of the balance of the premium to the producer of record is payment to insurer. *Insurance Co. v. Hale*, 195.

In a hearing before the Insurance Commissioner of charges against an agent in proceedings for the revocation of the agent's license, the agent having been given more than the 10 day statutory notice, motion for a continuance and motion for a bill of particulars are addressed to the sound discretion of the Commissioner, and the denial of the motions will not be desturbed in the absence of a showing of abuse. *Elmore v. Lanier, Comr. of Insurance*, 674.

Proceedings against an insurance agent for revocation of licenses do not become moot upon the surrender by the agent of his licenses or their expiration, since adjudication of the question of the agent's wrongdoing would affect subsequent issuance of license to him. *Ibid.*

§ 3. Construction and Operation of Policies in General.

Laws in effect at the time of the issuance of a policy of insurance become a part of the insurance contract, and provisions in the policy contrary to the statute are void. *White v. Mote*, 544.

Policies of insurance are to be liberally construed in favor of insured. *Ibid.*

Statutory provisions in effect at the time of the issuance of a policy become a part thereof, and policy provisions in conflict with the statute are void. *Wright v. Casualty Co.*, 577.

The insured may accept the benefits of a binder even though he had no knowledge that the insurance broker had issued the binder for his protection, and delivery of the binder to him is not essential. *Wiles v. Mullinax*, 661.

The extension of credit to the insured for the premium does not destroy the effectiveness of a binder. *Ibid.*

INSURANCE—*Continued.*

In order to be valid, a binder need not be a complete contract, since it is merely a memorandum of the most important terms of a preliminary contract of insurance, and where the contemplated policy is required by statute, the binder is deemed to incorporate all of the terms of the statutory policy, and no specific form or provision is necessary to constitute a valid memorandum. *Ibid.*

Valid binder for compensation insurance cannot be cancelled until after statutory notice. *Ibid.*

§ 8. Agreements to Procure or Maintain Insurance.

Where insurance agents are sued for breach of duty to use reasonable diligence to obtain insurance coverage in accordance with contractual obligations and breach of duty to notify the proposed insured of its failure to obtain such coverage, the agents are entitled to defend on the ground that in fact they did procure insurance in effect at the time of the loss, and, upon evidence which would support such finding, to argue such contention to the jury and to read to the jury, in the course of the argument, the pertinent statute and a decision of the Supreme Court on the question. *Wiles v. Mullinax*, 661.

In a suit against insurance agents for their failure to provide insurance coverage and their failure to advise the proposed insured of such failure, a binder stipulating dates of coverage which do not include the date of the injury causing the loss is no defense, the question whether the dates as stipulated in the binder might be reformed for mistake not being presented. *Ibid.*

Valid binder for compensation insurance cannot be cancelled until after statutory notice. *Ibid.*

§ 26. Actions on Life Policies.

Plaintiff's evidence to the effect that his mother was insured under a group policy, that he was named beneficiary therein, and that his mother died in the employment, *held* to make out a *prima facie* case sufficient to overrule nonsuit in the son's action to recover upon the certificate issued to his mother, and the insurer's contention that it had paid the amount of the insurance to the estranged husband of insured in accordance with its obligations under the policy in effect at the time of insured's death is a matter of defense upon which insurer has the burden of proof. *Clayton v. Insurance Co.*, 758.

§ 47.1. Insurance Against Uninsured Vehicles.

The statutory requirement that a policy of automobile liability insurance issued in this State should provide protection against injury and damage inflicted by an uninsured motorist is remedial and will be liberally construed into and form a part of the policy, and policy provisions in conflict with the statutory provisions are void. *Moore v. Insurance Co.*, 532.

A policy provision that its uninsured motorist clause should constitute only excess insurance over any other similar insurance available to the injured person, is contrary to the statutory provisions of G.S. 20-279.21(b)(3), and the personal representative of a passenger killed as the result of the negligence of an uninsured motorist may recover on such clause, within the statutory limits, notwithstanding that the personal representative has theretofore received payment of a part of the claim under another policy of insurance covering the loss, provided that the recovery under both policies does not exceed the actual damages. *Ibid.*

Complaint held to state cause of action against insurer on uninsured motorist clause. *Wright v. Casualty Co.*, 577.

INSURANCE—*Continued.*

The provisions of Chapter 640, Session Laws of 1961, as certified by the Secretary of State, includes "hit and run" motorists within the protection of the compulsory uninsured motorist clause, and is controlling over the 1965 replacement codification, which omitted the provision relating to "hit and run" motorists. *Ibid.*

Since in many cases it is impossible to determine the identity of a "hit and run" driver, a provision in an uninsured motorist clause requiring institution of action by the insured against such driver as a condition precedent to an insurer's liability would in most cases defeat recovery against the insurer, and any such provision would be in conflict with the purport of the statute and void. *Ibid.*

Provision of an uninsured motorist clause stipulating that, upon failure of insurer and insured, or insured's legal representative, to agree as to the right of recovery under the clause and if so the amount, the matter should be settled by arbitration, in effect, ousts the jurisdiction of the courts and conflicts with the beneficient purposes of the uninsured motorist statute, and is void. *Ibid.*

Institution of action against the operator or owner of an uninsured vehicle is not a condition precedent to the right of the administrator of a passenger in an insured vehicle with which the uninsured vehicle collided to recover for such death under the uninsured motorist clause in the policy. *Ibid.*

Where it does not appear from the complaint that insured had rejected coverage under the uninsured motorist clause in the policy, G.S. 20-279.21(b)(3), demurrer on the ground that insurer had a statement in its file rejecting such coverage by insured, which insurer would offer in evidence, cannot warrant the sustaining of a demurrer to the complaint, since matters *de hors* the pleading may not be considered in passing upon the demurrer. *Ibid.*

§ 53.2. Construction and Operation of Liability Policies in General.

In regard to insurance in excess of the amount required by the Vehicle Financial Responsibility Act, a policy of insurance is voluntary and the rights and liabilities under the policy will be determined by construction of the policy agreement: but in regard to assigned risk insurance the policy must be interpreted in light of the statutory requirements rather than the agreement or understanding of the parties. *Insurance Co. v. Hale*, 195.

The Motor Vehicle Financial Responsibility Act is a remedial statute and must be liberally construed to effectuate its purpose to provide compensation for innocent victims injured by financially irresponsible motorists. *Jones v. Insurance Co.*, 454.

Policy violations which would constitute a valid and complete defense in regard to coverage in excess of, or not required by, the Motor Vehicle Financial Responsibility Act, do not constitute a defense in regard to compulsory coverage required by the statute, and as to compulsory coverage no violation of policy provisions by the insured after the infliction of damages for which insured is legally responsible can exonerate insurer. *Ibid.*

§ 54. Vehicles Insured Under Liability Policies.

The fact that a policy defines the vehicle insured as a "garbage truck" and the accident in suit occurred while the vehicle was being used for the transportation and operation of a chemical fogging machine, is immaterial, the vehicle being identified as to make, year, and model and identification number, and there being no clause excluding liability if the vehicle were used for any other purpose other than a garbage truck. *White v. Mote*, 544.

INSURANCE—*Continued.*

§ 57. Drivers Insured Under Automobile Liability Policies.

The fact that a policy of liability insurance issued to a municipality refers to the insured in its text as an individual rather than a municipal corporation, is immaterial. *White v. Mote*, 544.

§ 59. Risks Covered Under Automobile Liability Policies.

A policy provision that its uninsured motorist clause should constitute only excess insurance over any other similar insurance available to the injured person, is contrary to the statutory provisions of G.S. 20-279.21(b)(3), and the personal representative of a passenger killed as the result of the negligence of an uninsured motorist may recover on such clause, within the statutory limits, notwithstanding that the personal representative has theretofore received payment of a part of the claim under another policy of insurance covering the loss, provided that the recovery under both policies does not exceed the actual damages. *Moore v. Insurance Co.*, 532.

§ 60. Notice of Accident to Insurer in Liability Policy.

Failure of insured under an assigned risk policy to give notice of suit to insurer does not avoid liability of insurer to the party injured by the negligence of insured. *Jones v. Insurance Co.*, 454.

§ 61. Whether Liability Policy is in Force at Time of Accident.

Where an agent with authority from insurer to accept the balance due on the annual premium on an assigned risk policy accepts from insured the balance of the premium on the morning prior to the mailing of the notice by insurer of cancellation of the policy for nonpayment, the attempted cancellation by insurer is ineffective. *Insurance Co. v. Hale*, 195.

Under the 1963 amendment to the Vehicle Financial Responsibility Act, insurer must give the Department of Motor Vehicles 15 days notice prior to the effective date of cancellation of an assigned risk policy. *Ibid.*

§ 64. Rights of Injured Party Against Insurer Prior to Judgment Against Insured.

Provision of an assigned risk policy that no action should lie against insurer until insured's liability had been established by agreement signed by all the parties or by final judgment after trial, cannot preclude action against insurer after judgment properly obtained against insured through approved legal procedure, as by default, although insurer's liability may not be predicated on a judgment obtained against insured by consent or through collusion. *Jones v. Insurance Co.*, 454.

§ 86. Payment and Subrogation and Rights Against Tort-Feasor.

Insurer who has paid part of the loss in suit to insured is a proper party to an action by the insured against the tort-feasor to recover the loss, and upon motion of the tort-feasor, supported by allegations of such payment by insurer, the trial court has the discretionary power to order that insurer be joined as an additional party. Insurer's demurrer to the joinder on the ground that the complaint did not state a cause of action against it is frivolous. *New v. Service Co.*, 137.

JUDGMENTS.

§ 1. Nature and Requisites of Judgments in General.

The courts of this State have jurisdiction of an action instituted by a resident plaintiff against a nonresident defendant for divorce, and have power

JUDGMENTS—*Continued.*

in such action to award custody of the children of the marriage when the children are within the State, but service by publication cannot support a judgment *in personam* ordering defendant to pay a stipulated sum per month for the support of the children, and motion to quash the order for such payments is properly allowed upon defendant's motion upon special appearance. *Fleek v. Fleek*, 736.

A judgment *in personam* against a defendant served by publication is void as violating due process, which requires actual notice and an opportunity to be heard. *Ibid.*

§ 18. Direct and Collateral Attack in General.

Where neither party appeals from a valid temporary restraining order issued in the cause, both parties are bound to respect the terms of the order. *Rose's Stores v. Tarrytown Center*, 206.

§ 19. Void Judgments.

Default judgment may not be entered against one tort-feasor during extension of time to answer granted other tort-feasors. *Johnson v. McNeil*, 127.

The fact that a party does not appeal from a judgment does not preclude such party from thereafter attacking the judgment on the ground that the court was without jurisdiction to enter the judgment, since jurisdiction cannot be conferred upon a court by consent, waiver or estoppel. *In re Custody of Sauls*, 180.

The Superior Court has no jurisdiction to transfer to another tribunal a matter over which the Superior Court has jurisdiction and such other tribunal has none, and therefore an order of the Superior Court transferring a cause within its jurisdiction to the Industrial Commission is void, and such order, even though no appeal is entered therefrom, cannot constitute a bar, and allegations that such an order constituted *res judicata* are properly stricken on motion. *Bryant v. Dougherty*, 748.

§ 29. Parties Concluded by Judgment.

Even though separate judgments against the employer and the employee may be obtained by the injured party for a tort committed by the employee in the course of his employment, there may be only one satisfaction for the injury, and payment of one judgment extinguishes the other. *Bowen v. Insurance Co.*, 486

An order entered in the cause is not binding on one who was not made a party until after the order was entered. *Estridge v. Denson*, 556.

Adjudication by the Industrial Commission that the employer was uninsured at the time of the employee's injury is not conclusive upon insurance agents who were not parties to the suit, even though one of them was a witness, and does not preclude such agents from asserting in a subsequent suit against them by the employer that they had in fact obtained valid insurance in effect at the time of the accident. *Wiles v. Mullinax*, 661.

§ 30. Matters Concluded by Judgment in General.

An award of compensation to an employee against his employer and the employer's insurance carrier for an injury arising out of and in the course of the employment does not purport to adjudicate the employee's claim against a physician for damages sustained from the negligent treatment of the injury by the physician, and therefore allegations setting up the award of the Industrial Commission as a bar to the action for malpractice are properly stricken. *Bryant v. Dougherty*, 748.

JUDGMENTS—*Continued.*

§ 47. Payment and Discharge of Judgments.

Payment of the amount of the judgment to the clerk of the Superior Court satisfies the judgment, since the clerk is the statutory agent of the owner of the judgment and not of the party making the payment. *Bowen v. Insurance Co.*, 486.

JURY.

§ 2. Special Venires.

Motions to quash the venire or for a special venire from another county are addressed to the sound discretion of the trial court, and the refusal of the motions will not be disturbed in the absence of a showing of abuse of discretion. *S. v. Oxentine*, 412.

§ 3. Selection, Examination and Personal Disqualifications and Exemptions.

The court correctly permits the solicitor to ask prospective jurors whether they have scruples against capital punishment and in the event they express such scruples the court correctly excuses them for cause, since the State, as well as defendant, is entitled to impartial jurors. *S. v. Bumpers*, 521.

LABORERS' AND MATERIALMEN'S LIENS.

§ 5. Filing of Claim.

The claim of lien is the foundation of an action to enforce the lien, and if the claim of lien is fatally defective when filed there is no lien, and such defect cannot be cured by amendment after the filing period has expired, nor by allegations in an action to enforce the lien. *Lumber Co. v. Builders*, 337.

A claim of lien for materials furnished under an entire and indivisible contract for a specified job for a gross contract price need not itemize the materials furnished; however, if the contract is divisible, the materials furnished must be itemized in sufficient detail to put interested parties, or parties who may become interested, on notice as to the materials furnished and the time they were furnished and the amount due therefor. *Ibid.*

Allegations that materials were furnished under an entire and indivisible contract is a mere conclusion, since whether a contract is entire or divisible must be determined by construction of the instrument. *Ibid.*

A claim of lien based on separate statements respectively specifying the date materials were furnished and the amount due therefor, but describing the materials only as loads delivered on the respective dates, *held* to disclose that the materials were furnished under a severable and not an entire contract, and the materials were not itemized as required by statute for a valid lien. *Ibid.*

LARCENY.

§ 7. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendant's guilt of larceny held insufficient in this case to be submitted to the jury. *S. v. Barnes*, 146.

§ 10. Judgment and Sentence.

A plea of guilty of receiving stolen property knowing it to have been stolen is insufficient to support a felony sentence, even though the indictment charges defendant with receiving stolen goods having a value of more than $200. If there should be a correction of the record proper by appropriate pro-

ceedings so as to show that defendant pleaded guilty as charged, the court could then enter a felony sentence. *S. v. Wallace*, 155.

LIBEL AND SLANDER.

§ 1. Nature and Essentials of Cause of Action in General.

A corporation may maintain an action for libel or slander for words which injure it in its credit, in its business good will, or in its relations with its employees. *Bouligny, Inc., v. Steelworkers*, 160.

While a corporation may not maintain an action for libel or slander of its officers, where the published statements complained of charge that the corporation's representative did certain things, but, in context, it is clear that the accusation was that the things were done by the representative in the execution of corporate policy, the libel relates to the corporation itself. *Ibid.*

Written statements that a corporation did certain acts which would have the natural and immediate tendency to cause actual damage to the relationship between the corporation and its employees are actionable *per se*. *Ibid.*

Even though the First Amendment to the Federal Constitution applies to state action by virtue of the Fourteenth Amendment, the constitutional guarantee of freedom of speech and of the press affords no protection against an action for libel or slander uttered with actual malice and resulting in actual damage. *Ibid.*

In an action by an employer against a labor union for libel growing out of a publication by the union in its efforts to organize the employees for collective bargaining, proof that the labor union made false and malicious statements having a tendency to injure the employer's good name and reputation in the eyes of its employees or prospective employees would constitute proof of the element of actual damages sufficient to permit recovery of nominal damages under the National Labor Relations Act. *Ibid.*

§ 8. Qualified Privilege.

Qualified privilege extends to all communications made *bona fide* upon any subject matter in which the party uttering the statement has an interest or in reference to which he has some moral or legal duty to perform, in which case recovery for false and defamatory words may be had only upon proof of actual malice. *Bouligny, Inc., v. Steelworkers*, 160.

Statements spoken or published in good faith by a labor union in the course of a campaign to solicit members or to establish itself as an authorized representative of the employees of a business enterprise are qualifiedly privileged provided there is a reasonable relation between such objectives and the statements made, and such privilege extends to communications between the union and prospective members as well as between the union and its members. *Ibid.*

Qualified privilege is no defense to an action for libel or slander if the false statements were made with actual malice. *Ibid.*

Mere vituperation and name calling by a labor union in its activities to solicit members or obtain the right to represent the employees of a business cannot be made the basis of an action for libel or slander by the employer. *Ibid.*

Plaintiff alleged that defendant labor union published false statements concerning plaintiff's treatment of an employee or former employee, which statements were made for the purpose of creating, and had the natural tendency to create, distrust and disloyalty between plaintiff and its employees. *Held:* The burden rests upon plaintiff to prove actual malice in the publica-

LIBEL AND SLANDER—*Continued.*

tion of the defamatory statements, but if the jury finds actual malice by the greater weight of the evidence, the fact that such statements were qualifiedly privileged, is no defense. *Ibid.*

§ 9. Absolute Privilege.

The public interest in the free expression and communication of ideas in legislative bodies and in judicial proceedings, etc., requires that words spoken or published by the participants in such circumstances be absolutely privileged, and no action for libel or slander will lie even though the statements be false and malicious, but the privilege attaches to the circumstances under which the words are used and not to the persons themselves. *Bouligny, Inc., v. Steelworkers*, 160.

§ 12. Pleadings.

Privilege is an affirmative defense which must be alleged in the answer. *Bouligny, Inc., v. Steelworkers*, 160.

§ 16. Damages and Verdict.

A libel or slander which is actionable *per se* ordinarily entitles plaintiff to recover nominal damages at least, but plaintiff may recover compensatory damage only upon proof of both the fact and the extent of damages actually suffered by it as a result of the publication, and may recover punitive damages only upon proof that the publication was made with actual malice, and, even so, the amount awarded as punitive damages rests in the discretion of the jury, subject to the limitation that the amount may not be excessively disproportionate to the circumstances. *Bouligny, Inc., v. Steelworkers*, 160.

The Federal decisions do not preclude the recovery of punitive damages by an employer in its action for false and malicious libel by a labor union, in connection with the union's efforts to organize plaintiff's employees, when the plaintiff establishes that it has suffered some compensable harm as a result of the libel. *Ibid.*

LIMITATION OF ACTIONS.

§ 10. Absence and Nonresidence.

The proviso contained in the 1955 amendment to G.S. 1-21 has the effect of barring in this State a cause of action arising in another state if, at the time of the institution of the action here, the cause is barred in the state in which it arose, unless the action originally accrued in favor of a resident of this State. *Broadfoot v. Everett*, 429.

The purpose of tolling a statute of limitations when defendant is not within the state is to prevent a defendant from defeating a claim by absenting himself from the State, and where, in the state in which the cause of action arose, a nonresident defendant may be served by substituted service upon a state official, the statute is not tolled so as to preclude the nonresident defendant from asserting the benefits of an applicable statute of limitations. *Ibid.*

This action for wrongful death was based upon an airplane crash occurring in the State of Pennsylvania, plaintiff's intestate being a resident of Maryland and defendant's intestate being a resident of North Carolina. The action was not brought until more than a year after cause of action arose, and the State of Pennsylvania prescribed a one-year statute of limitations. Under Pennsylvania law, defendant was subject to substituted service of process. *Held:* The cause of action being barred in the state in which it arose, the action is barred in this State. *Ibid.*

LIMITATION OF ACTIONS—*Continued.*

§ 12. Institution of Action, Discontinuance and Amendment.

A void order purporting to transfer the cause from the Superior Court, which had jurisdiction, to the Industrial Commission, which had no jurisdiction, does not take the cause out of the Superior Court, and the cause remains in the Superior Court so that when a voluntary nonsuit is thereafter entered in the Superior Court another action entered within a year is not barred. *Bryant v. Dougherty*, 748.

§ 15. Agreement Not to Plead the Statute and Estoppel.

A stipulation of the parties that if the court should find that defendant is liable under the policy of insurance sued on, the court should then hear evidence and rule on the question of damages, waives any plea of the statute of limitations to the determination of damages. *Moore v. Insurance Co.*, 532.

§ 16. Procedure to Set Up the Defense of the Statute of Limitations.

The question of the bar of the statute of limitations may not ordinarily be raised by a demurrer for failure of the complaint to state a cause of action. *Kuykendall v. Proctor*, 510.

MANDAMUS.

§ 1. Nature and Grounds of the Writ in General.

The purpose of *mandamus* is identical with that of a mandatory injunction, and its function is to enforce, but not to establish, a legal right. *Safrit v. Costlow*, 680.

§ 2. Ministerial or Discretionary Duty.

Ordinarily, *mandamus* does not lie to control the exercise of a discretionary power. *Safrit v. Costlow*, 680.

Where more than a year after the effective date of an annexation ordinance, a municipal corporation has failed to take steps to provide sewerage service to the annexed area in accordance with its plans theretofore filed, the owners of property within the territory annexed, while not having the right to require any particular type of sewerage system be installed, do have a clear legal right to require that the municipality provide a sewerage system which will offer them the same benefits as those offered any other property owners throughout the municipality. *Ibid.*

MASTER AND SERVANT.

§ 10. Duration of Employment and Wrongful Discharge.

Plaintiff's evidence tending to show a contract of employment for a specified term at a specified salary, binding on one of defendant corporations by ratification and on the other by its adoption of the agreement, and that plaintiff was wrongfully discharged prior to the end of the term, *is held* sufficient to overrule nonsuit in plaintiff's action for damages for breach of the contract of employment, defendants' evidence in contradiction not being considered on motion to nonsuit. *McCrillis v. Enterprise*, 637.

§ 14. Collective Bargaining and Strikes — State and Federal Regulations.

The National Labor Relations Act, 29 U.S.C. 141 etc., and the Norris-LaGuardia Act, 29 U.S.C. 101, do not deprive the State courts of jurisdiction of an action for libel by an employer against a labor union for statements published during the course of a campaign by the union to solicit members and

become the representative of the employees for collective bargaining; nevertheless, in such instance a State court may not apply the doctrine of libel *per se* and may render judgment only if the plaintiff alleges and proves not only actual malice but some actual damage resulting from the libelous publications. *Bouligny, Inc., v. Steelworkers*, 160.

The Federal decisions do not preclude the recovery of punitive damages by an employer in its action for false and malicious libel by a labor union, in connection with the union's efforts to organize plaintiff's employees, when the plaintiff establishes that it has suffered some compensable harm as a result of the libel. *Ibid.*

§ 15. Negotiation, Construction and Operation of Labor Contracts.

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members, G.S. 1-69.1, G.S. 1-97(6), and may be held liable in damages for torts committed by its employees or agents while acting in the course of their employment. *Bouligny, Inc., v. Steelworkers*, 160.

Statements spoken or published in good faith by a labor union in the course of a campaign to solicit members or to establish itself as an authorized representative of the employees of a business enterprise are qualifiedly privileged provided there is a reasonable relation between such objectives and the statements made, and such privilege extends to communications between the union and prospective members as well as between the union and its members. *Ibid.*

In an action by an employer against a labor union for libel growing out of a publication by the union in its efforts to organize the employees for collective bargaining, proof that the labor union made false and malicious statements having a tendency to injure the employer's good name and reputation in the eyes of its employees or prospective employees would constitute proof of the element of actual damage sufficient to permit recovery of nominal damages under the National Labor Relations Act. *Ibid.*

§ 29. Contributory Negligence of Servant.

An employee will not be held guilty of contributory negligence as a matter of law merely because he accepts hazardous employment in an established trade. *Moody v. Kersey*, 614.

§ 32. Liability of Employer for Injuries to Third Persons in General.

Evidence of negligence of steel erecting company resulting in injury to employee of construction company held for jury. *Moody v. Kersey*, 614.

Even though separate judgments against the employer and the employee may be obtained by the injured party for a tort committed by the employee in the course of his employment, there may be only one satisfaction for the injury, and payment of one judgment extinguishes the other. *Bowen v. Insurance Co.*, 486.

The driver of one vehicle involved in a collision obtained judgment against the other driver. In another action instituted in another county, the first driver and his employer obtained judgment in a smaller amount against the owner of the second vehicle under the doctrine of *respondeat superior*, and this judgment was satisfied by payment into court of the amount of the recovery. *Held:* The payment by the employer of the second judgment extinguished the liability of its employee under the first judgment, particularly when the first driver rejected a settlement of the first judgment and elected to pursue his action against the employer. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 33. Liability of Employer for Injuries to Third Persons — Scope of Employment.

The employer is liable to third persons for an assault committed by an employee if the act of the employee occurs while the employee is engaged in doing something he is employed or authorized to do for the employer, notwithstanding the act is unauthorized or even prohibited, but if the act of the the employee had departed, however briefly, from his duties, and such purpose is not incidental to the work he is employed to do, the employer is not liable. *Wegner v. Delicatessen*, 62.

Evidence held insufficient to show that assault by employee was committed by him while engaged in duties of his employment. *Ibid.*

§ 34. Dual Employment and Determination of Which of Two Persons is Responsible for Injury to Third Persons.

Crane operator held employee of steel erecting company and not construction company. *Moody v. Kersey*, 614.

§ 67. Amount of Compensation for Injury in General.

When the death of the employee occurs more than two years after the accident, the award of compensation for the death is authorized only if there is evidence to support a finding that from the date of the accident to the time of death the employee had a continuing incapacity because of the injury to earn the wages which he was receiving at the time of the accident. *Burton v. Blum & Son*, 695.

Disability as used in the Workmen's Compensation Act means incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment, G.S. 97-2(9), and therefore "disability" as used in the Act refers not to physical injury but to diminished capacity to earn money, and such definition must be read into G.S. 97-38. *Ibid.*

Where the parties stipulate that after the injury the injured employee worked for the same employer, in one instance for over thirteen months and in another instance for over five months, at his regular wages, such stipulation precludes a finding by the Commission that the employee's total disability continued without interruption from the date of the accident. *Ibid.*

The limitation of compensation payments for ordinary injuries to 400 weeks and a maximum of $12,000, does not apply to compensation for spinal cord and brain injuries, which may be authorized for the life of the injured employee. *Godwin v. Swift Co.*, 690.

In cases of spinal cord and brain injuries, provision may be made for the payment of compensation for reasonable and necessary nursing services, medicines, sick travel, medical, hospital and other treatment or care, and the provision for payment for "other treatment or care" authorizes payment for such purposes in addition to the specifics set out in this statute. *Ibid.*

The requirement of prior written authority of the Industrial Commission for the payment of fees for practical nursing by a member of the family of the injured employee, applies to ordinary injuries; in regard to spinal and brain injuries the statute specifically provides that payment may be made for "other treatment or care" which may include nursing care by a member of the employee's family, and therefore in such case approval of payment for such nursing care by the Commission before payment or demand for payment is a substantial compliance with the Commission's rules. *Ibid.*

Evidence held to support conclusion that employee's brother and sister-in-law could give him better nursing care in the home. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 70. Compensation for Partial Disability.

Expert testimony that, as a result of an accident arising out of and in the course of claimant's employment, claimant had suffered a twenty per cent permanent disability of her right hand, together with claimant's testimony that she had trouble with her right hand at all times since the injury but never before, *is held* sufficient to support an award for partial permanent disability, notwithstanding further testimony by the expert on cross-examination that the disability could have resulted from causes unrelated to the employment, since even contradictions in claimant's testimony go to its weight to be resolved by the fact finding body. *Evans v. Topstyle, Inc.*, 134.

§ 74. Review of Award by Commission for Change of Condition.

Testimony to the effect that subsequent to the award of compensation, the injured employee, who had suffered a brain injury, was "gradually going backwards now" and that his condition required increased care so that someone should be on call for his needs 24 hours a day, *held* to support a finding of a change of condition justifying an increase in the award. *Godwin v. Swift Co.*, 690.

§ 80. Cancellation of Compensation Policies.

In this action against insurance agents for breach of duty to exercise due diligence to provide compensation insurance coverage and for failure to notify the proposed insured of their failure to procure such insurance, testimony of a defendant agent that he had authority from insurer to issue a binder, and that some 26 days prior to the loss he forwarded to insurer a document constituting a binder covering a period of one year beginning some 11 days prior to the loss in question, is sufficient to support a finding that there was a valid binder in force on the date of the loss, notwithstanding advice by insurer to the agency nine days before the loss in question that the insurer would not accept the risk, since a valid binder for workmen's compensation insurance cannot be terminated except by giving to insured 30 days notice. *Wiles v. Mullinax*, 661.

§ 84. Jurisdiction of the Industrial Commission — Exclusion of Common Law Action.

Defendant leased a crane with operator to a construction company, the crane operator being in sole charge of the manner in which materials and parts should be elevated for the performance of the construction work, and the construction company giving only instructions as to the position to which the materials and parts should be carried in the performance of the work. *Held:* The crane operator was an employee of the crane company and was not a special employee or agent of the construction company, and therefore the Workmen's Compensation Act does not preclude recovery by an employee of the construction company for injury resulting from the negligent operation of the crane. *Moody v. Kersey*, 614.

§ 93. Review of Compensation Award in the Superior Court.

When all the evidence and inferences to be drawn therefrom permit but a single conclusion, liability under the Workmen's Compensation Act is a question of law subject to review. *Burton v. Blum & Son*, 695.

§ 93. Review in the Superior Court.

Findings of fact of the Industrial Commission which are supported by competent evidence are binding in the Superior Court and in the Supreme Court on appeal. *Evans v. Topstyle, Inc.*, 134; *Burton v. Blum & Son*, 695.

MASTER AND SERVANT—*Continued.*

§ 94. Judgment of Superior Court, Disposition of Appeal and Appeal to Supreme Court.

Findings of fact of the Industrial Commission which are supported by competent evidence are binding in the Superior Court and in the Supreme Court on appeal. *Evans v. Topstyle, Inc.*, 134.

MONOPOLIES.

§ 1. Validity and Construction of Monopoly Statutes in General.

The use of a "loss leader" as a competitive device in the retail grocery business is not generally unlawful and may not generally be restrained unless in violation of a contract permitted under the Federal Fair Trade Act, and in this State the Legislature has not prohibited such practice as contrary to public policy, and such determination is as binding on the courts of this State as a contrary legislative determination is binding on the courts of other states having such legislative policy. *Milk Commission v. Food Stores*, 323.

MUNICIPAL CORPORATIONS.

§ 2. Territorial Extent and Annexation.

Chapter 1009 of the Session Laws of 1959 has remained in full force and effect since July 1959, G.S. 160-453.23, notwithstanding its provision that prior laws governing annexation should remain in force to 1 July 1962. *Dale v. Morganton*, 567.

The introduction of an annexation ordinance into evidence, which ordinance recites compliance with all procedures made prerequisite to annexation, establishes *prima facie* substantial compliance with the requirements and provisions of the statute, and a party attacking the validity of the ordinance who fails to carry the burden of showing by competent evidence failure of the municipality to comply with any statutory requirement, must fail. *Ibid.*

The requirement of G.S. 160-453.19 that a map of annexed territory, together with a certified copy of the ordinance, be recorded in the office of the register of deeds and in the office of the Secretary of State, is not a condition precedent to effective annexation of territory by a municipality, but is a duty to be performed after annexation is complete. *Ibid.*

The failure of a city to extend sewer lines and other services into an annexed area pursuant to the plan of annexation is not a condition precedent to annexation, and the remedy of a property owner for failure of the city to provide him with such services is solely by suit for *mandamus* to compel the city to provide such services. *Ibid.*

The owner of property within territory annexed by a municipality may bring an action after the expiration of one year from the effective date of annexation and prior to the expiration of 15 months from such date, to compel the municipality to follow through on its plans for furnishing essential municipal services to the area annexed in accordance with the plans filed in the proceedings. *Safrit v. Costlow*, 680.

Where a municipality is unable to extend its municipal sewerage system to an annexed territory because such system has been declared obsolete and a source of unlawful pollution, but the municipality has planned to construct a new sewerage system to service all areas within the municipal limits, and has initiated studies for such plan by an engineering firm, *held*, a resident of the area is entitled to maintain an action, timely instituted, to compel the municipality to follow through on its plan for the new sewerage system. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

Where more than a year after the effective date of an annexation ordinance, a municipal corporation has failed to take steps to provide sewerage service to the annexed area in accordance with its plans theretofore filed, the owners of property within the territory annexed, while not having the right to require any particular type of sewerage system be installed, do have a clear legal right to require that the municipality provide a sewerage system which will offer them the same benefits as those offered any other property owners throughout the municipality. *Ibid.*

Chapter 1189, Session Laws of 1963, applicable solely to the Town of Beaufort and providing that in the event the sewerage system of a municipality shall have been declared a source of unlawful pollution to adjacent streams or waterways the municipality should not be required to extend any sewerage outfalls into an area annexed by it, *held* a local act relating to health and sanitation within the meaning of Article II, § 29, of the Constitution of North Carolina, and therefore void. *Gaskill v. Costlow*, 686.

An owner of land in an area annexed by a municipality may attack the validity of the annexation ordinance only by filing a petition within 30 days following the passage of the ordinance seeking a review of the action of the municipal board of commissioners, in accordance with the procedure provided by the statute, and an independent action instituted some 22 months after the adoption of the ordinance and seeking to have it declared void *ab initio*, should be dismissed. *Ibid.*

§ 4. Legislative Control and Supervision and Powers of Municipalities in General.

A municipality, in the exercise of the proprietary function of furnishing electricity to consumers, is under the common law duty not to discriminate in service or rates, notwithstanding that it is exempt from regulation by the Utilities Commission, G.S. 62-3(23), and may not lawfully refuse electrical service because of a controversy with a consumer concerning a matter which is not related to the service sought, and therefore may not refuse service in order to coerce the consumer to comply with the municipality's police regulations enacted in the exercise of a governmental function in regard to the safety of the consumer's house. *Dale v. Morganton*, 567.

Since a city engaged in the proprietary function of supplying electricity to consumers is liable for injuries due to its negligence, a city may, in order to obviate possible future liability, refuse to render service to a customer when its inspection of the customer's house reveals that the electrical wiring therein is in a dangerous condition. *Ibid.*

§ 5. Distinction Between Governmental and Private Powers.

A municipal corporation, in operating a chemical fogging machine for the control of insects, is engaged in a governmental function. *White v. Mote*, 544.

§ 10. Liability for Torts in General.

Where a municipal corporation procures liability insurance on a vehicle used by it in the performance of a governmental function, it waives its governmental immunity for the negligent operation of such vehicle to the extent of the liability insurance thereon, unless the municipal corporation takes affirmative action against waiver. *White v. Mote*, 544.

§ 12. Injuries from Defects and Obstructions in Streets or Sidewalks.

It is the duty of a municipality to exercise a reasonable and continuing supervision over its streets and sidewalks, including the inspection thereof in

a manner and with a frequency reasonable in view of the location, nature and extent of the use of each street or walk. *Waters v. Roanoke Rapids*, 43.

In an action to recover for injuries received in a fall on a sidewalk, plaintiff must introduce evidence sufficient to support findings that she fell and sustained injuries as the proximate result of a defect in or condition of the sidewalk, that the defect was of such nature and extent that a reasonable person, knowing of its existence, should have foreseen that it would likely cause injury, and that the city had actual or constructive notice of the existence of the defect for a sufficient time prior to the fall to remedy the defect or guard against injury therefrom. *Ibid.*

Evidence tending to show that plaintiff fell when she stepped from the paved portion of a sidewalk to an unpaved portion thereof, on a dark night, at a point at which the street lights failed to give appreciable light, that there was a declivity of some two inches at the end of the paved portion and a declivity of some three to five inches at a point 18 inches from the paved portion, and that the general condition of the sidewalk had existed for several years, *held* sufficient to be submitted to the jury on the issue of negligence of the municipality and not to show contributory negligence as a matter of law on the part of plaintiff. *Ibid.*

In an action by a pedestrian to recover for injuries from a fall on a sidewalk, evidence as to the location of the point of the fall with reference to the principal business district of the city and with reference to a store, and that the sidewalk at the site of the accident was heavily traveled both day and night, is competent, since it is relevant upon the frequency of inspection required of the municipality concerning the condition of the sidewalk at this point. *Ibid.*

In an action by a pedestrian to recover for injuries from a fall on a sidewalk at a point where the paved portion of the sidewalk ended, evidence of the difference in levels between the paved portion and the unpaved portion at a point some 18 inches beyond the pavement is competent, even though plaintiff's evidence fails to show that she stepped the full 18 inches beyond the paved portion, since the condition of the sidewalk throughout the vicinity is competent upon the question of whether the condition was such as to put the city upon notice that injuries to a pedestrian using the walk at night could have been foreseen. *Ibid.*

A municipality is not liable for injuries sustained by a pedestrian in a fall on a city street or sidewalk merely because of a defect in its sidewalk, curb or street unless such defect is of such nature and extent that a reasonable person, knowing of its existence, should have foreseen that it would likely cause injury, and the city had actual or constructive notice of its existence for a sufficient time prior to the fall to have remedied the defect. *Gower v. Raleigh*, 149.

Evidence held insufficient to be submitted to the jury in this action to recover for fall on municipal street. *Ibid.*

§ 24. Nature and Extent of Municipal Police Power in General.

Where a municipality is given express legislative authority in regard to a matter, an ordinance enacted pursuant to such power need not refer to the statute. *Dale v. Morganton*, 567.

A municipal corporation has no inherent police power, and statutes conferring such powers are to be strictly construed. *Ibid.*

Where an ordinance adopting a building code specifies that, in the event of conflict between the building code adopted and the provisions of the ordinance, the ordinance should control, procedural requirements in the ordinance

MUNICIPAL CORPORATIONS—*Continued.*

and the applicable statute must be substantially complied with in order to confer upon the municipality authority to forbid the occupancy of a dwelling, and any wider latitude delegated by the building code is immaterial. *Ibid.*

Where a municipal building code provides that the occupant of a dwelling should be given notice and an opportunity to be heard upon the question of the fitness of the dwelling for human habitation before the municipality should have the right to prevent occupancy of the house as a dwelling, a notice posted on the dwelling stating that its occupancy had been prohibited by the municipal building official, without compliance with procedural prerequisites, is void and of no legal effect, and the city should be required to remove such notice until the requisite procedure has been complied with. *Ibid.*

§ 25. Zoning Ordinances and Building Permits.

Where a municipal code substantially incorporates in its ordinance the conditions specified in G.S. 160-182 as prerequisite to the closing of a dwelling house unfit for human habitation, its ordinance adopting the code is within the statutory power conferred, and it is not necessary to determine whether the municipality had any other authority to enact such police regulation. *Dale v. Morganton*, 567.

NARCOTICS.

§ 4. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence held insufficient in this case to show that defendant had marijuana in his possession. *S. v. Chavis*, 306.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

In determining negligence, the standard is always the conduct of a reasonably prudent person or the standard prescribed by statute, and although the standard is constant, the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occasion, and, in an action involving a collision with a boy riding a pony, the age, experience, capacity and knowledge of the boy are "exigencies of the occasion" to be considered in determining whether he exercised the care of a reasonably prudent boy under the circumstances. *Watson v. Stallings*, 187.

Negligence is the failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owes the plaintiff under the circumstances, which failure proximately causes injury which could have been reasonably foreseen. *Moody v. Kersey*, 614.

§ 4. Dangerous Substances, Machinery and Instrumentalities.

A person in control of machinery in a hazardous operation is under duty to exercise a degree of care commensurate with the dangerous character of the operation. *Moody v. Kersey*, 614.

§ 11. Contributory Negligence in General.

Contributory negligence is negligence on the part of the plaintiff which concurs with the negligence of the defendant as alleged in the complaint, and contributory negligence does not negate negligence as alleged in the complaint but presupposes the existence of such negligence. *Jackson v. McBride*, 367.

§ 16. Contributory Negligence of Minors.

In determining negligence, the standard is always the conduct of a reasonably prudent person or the standard prescribed by statute, and although

the standard is constant, the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occasion, and, in an action involving a collision with a boy riding a pony, the age, experience, capacity and knowledge of the boy are "exigencies of the occasion" to be considered in determining whether he exercised the care of a reasonably prudent boy under the circumstances. *Watson v. Stallings*, 187.

Instruction on contributory negligence of minor held without error. *Ibid.*

§ 20. Pleadings in Negligence Actions.

Contributory negligence must be alleged in the answer. *Jackson v. McBride*, 367.

§ 21. Presumption and Burden of Proof.

Defendant is not required to prove lack of negligence on his part, but the burden is on plaintiff to show affirmatively and by the greater weight of the evidence that defendant was negligent and that such negligence proximately caused the injury. *Miller v. Henry*, 97.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Motion to nonsuit presents the question of law whether the evidence is sufficient to be submitted to the jury, taking the evidence favorable to plaintiff as true and resolving all conflicts in the evidence in plaintiff's favor, and nonsuit is properly denied if there is evidence, so considered, tending to support all essential elements of plaintiff's cause of action. *Chandler v. Chemical Co.*, 395.

§ 24d. Sufficiency of Evidence and Nonsuit — Variance.

In an action to recover for negligence, plaintiff has the burden of proving each essential element of his cause of action substantially as alleged in his complaint, and may not recover by proving that he sustained injuries by negligent conduct of defendant not alleged if the difference between his allegations and his proof is so substantial as to constitute a material variance. *Jackson v. McBride*, 367.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence is proper only when plaintiff's evidence, construed most favorably to her, establishes this defense so clearly that no other conclusion can reasonably be drawn therefrom. *Waters v. Roanoke Rapids*, 43.

Nonsuit on the ground of contributory negligence should be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom, and nonsuit on the issue should be denied when opposing inferences are permissible from plaintiff's proof. *Barefoot v. Joyner*, 388.

Nonsuit for contributory negligence is proper only when plaintiff's own evidence establishes this defense so clearly that no other conclusion may be reasonably drawn therefrom, and when the evidence presents diverse inferences, the issue is for the jury. *White v. Mote*, 544.

Nonsuit for contributory negligence is proper only when the evidence, considered in the light most favorable to plaintiff and resolving all conflicts therein in his favor, establishes this defense as the sole reasonable inference. *Moody v. Kersey*, 614.

NEGLIGENCE—*Continued.*

§ 27. Nonsuit for Intervening Negligence.

Negligence cannot be insulated by the intervening act of another if such intervening act was reasonably foreseeable or if the injurious consequences which ensued, or consequences of like nature, could have been reasonably anticipated from the primary negligence. *Childers v. Seay*, 721.

§ 28. Instructions in Negligence Accidents.

An instruction to the effect that if plaintiff had satisfied the jury by the greater weight of the evidence that he was struck by the car driven by defendant as he was standing on the shoulder of the road on defendant's left side of the highway to answer the issue of negligence in the affirmative, without any instruction or explanation of the meaning of negligence or proximate cause, does not satisfy the requirements of G.S. 1-180. *Jackson v. McBride*, 367.

An instruction that the proximate cause of the injury is one that produces the result in continuous sequence and without which it would not have occurred, and one from which injury was reasonably foreseeable under the circumstances, is not erroneous, but it is erroneous to give such instruction without charging upon the element of foreseeability. *Barefoot v. Joyner*, 388.

In an action against joint tort-feasors, correct instructions on proximate cause, without elaboration on the subordinate phase of insulating negligence, are sufficient in the absence of a prayer for special instructions. *Childers v. Seay*, 721.

§ 37b. Duties to Invitees in General.

The rule that the proprietor of a business owes his customers the duty to use reasonable care to keep the premises in a reasonably safe condition within the scope of the invitation extends to a proprietor of a restaurant or other establishment serving meals for compensation. *Wegner v. Delicatessen*, 62.

The proprietor of a restaurant may be held liable for an assault committed by his employee upon a customer if the proprietor knew, or in the exercise of reasonable care in the selection and supervision of his employee should have known, that the employee would be likely to commit an assault upon a customer by reason of past conduct, bad temper, or otherwise, even though the particular assault was not committed within the scope of the employment; but when there is no evidence of any express or implied knowledge on the part of the proprietor of such propensity on the part of the employee, or that any officer or other employee of the proprietor failed to act promptly to restrain the employee committing the assault after difficulties arose, the evidence is insufficient to invoke this rule. *Ibid.*

A proprietor is not an insurer of the safety of his invitees but is under duty to exercise ordinary care to keep his premises in a reasonably safe condition so as not to expose invitees unnecessarily to danger. *Wrenn v. Convalescent Home*, 447.

The duty of the proprietor to warn his invitee of a dangerous condition of which the proprietor has knowledge, express or implied, does not apply to conditions of which the invitee has equal or superior knowledge. *Ibid.*

§ 37f. Duties and Liabilities to Invitees — Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence tending to show that defendant slipped and fell to her injury on a thin sheet of ice over the sidewalk in front of the door leading to defendant's place of business, and that the fall occurred early on the morning

NEGLIGENCE—*Continued.*

after a snow and sleet storm, *held* insufficient to be submitted to the jury on the issue of defendant's negligence. *Phillips v. Laundry*, 116.

Evidence tending to show that plaintiff fell to her injury on ice on a walk on the premises under defendant's control, that plaintiff had knowledge of the weather conditions and the existence of the ice, *held* insufficient to be submitted to the jury on the issue of defendant's negligence. *Wrenn v. Convalescent Home*, 447.

PARENT AND CHILD.

§ 2. Liability of Parent for Injury to Child.

Since an unemancipated infant who is a member of the household cannot maintain an action for negligence against his parents, in an action on behalf of an unemancipated child to recover for negligent injury from the power lawn mower of a neighbor, the defendants may not file a cross-action against the plaintiff's parents, either on the ground of primary negligence on the part of plaintiff's parents or for contribution, since such cross-action would indirectly hold the unemancipated minor's parents liable to him for the injury. *Watson v. Nichols*, 733.

§ 5. Right to Custody of Minor Child.

The respective rights of the parents to the custody of their children is not absolute and must give way to the controlling consideration of the welfare of the children, and upon findings supported by evidence that neither parent is a fit and suitable person to have the custody of the children, the court may award their custody to a third person. *Brake v. Mills*, 441.

While the abilities of the respective claimants to provide material comforts and advantages to the child are relevant in determining the custody of such child, financial means is of minor significance in comparison with the intangible attributes and qualities which characterize a good home. *Ibid.*

Upon the mother's petition for the custody of her minor children after the award of their custody to their paternal aunt by the court of another state, a court of this State may deny the petition for insufficient evidence by petitioner that the welfare of the children would be promoted by the change in their custody, and may properly continue the custody in the aunt upon findings supported by evidence that such custody is in the best interest of the children. *Ibid.*

Responsibility for care of minor child rests upon parent when parent is present. *Watson v. Nichols*, 733.

PARTIES.

§ 1. Necessary Parties in General.

The Supreme Court will take notice *ex mero motu* of the absence of a necessary party to an action and remand the cause for joinder of such necessary party. *Underwood v. Stafford*, 700.

§ 4. Proper Parties.

Insurer who has paid part of the loss in suit to insured is a proper party to an action by the insured against the tort-feasor to recover the loss, and upon motion of the tort-feasor, supported by allegations of such payment by insurer, the trial court has the discretionary power to order that insurer be joined as an additional party. Insurer's demurrer to the joinder on the ground that the complaint did not state a cause of action against it is frivolous. *New v. Service Co.*, 137.

PARTIES—*Continued.*

§ 8. Amendment of Parties.

Insurer who has paid part of the loss in suit to insured is a proper party to an action by the insured against the tort-feasor to recover the loss, and upon motion of the tort-feasor, supported by allegations of such payment by insurer, the trial court has the discretionary power to order that insurer be joined as an additional party. Insurer's demurrer to the joinder on the ground that the complaint did not state a cause of action against it is frivolous. *New v. Service Co.*, 137.

PHYSICIANS AND SURGEONS.

§ 11. Nature and Extent of Liability of Physician for Malpractice.

It is negligence for a physician to prescribe, as a remedy for an illness of a three year old child, a drug which is neither necessary nor suitable for such illness and which the physician knows or should know to be dangerous, without advising the child's parents of the possibility or probability of injurious effects from the use thereof, and in an action for wrongful death of the child from a fatal side effect of the drug, allegations that the physician failed to warn the parents of the dangerous character of the drug are improperly stricken. *Sharpe v. Pugh*, 598.

§ 16. Sufficiency of Evidence and Applicability of Doctrine of Res Ipsa Loquitur in Malpractice Actions.

The doctrine of *res ipsa loquitur* does not apply in malpractice cases and a showing of an injurious result is not enough, but plaintiff must offer proof of facts and circumstances which permit a legitimate inference of actionable negligence on the part of the physician, surgeon, or dentist. *Boyd v. Kistler*, 744.

Plaintiff's evidence tended to show that plaintiff entered a hospital for oral surgery and new dentures, that while she was under anesthesia defendant dentist completed the work, that after the operation she discovered a red mark on her left lip running to her cheek, which mark developed into a permanently disfiguring scar, and that the red mark corresponded to an arm of the prop used to keep her mouth open during the operation. *Held:* Nonsuit was correctly allowed, there being no evidence as to when or how the injury occurred and who caused it. *Ibid.*

PLEADINGS.

§ 1. Filing and Service of the Complaint.

Upon application for extension of time to file complaint the statement as to the "nature and purpose" of the action is sufficient if it apprizes defendant of the basis of plaintiff's claim so that defendant is not taken by surprise. *Sharpe v. Pugh*, 598.

The statement in an application for extension of time to file complaint that the nature and purpose of the action was to recover damages for wrongful death of plaintiff's intestate resulting from defendant's negligence in the care and treatment of intestate, *held* sufficient to entitle plaintiff to allege both an action for wrongful death and an action for pain and suffering endured by intestate from the time of injury until death, since defendant could not have been taken by surprise by the assertion of the separate claim for pain and suffering. *Ibid.*

PLEADINGS—*Continued.*

§ 2. Statement of Cause of Action in General.

The nature and purpose of an action is to be determined by the allegations of the complaint. *Rose's Stores v. Tarrytown Center*, 201.

§ 12. Office and Effect of Demurrer.

The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be reasonably deduced therefrom, construing the pleading liberally with a view to substantial justice between the parties, but the demurrer does not admit legal inferences or conclusions. *Woodard v. Carteret County*, 55.

A demurrer admits for its purpose the truth of the facts alleged in the complaint and relevant inferences of fact deducible therefrom, but it does not admit legal inferences or conclusions. *Lumber Co. v. Builders*, 337.

Upon demurrer, the complaint should be liberally construed with a view to substantial justice between the parties and the demurrer must be overruled unless the complaint is fatally defective. *Belmany v. Overton*, 400.

A demurrer admits for the purpose of testing the sufficiency of the complaint the truth of all factual averments well stated and all relevant inferences reasonably deducible therefrom, together with exhibits attached to the complaint and made a part thereof, but a demurrer does not admit inferences or conclusions of law. *Wright v. Casualty Co.* and *Wright v. Insurance Co.*, 577.

A demurrer does not admit the construction placed upon an instrument by the pleader when the instrument itself is incorporated in the pleading and the pleader's construction is repugnant to the language of the instrument. *Ibid.*

§ 15. Defects Appearing on Face of Pleading and "Speaking" Demurrers.

Where it does not appear from the complaint that insured had rejected coverage under the uninsured motorist clause in the policy, G.S. 20-270.21(b)(3), demurrer on the ground that insurer had a statement in its file rejecting such coverage by insured, which insurer would offer in evidence, cannot warrant the sustaining of a demurrer to the complaint, since matters *dc hors* the pleading may not be considered in passing upon the demurrer. *Wright v. Casualty Co.*, 577.

§ 18. Demurrer For Misjoinder of Parties and Causes of Action.

A complaint alleging that the male plaintiff is the owner in fee simple and is in possession of a described tract of land, that the dividing line between plaintiffs' tract and two adjoining tracts extended to and from a common corner, and that the owner of one of the contiguous tracts and the owners of the other contiguous tract had trespassed upon plaintiff's tract, and praying that the male plaintiff be declared owner of the land within the boundaries contended by him, that defendants be enjoined from trespassing thereon, and that plaintiffs recover a specified sum from each as damages for their respective trespasses, *held* demurrable for misjoinder of parties and causes of action, since plaintiff seeks not only the establishment of the dividing lines between his tract and the respective contiguous tracts, but also damages for independent trespasses by the owners of the contiguous tracts, and therefore the causes united in the complaint do not affect all the parties to the action. *Johnson v. Daughety*, 762.

PLEADINGS—*Continued.*

§ 19. Demurrer for Failure of the Pleading to State a Cause of Action or Defense.

Where plaintiff's allegations affirmatively disclose that the cause of action he attempted to allege is fatally defective, the court properly dismisses the action upon demurrer. *Tyndall v. Tyndall*, 106.

Upon a demurrer for failure to state a cause of action, a complaint must be liberally construed in favor of the pleader. *Milk Commission v. Food Stores*, 323.

A demurrer for failure of the complaint to state a cause of action admits for the purpose of testing the complaint all facts well pleaded in the complaint and appearing in any document attached thereto, together with all reasonable inferences therefrom, but it does not admit conclusions of law. *Kuykendall v. Proctor*, 510.

General allegations that defendant did things not authorized by law, without specifying the particular acts complained of, constitute a mere conclusion not admitted by demurrer. *Ibid.*

A demurrer for failure of the complaint to state a cause of action must be overruled when facts properly alleged in the complaint, together with inferences of fact reasonably deducible therefrom, entitle plaintiff to judgment granting any relief. *Ibid.*

§ 21.1. Judgment on Demurrer and Effect Thereof.

Upon sustaining a demurrer for failure of the complaint to allege a cause of action, the action should not be dismissed until the pleader has had opportunity to amend. *Mabe v. Green*, 276.

§ 24. Motions to be Allowed to Amend.

A motion to be allowed to amend after trial is begun is addressed to the discretion of the trial court, and the denial of the motion will not be disturbed in the absence of a showing of abuse. *Tyndall v. Tyndall*, 106.

The effect of sustaining a plea in bar is to destroy the cause of action alleged, and motion to be allowed to amend thereafter made by plaintiff is properly denied. *Montague v. Womble*, 152.

§ 28. Variance Between Proof and Allegation.

A material variance between allegation and proof warrants nonsuit for failure of plaintiff to prove the cause alleged, but whether a variance is material must be determined upon the facts of each particular case, and a variance which could not have misled defendant to his prejudice will not be deemed material. *McCrillis v. Enterprises*, 637.

Allegation that a contract of employment was for a period of six years, with evidence that the contract was for a period of five years modified by mutual consent so as to begin one year after the beginning of the employment, is not a material variance. *Ibid.*

A plaintiff must make out his case as alleged in the complaint. *Moody v. Kersey*, 614.

§ 34. Right to Have Allegations Stricken on Motion.

Where it is determined on appeal that a certain state of facts does not constitute a defense to plaintiff's action, and the cause is remanded, defendant's allegation thereafter of the same state of facts as a defense is properly stricken. *Bryant v. Dougherty*, 748.

The Superior Court has no jurisdiction to transfer to another tribunal a matter over which the Superior Court has jurisdiction and such other tribunal

PLEADINGS—*Continued.*

has none, and therefore an order of the Superior Court transferring a cause within its jurisdiction to the Industrial Commission is void, and such order, even though no appeal is entered therefrom, cannot constitute a bar, and allegations that such an order constituted *res judicata* are properly stricken on motion. *Ibid.*

An award of compensation to an employee against his employer and the employer's insurance carrier for an injury arising out of and in the course of the employment does not purport to adjudicate the employee's claim against a physician for damages sustained from the negligent treatment of the injury by the physician, and therefore allegations setting up the award of the Industrial Commission as a bar to the action for malpractice are properly stricken. *Ibid.*

Subsequent to a void order of the Superior Court transferring the cause to the Industrial Commission, the plaintiff requested the Commission to hear the matter. *Held:* Plaintiff's request that the Commission hear the matter could not confer jurisdiction on the Commission, since jurisdiction may not be conferred on a court by consent, and the order of the Commission dismissing the action cannot constitute *res judicata* of the plaintiff's right to proceed with the action in the Superior Court. *Ibid.*

There is no prejudicial error in striking from a pleading allegations which merely repeat or restate that which has been expressly alleged or necessarily implied in other portions of the pleading not stricken. *Bouligny, Inc., v. Steelworkers*, 160.

In an action by an employer against a labor union for libel, allegations of the answer to the effect that the statements were published in connection with the union's efforts to organize plaintiff's employees are relevant to the question of the union's qualified privilege and to the application of the modification of State law by the National Labor Relations Act, and were improperly stricken. *Ibid.*

There is no error in striking from a pleading matters which are not allegations of fact but mere conclusions. *Ibid.*

PRINCIPAL AND AGENT.

§ 6. Ratification and Estoppel.

The fact that a person dealing with an agent knows at the time that the agent does not have authority to bind the principal in the matter does not preclude ratification of the agreement by the principal. *McCrillis v. Enterprises*, 637.

PROCESS.

§ 9. Service by Publication.

Service by publication is in derogation of common law rights, and G.S. 1-98.2(3), providing for such service, must be strictly construed; even if a statute should be construed as authorizing a judgment *in personam* upon substituted service, such provision would be unconstitutional. *Fleek v. Fleek*, 736.

§ 15. Service on Nonresidents in Actions to Recover for Negligent Operation of Automobile in This State.

The statute providing for service of summons on a nonresident automobile owner by serving a copy on the Commissioner of Motor Vehicles and the forwarding of such copy to the nonresident by registered mail is constitutional, but its provisions are in derogation of the common law, and G.S. 1-89

PROCESS—*Continued.*

and G.S. 1-105 must be construed together and the provisions of both statutes strictly complied with. *Distributors v. McAndrews*, 91.

The summons in this action commanded the sheriff to summon the Commissioner of Motor Vehicles as a process agent for named nonresidents, and a copy thereof was duly mailed by the Commissioner to the named nonresidents with return receipt requested. *Held:* The nonresidents were not summoned, and, in the absence of a general appearance by them, the summoning of the Commissioner of Motor Vehicles is of no avail. The question of amendment is not apposite since there was no error in identifying the person summoned. *Ibid.*

PROPERTY.

§ 4. Criminal Prosecutions for Wilful or Malicious Damage to Property.

A warrant which fails to charge that defendants unlawful and wilful injury or damage to property was malicious, is fatally defective, and judgment thereon will be arrested *ex mero motu*. *S. v. Fisher*, 315.

RAPE.

§ 18. Prosecutions for Assault.

In a prosecution of defendant for a felonious assault of a ten year old child, nonsuit of the case cannot be properly entered if there is sufficient evidence of defendant's guilt of any offense included in the indictment. *S. v. Roberts*, 449.

Evidence in this case held amply sufficient to support the jury's verdict of guilty of assault with intent to commit rape. *S. v. Rose*, 406.

REFERENCE.

§ 3. Compulsory Reference.

Findings by the court after trial begun that the case required an examination of the books and records of the maker of the note sued on, with numerous calculations of interest, detailed examination of numerous exhibits, determination of the fair value of the stock of the maker of the note, and that from the volume of evidence the ends of justice would be best served by compulsory reference, *are held* sufficient to sustain the court's order of compulsory reference, G.S. 1-189, it not being required that the court use the exact words of the statute in characterizing a case for compulsory reference. *Shute v. Fisher*, 247.

The rule that a party waives the right to a compulsory reference by failing to make a motion therefor before the jury has been empaneled has no application to a compulsory reference ordered by the court *ex mero motu*, and where after trial has begun and after evidence has been introduced and numerous exhibits entered, the court finds facts supporting a compulsory reference and concludes that a compulsory reference would best serve the ends of justice the discretionary order of the court for a compulsory reference will not be disturbed. *Ibid.*

§ 4. Pleas in Bar.

A plea in bar which precludes a compulsory reference is one which extends to the whole cause of action so as to defeat it absolutely and entirely, and a plea amounting to a mere defense avoiding liability is not such plea in bar. *Shute v. Fisher*, 247.

REFERENCE—*Continued.*

In this action against the endorsers and guarantors of a note, defendants claim that the payee bank and not the plaintiff was the real party in interest, that defendants' endorsement was obtained by fraud, and that defendants were entitled to offset usury charged by plaintiff in the transaction. *Held:* The pleas were not sufficient to preclude the discretionary power of the court to order a compulsory reference. *Ibid.*

§ 5. Appointment and Removal of Referee.

Where the parties fail to agree upon a referee, the court may appoint a referee, and such appointment will not be disturbed when only one of the parties objects thereto. *Shute v. Fisher*, 247.

ROBBERY.

§ 2. Indictment.

A person who aids or abets another in the commission of armed robbery is guilty under the provisions of G.S. 14-87, and it is not required that the indictment charge defendant with aiding and abetting. *S. v. Bell*, 25.

§ 4. Sufficiency of Evidence and Nonsuit.

Where the indictment charges defendant with armed robbery of property from a named person and the entire proof is that the property was taken from a person of a different name, there is a fatal variance between the indictment and proof, and nonsuit should be allowed. *S. v. Bell*, 25.

The doctrine of recent possession obtains in prosecutions for robbery as well as in prosecutions for larceny and breaking and entering. *Ibid.*

Evidence that a portion of the property taken by armed robbery from a named person was found not more than 25 minutes after the robbery in defendant's automobile, which had been described by the victim and which was being operated by defendant from the direction where the armed robbery occurred, and that a pistol of the same description as that given by the victim as being used in the perpetration of the robbery was in plain sight on the seat of the automobile, is sufficient to be submitted to the jury on the question of defendant's guilt of armed robbery, notwithstanding the evidence tended to show that the actual perpetrator of the offense was a passenger in the car. *Ibid.*

§ 5. Instructions and Submission of the Question of Guilt of Less Degrees of the Crime.

Where all of the evidence discloses that the offense committed was that of armed robbery and the sole question is the identity of defendants as the perpetrators of the crime, it is not required that the court submit the question of defendants' guilt of less degrees of the offense charged. *S. v. Lentz*, 122.

SALES.

§ 16. Actions by Purchaser or User for Personal Injuries.

Evidence of negligence in delivering sulphuric acid in drum with defective bung held for jury. *Chandler v. Chemical Co.*, 395.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant and Waiver.

Where, upon defendant's objection to the admission in evidence of exhibits which were obtained from a search of defendant's automobile, the trial court,

SEARCHES AND SEIZURES —*Continued.*

in the absence of the jury, hears the State's evidence as to the circumstances under which the search was made, and defendant cross-examines the State's witness at length, but offers no evidence, although defendant had opportunity to do so, the ruling by the trial court that the evidence was competent is necessarily based on a finding that the search was legal, and the failure of the court to make specific findings of fact is not fatal. *S. v. Bell*, 25.

Where some half hour after the perpetration of armed robbery an officer stops an automobile fitting the description of the one used in conjunction with the robbery and observes a pistol on the seat of the automobile, the officer may arrest the driver and owner of the car without a warrant, G.S. 15-41, and, as an incident to the arrest, may search the automobile without a search warrant, and incriminating exhibits found in the car are competent in evidence, G.S. 15-27.1, particularly when the exhibits were visible from outside the automobile without the necessity of a search. *Ibid.*

A person may consent to a search of his premises, and such consent will render competent evidence obtained by the search, but the presumption is against the waiver of the constitutional right to be free from unreasonable searches and seizures, and the burden is upon the State to establish unequivocally that the consent was voluntarily, freely and intelligently given, free from coercion, duress or fraud. *S. v. Little*, 234.

Evidence held sufficient to support finding that defendant freely and voluntarily consented to search of his room. *Ibid.*

Upon the *voir dire* to determine the voluntariness of defendant's consent to a search of his premises, the weight to be given the evidence is peculiarly one for the trial judge, and his findings are conclusive when supported by competent evidence. *Ibid.*

Where, upon the arrest of defendant upon a fugitive warrant, an incriminating article is in plain view of the officers upon entering the room to which defendant admitted them, such article is properly admitted in evidence, since where no search is required the constitutional guaranty is not applicable. *S. v. Kinley*, 296.

The search with the free assent of the owner of a house in which defendant lived, as established by the owner's testimony, and the seizure of a gun belonging to the owner of the house from a part of the house not assigned to defendant, *held* not to require a search warrant, and the gun was properly admitted in evidence upon ballistics identification of it as the one used in the commission of the offenses, and defendant's motion to suppress the evidence was properly denied. *S. v. Bumpers*, 521.

Defendant, against whom incriminating evidence is procured by the search of premises with the consent of the owner, has no ground for complaint, since no constitutional right can be violated by a search with the consent of the owner of the premises. Constitutional guarantees must be applied with a view of protecting the public against criminals as well as protecting the innocent who are unjustly accused. *Ibid.*

Some two hours after a felonious breaking, officers apprehended a person, answering the description of the perpetrator, hiding behind a bush two blocks from the scene of the crime. *Held:* Under the circumstances it was lawful for the officer to arrest such person without a warrant and, as an incident to the arrest, to search him and take from him any property which might be competent as evidence in proving his guilt. *S. v. Tippett*, 588.

Where the circumstances are such as to authorize a police officer to arrest defendant without a warrant, it is not required, as a prerequisite to a search incidental to the arrest, that the officer make a formal declaration of arrest, and it is sufficient if the officer tells defendant upon apprehending the defend-

SEARCHES AND SEIZURES—*Continued.*

ant near the scene of the crime to get into the police car and advises him to take his hands out of his pockets. Fourth and Fourteenth Amendments to the Constitution of the United States. *Ibid.*

STATUTES.

§ 2. Constitutional Prohibition Against Enactment of Local or Special Acts Relating to Designated Subjects.

Chapter 1189, Session Laws of 1963, applicable solely to the Town of Beaufort and providing that in the event the sewerage system of a municipality shall have been declared a source of unlawful pollution to adjacent streams or waterways the municipality should not be required to extend any sewerage outfalls into an area annexed by it, *held* a local act relating to health and sanitation within the meaning of Article II, § 29, of the Constitution of North Carolina, and therefore void. *Gaskill v. Costlow*, 686.

§ 4. Procedure to Test Validity and Construction in Regard to Constitutionality.

A person who asserts that a particular act violates his rights under the Constitution ordinarily must point out the particular provision of the Constitution that he claims is violated. *S. v. Davis*, 1.

A statute will not be construed so as to raise a serious question as to its constitutionality when a reasonable construction will avoid such question. *Milk Commission v. Food Stores*, 323.

§ 5. General Rules of Construction.

While a statute must be construed to carry out the legislative intent, that intent must be found from the language of the act, its legislative history, and circumstances surrounding its adoption which will throw light upon the evil sought to be remedied, and such intent may not be established by testimony of members of the Legislature which adopted the statute nor by the affidavits of witnesses as to their opinion of the purpose of the act. *Milk Commission v. Food Stores*, 323.

The transcript of a Session Law as certified by the Secretary of State is controlling over the statement of its contents as codified. *Wright v. Casualty Co.*, 577.

The first two paragraphs of G.S. 1-240 are interrelated and must be construed *in pari materia*, and therefore when plaintiff has recovered judgment against defendants as joint tort-feasors, no one of defendants is entitled to file petition for a determination of the defendants' respective liabilities *inter se* unless and until such defendant has first paid the judgment and had it transferred to a trustee for his benefit. *Shaw v. Baxley*, 740.

TAXATION.

§ 19. Exemption of Property and Transactions from Taxation in General.

While statutory exemptions from tax liability must be strictly construed against the claim of exemption, such rule does not require that the plain language of the statute be distorted from its natural meaning in order to increase the revenue of the State. *Isaacs v. Clayton, Comr. of Revenue*, 424.

§ 25. Listing, Levy and Assessment of Property for Ad Valorem Taxes.

The principle that an administrative interpretation of a statute continued over a long period of time should be given consideration by the courts in the

TAXATION—*Continued.*

construction of the statute, loses its force when, for practical reasons, contest of the administrative interpretation would rarely be feasible. *Isaacs v. Clayton, Comr. of Revenue*, 424.

A truck comes under the generic term of motor vehicle, and under the provisions of G.S. 105-428, the National Market Report's Blue Book for Trucks may be used as a guide in ascertaining the tax valuation of trucks, either upon the theory that the Statute's specification of "Automobile Blue Book" is sufficiently broad to include the "Truck Blue Book" or that the Truck Blue Book is a "standard of value" which is reasonable, equitable and just within the purview of the statute. *In re Block Co.*, 765.

When tax authorities use the "Truck Blue Book" as a guide in ascertaining the fair market value of a truck, they must assess the property for taxation at the same percentage of its fair value as is used in assessing all other property. *Ibid.*

Tax authorities may not arbitrarily use the values set out in the "Truck Blue Book" in ascertaining the fair market value of trucks when the taxpayer introduces evidence of exceptional conditions affecting value. Therefore, where the taxpayer offers evidence that his trucks were constructed for a particular seasonal use and suffered depreciation equal to a full year in hard use during the season, such fact should be considered in ascertaining the fair market value of the trucks. *Ibid.*

§ 27. Liability for Inheritance, Estate and Gift Taxes.

The statutory exemption of $5000 for each child under 21 years of age in computing the inheritance taxes payable by a widow to whom the husband has willed substantially all of his property is a personal exemption to her and may not be limited to a deduction from the amount accruing to her under the provisions of her husband's will, but such exemption may be subtracted at her option from whatever interest passes to her by reason of his death, including one-half interest in property held by the entirety and funds payable to her from insurance policies on his life. *Isaacs v. Clayton, Comr. of Revenue*, 424.

The widow's election to claim the $5000 exemption from inheritance taxes for each child deprives the children of the exemption which otherwise would be theirs, and therefore where the wife claims the exemptions, the tax is correctly imposed against the entire funds passing to the children by revocable trusts. *Ibid.*

TELEPHONE COMPANIES.

§ 5. Indecent Calls.

Entrapment held not available to defendant charged with making indecent telephone calls. *S. v. Coleman*, 357.

The use of a diode device to prevent the originator of a telephone call from breaking the connection so that the telephone from which the call originated can be identified is to protect the telephone system from abuse by a threatening or obscene caller, and use of such device in no way violates the prohibition against wiretapping, since it does not involve the interception of any communication and the divulgence of its contents by a third person. *Ibid.*

TORTS.

§ 1. Nature and Elements of Torts.

Even though separate judgments against the employer and the employee may be obtained by the injured party for a tort committed by the employee in the course of his employment, there may be only one satisfaction for the

TORTS—*Continued.*

injury, and payment of one judgment extinguishes the other. *Bowen v. Insurance Co.*, 486.

The driver of one vehicle involved in a collision obtained judgment against the other driver. In another action instituted in another county, the first driver and his employer obtained judgment in a smaller amount against the owner of the second vehicle under the doctrine of *respondeat superior*, and this judgment was satisfied by payment into court of the amount of the recovery. *Held:* The payment by the employer of the second judgment extinguished the liability of its employee under the first judgment, particularly when the first driver rejected a settlement of the first judgment and elected to pursue his action against the employer. *Ibid.*

§ 2. Joint Tort-Feasors.

The actual tort-feasor and the party sought to be held liable for the tort solely under the doctrine of *respondeat superior* are not joint tort-feasors in the technical sense, since the employer's liability is derivative only and not predicated on any wrongful act on his part. *Bowen v. Insurance Co.*, 486.

§ 4. Right of One Defendant to Compel Contribution.

The right of contribution between joint tort-feasors is solely statutory and may be enforced only in accordance with the procedure set forth in the statute. *Shaw v. Baxley*, 740.

The first two paragraphs of G.S. 1-240 are interrelated and must be construed *in pari materia*, and therefore when plaintiff has recovered judgment against defendants as joint tort-feasors, no one of defendants is entitled to file petition for a determination of the defendants' respective liabilities *inter se* unless and until such defendant has first paid the judgment and had it transferred to a trustee for his benefit. *Ibid.*

§ 7. Release from Liability and Covenants Not to Sue.

An instrument under which a party covenants not to assert any claim or sue other named parties, directly or indirectly, for injuries or damages arising out of a specified accident, and stipulating that the agreement might be pleaded in bar to any action by the party executing the agreement or his heirs, executors, administrators, and assigns, *is held* a covenant not to sue and not a release. *Autry v. Jones*, 705.

A passenger in one vehicle involved in a collision sued the driver and the owner of the other vehicle involved in the collision, and defendants filed a cross-action for contribution against the driver of the vehicle in which plaintiff was riding. The driver of the car in which plaintiff was riding pleaded a covenant not to sue theretofore executed by the owner of his vehicle in favor of the owner and the driver of the other vehicle involved in the collision. *Held:* The covenant not to sue does not bar the cross-action for contribution, since the driver of the car in which plaintiff was riding was not a party to the covenant. *Ibid.*

A covenant not to sue executed by the owner of one car involved in a collision in favor of the owner and the driver of the other car involved in the collision precludes litigation *inter se* by either party to the agreement, but does not bar the owner and the driver of the second car from asserting a claim against the driver of the first car, who was not a party to the covenant, notwithstanding a settlement embodied in a consent judgment would constitute *res judicata* barring such claim. *Ibid.*

TRIAL.

§ 5. Course and Conduct of Trial in General.

In the absence of controlling statutory provision or recognized rule of procedure, the conduct of a trial rests in the sound judicial discretion of the trial court. *Shute v. Fisher*, 247.

§ 16. Withdrawal of Evidence.

In this action for wrongful death, a witness testified that the deceased left a wife and son. The court prevented the witness from answering a further question as to the condition of the son, and instructed the jury to disregard the testimony as to deceased's survivors. *Held:* By withdrawing the evidence the court cured any error. *Wands v. Cauble*, 311.

§ 20. Necessity for Motions to Nonsuit and Time of Determining Such Motions.

The court may not set aside the verdict of the jury on the ground that the court had committed error of law in denying defendant's motions for nonsuit aptly made, or for the insufficiency of the evidence as a matter of law to support the verdict. *Bittle v. Jarrell*, 266.

While ordinarily the question of the sufficiency of the evidence to be submitted to the jury must be presented by motion to nonsuit, it is not error for the trial court on its own motion to grant nonsuit when the evidence would justify a directed verdict, G.S. 1-183, since the legal effect is the same. *Nunn v. Smith*, 374.

When defendant offers evidence, only his motion to nonsuit at the close of all of the evidence need be considered in determining the sufficiency of the evidence to be submitted to the jury. *Belmany v. Overton*, 400.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, resolving all conflicts and inconsistencies in his favor and giving him the benefit of all reasonable inferences therefrom. *McCrillis v. Enterprises*, 637.

On motion to nonsuit, defendant's evidence which tends to establish an affirmative defense or which is contradictory to that offered by plaintiff must be disregarded. *Ibid.*

§ 26. Nonsuit for Variance.

A material variance between allegation and proof warrants nonsuit for failure of plaintiff to prove the cause alleged, but whether a variance is material must be determined upon the facts of each particular case, and a variance which could not have misled defendant to his prejudice will not be deemed material. *McCrillis v. Enterprises*, 637.

Allegation that a contract of employment was for a period of six years, with evidence that the contract was for a period of five years modified by mutual consent so as to begin one year after the beginning of the employment, is not a material variance. *Ibid.*

§ 31. Directed Verdict and Peremptory Instructions.

The correct form of a peremptory instruction in favor of the party upon whom rests the burden of proof is that the jury should answer the issue in the affirmative if they found the facts to be as all of the evidence tended to show, and should answer the issue in the negative if the jury should not so find. A peremptory instruction which does not add that the jury should answer the issue in the negative if they should not so find the facts to be, must be

TRIAL—*Continued.*

held for prejudicial error in failing to leave it to the jury to decide the issue. *Electro Lift v. Equipment Co.*, 433.

§ 35. Expression of Opinion on Evidence in Instructions.

G.S. 1-180 proscribes the trial court from expressing or indicating an opinion on the facts, either directly or indirectly. *Stanback v. Stanback*, 497.

§ 37. Instructions — Statement of Contentions.

The fact that the court necessarily takes more time in stating the contentions of one party than in stating the contentions of the other is not alone ground for complaint. *Durham v. Realty Co.*, 631.

§ 38. Requests for Instructions.

If a party desires fuller or more specific instructions on a particular aspect of the case he should make a special request therefor prior to verdict. *Miller v. Henry*, 97.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence.

Motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the sound discretion of the trial court. *Watson v. Stallings*, 187.

§ 53. New Trial for Error of Law During Trial.

The court may not set aside the verdict of the jury on the ground that the court had committed error of law in denying defendant's motions for nonsuit aptly made, or for the insufficiency of the evidence as a matter of law to support the verdict. *Bittle v. Jarrell*, 266.

TRUSTS.

§ 6. Title, Authority and Duties of Trustee.

A court of equity will always compel a trustee to exercise a mandatory power and will control his exercise of a discretionary power when it is shown that he has exercised such discretionary power dishonestly or from other improper motives. *Kuykendall v. Proctor*, 510.

§ 8. Income from Written Trusts and Persons Entitled Thereto.

Provision that trustee should provide reasonable comforts to life beneficiary held mandatory. *Kuykendall v. Proctor*, 510.

VENUE.

§ 5. Actions Involving Title to or Right to Possession of Property.

Where the facts alleged in the complaint put in issue the title to land, or the judgment which may be rendered thereon would affect an interest in land, the action is removable as a matter of right upon motion aptly made to the county in which the land is situate. *Rose's Stores v. Tarrytown Center*, 201.

Plaintiff lessee brought this action in the county of its residence against defendant lessor to enjoin lessor from constructing a building which plaintiff alleged would encroach upon the parking area and driveway rights which were guaranteed to plaintiff in the lease of a store in lessor's shopping center. *Held:* The action is to obtain a decree *in personam* to enforce contractual rights under the lease, and judgment would not alter the terms of the lease,

VENUE—*Continued.*

require notice to third parties, or affect title to the land, and therefore defendant's motion to remove as a matter of right to the county in which the land is situate was properly denied. *Ibid.*

§ 7. Motions to Remove as Matter of Right.

A motion for change of venue made before the time for answer has expired is made in apt time. *Rose's Stores v. Tarrytown Center*, 201.

WILLS.

§ 27. General Rules of Construction.

Where the words of a will are plain and intelligible but ambiguity arises in its designation of a beneficiary in one clause and the particular property intended to be devised in another, the ambiguities are latent and evidence *de hors* the instrument is competent to ascertain the intent of testatrix, and when such evidence clarifies testatrix' intent the provisions of the will will not be declared void for uncertainty. *Redd v. Taylor*, 14.

§ 32. Rule in Shelley's Case.

When applicable, the rule in *Shelley's* case is applicable to both real and personal property in this jurisdiction. *Ray v. Ray*, 715.

The rule in *Shelley's* case applies to a devise or bequest only if testator uses the word "heirs" in its technical sense of heirs general, designating persons to take in an indefinite line of succession, and when used to refer to the children or issue of the first taker, the rule does not apply; however, it will be presumed that testator used the technical term in its technical sense unless the contrary intent can be ascertained from the language of the instrument. *Ibid.*

Testatrix devised and bequeathed all her property to her daughter during her lifetime and at her death to the "heirs of her body, if any", with further provision that if the daughter should die before testatrix without heirs of the body, the property should go to named collateral kin. *Held:* The daughter takes a fee tail under the rule in *Shelley's* case, converted into a fee simple by G.S. 41-1, since the instrument does not show that testatrix intended to use the word "heirs" in a sense other than heirs general, there being no limitation over in the event the daughter survived testatrix and then died without issue. *Ibid.*

§ 35. Defeasible Fees, Shifting Uses, and Estates Upon Special Limitations.

Provision in a will that others named should take in the event the primary beneficiary should predecease testatrix without heirs, creates a gift in substitution which is eliminated if the primary beneficiary survives testatrix. *Ray v. Ray*, 715.

§ 50. Designation of Charities.

Testatrix devised and bequeathed property to "World Missions." The Division of World Missions of the Board of Missions of the Methodist Church, Inc., and the Board of World Missions of the Presbyterian Church in the United States, Inc., claimed to be the beneficiary. The evidence tended to show that testatrix was a lifelong and devout Presbyterian, and that the agency for the Board of World Missions of the Presbyterian Church was commonly referred to as "World Missions" and was so denominated in the Church bulletin and on envelopes provided for donations. *Held:* The latent ambiguity

WILLS—*Continued.*

is resolved by the competent evidence *de hors* the instrument, and the agency of testatrix' denomination takes the property. *Redd v. Taylor*, 14.

§ 55. Sufficiency of Description of Land or Chose.

Evidence held to make certain the boundaries of that part of a larger tract of land which testatrix intended to devise to claimants. *Redd v. Taylor*, 14.

§ 63. Whether Beneficiary is Put to His Election.

The doctrine of election is in derogation of the property right of the true owner, and therefore a beneficiary will not be put to his election unless it clearly appears from the terms of the will that testator intended to put him to an election, and the doctrine does not apply to testator's devise of property belonging to the beneficiary under the mistaken belief of testator that the property was his own. *Breece v. Breece*, 605.

Testator devised to named beneficiaries property owned by himself and wife by the entirety, and also devised to his wife a piece of property which she owned in fee simple, and devised other property owned by him to his wife. It appeared from the will in its entirety that testator regarded all of the property disposed of in the will as his own and that he had no intent to put his wife to an election. *Held:* The doctrine of election does not apply and the land held by the wife in fee and the land devolving to her by survivorship remains hers notwithstanding her acceptance of other property of testator passing to her under the will. *Ibid.*

§ 66. Ademption.

Where, subsequent to the execution of a will devising described real estate to a named beneficiary, testatrix becomes incompetent and remains incompetent until her death, and during her incompetency her trustee sells the real estate under order of court for the support of testatrix, the doctrine of ademption does not apply, and the devisee is entitled to the funds traceable to the proceeds of sale to the extent that such funds are not needed to meet debts of the estate or cost of administration. G.S. 33-32. *Grant v. Banks*, 473.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

1-21. Fact that action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute the action one accruing to a resident of this State within the meaning of the proviso. *Broadfoot v. Everett*, 429.

1-25. New action may be instituted within one year after voluntary nonsuit. *Bryant v. Dougherty*, 748.

1-69.1, 1-97(6). Unincorporated labor union may be sued as legal entity. *Bouligny v. Steelworkers*, 160.

1-76. Action of decree to enforce rights under lease to user of easement is not action affecting realty. *Rose's Stores v. Tarrytown Center*, 201.

1-83. Motion for change of venue made before time for answer has expired is made in apt time. *Rose's Stores v. Tarrytown Center*, 201.

1-89, 1-105. Must be construed together, and provisions of both statute complied with in order to support service. *Distributors v. McAndrews*, 92.

1-98.2(3). Statute must be strictly construed and may not authorize judgment *in personam* upon substituted service. *Fleek v. Fleek*, 736.

1-123. Demurrer for misjoinder of parties and causes of action held properly sustained. *Johnson v. Daughety*, 762.

1-131. Ordinarily, action should not be dismissed on demurrer until pleader has opportunity to amend. *Mabe v. Green*, 276.

1-151. Upon demurrer, allegations of complaint will be liberally construed. *Woodard v. Carteret County*, 55.
Demurrer will be overruled unless complaint, liberally construed, is fatally defective. *Belmany v. Overton*, 400.

1-153. Repetitious allegations are properly stricken on motion. *Bouligny v. Steelworkers*, 160.

1-168, 1-169. Variance which could not mislead opposing party is not material. *McCrillis v. Enterprises*, 637.

1-180. Proscribes trial court from expressing opinion on facts in any matter at any time. *Stanback v. Stanback*, 497.
Instruction on presumption which does not charge the jury that they could find to the contrary on supporting evidence, is error. *S. v. Cooke*, 644.
It is error for the court to charge that presumption pleaded by G.S. 20-139.1 places the burden upon defendant to rebut the presumption. *S. v. Jent*, 652.
Assignment of error that court failed to charge as required by statute is broadside and ineffectual. *S. v. McCaskill*, 788.
Charge in this case held without prejudicial error. *S. v. Barber*, 222.
Evidence held insufficient in failing to apply law to facts in evidence. *Jackson v. McBride*, 367.
Act of court in having witness arrested and placed in custody in view of jury held prejudicial. *S. v. McBryde*, 776.

1-183. When defendant offers evidence, only motion to nonsuit made at close of all evidence will be considered. *Belmany v. Overton*, 400.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

Trial court may grant motion to nonsuit *ex mero motu* when evidence would justify directed verdict. *Nunn v. Smith*, 374.

1-189. Findings held to support order for compulsory reference. *Shute v. Fisher*, 247.

1-190. Where parties fail to agree on referee, court may appoint referee. *Shute v. Fisher*, 247.

1-239. Payment of amount of judgment to clerk satisfies the judgment. *Bowen v. Ins. Co.*, 486.

1-240. First two paragraphs of statute must be construed together, and therefore one defendant is not entitled to file petition for determination of rights of defendant *inter se* unless he has first paid judgment and had it transferred to trustee. *Shaw v. Baxley*, 740.

1-254. Complaint held to state cause of action under Declaratory Judgment Act to determine validity of apportionment for election of county commissioners. *Woodard v. Carteret County*, 55.

1-277. Motion to strike allegations stating cause of action amounts to a demurrer thereto and is immediately appealable. *Sharpe v. Pugh*, 598. One tort-feasor cannot be party aggrieved by error relating to co-defendant. *Childers v. Seay*, 721.

1-311, 1-410. Evidence held insufficient against the person of defendant issuing worthless check. *Nunn v. Smith*, 374.

1-500. If building violated restrictive covenants, mandatory injunction would lie, and therefore dissolution of temportry restraining order is interlocutory order not affecting substantial right. *Currin v. Smith*, 108.

1-568.24(a). Defendant is entitled to introduce plaintiff's pretrial examination in evidence. *Watson v. Stallings*, 187.

5-1, 5-2, 5-5, 5-7, 5-8, 5-9. Evidence held sufficient to support finding that defendant wilfully violated terms of prior restraining order. *Rose's Stores v. Tarrytown Center*, 206.

8-46. Evidence held to support charge of damages for permanent injury. *Chandler v. Chemical Co.*, 395.

14-5. Person who counsels, procures or commands another to commit a felony is guilty as an accessory before the fact. *S. v. Bell*, 25.

14-32. Evidence held sufficient to show that knife was deadly weapon. *S. v. White*, 78.

14-33. Statute merely provides different punishments for various types of assault. *S. v. Roberts*, 655.

14-54. Evidence held sufficient for jury in prosecution for felonious breaking and entering. *S. v. Worthey*, 444.
Evidence held insufficient to support verdict of nonburglarious entry. *S. v. Fikes*, 780.

14-87. Person who aids or abets another in commission of felony is guilty. *S. v. Bell*, 25.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

14-127. Warrant that fails to charge that injury to property was malicious is fatally defective, *S. v. Fisher*, 316.

14-196.1. Entrapment held not available to defendant under evidence in this case. *S. v. Coleman*, 357.

15-4.1, 15-197. Defendant has no constitutional right to be represented by counsel at hearing to determine revocation of probation, since proceeding to revoke probation is not criminal prosecution. *S. v. Hewett*, 348.

15-5. Does not provide for payment of fees to lawyer representing indigent defendant in Federal Court. *S. v. Davis*, 1.

15-10.2. Notice must be given to solicitor and not to clerk in order for defendant to be entitled to limitation. *S. v. White*, 78.

15-27.1. Incriminating exhibits are competent when officer had right to search car without warrant. *S. v. Bell*, 25.

15-41. Officer may arrest without warrant when he has reasonable grounds to suspect person guilty of felony. *S. v. Bell*, 25.

15-41(1). Officer may arrest motorist whom officer sees violating speed limit. *S. v. McCaskill*, 788.

15-173. Failure to renew motion to nonsuit at close of all of the evidence waives motion made at close of State's evidence. *S. v. Fikes*, 780; *S. v. Prince*, 769.

17-39, 17-39.1. Action for divorce ousts custody jurisdiction under writ of *habeas corpus. In re Custody of Sauls*, 180.

17-39, 50-13. Judgment awarding custody of children under G.S. 17-39 does not oust jurisdiction of court to hear motion for custody in divorce action. *Swicegood v. Swicegood*, 278.

20-28. Warrant charging operating motor vehicle while license was suspended need not make specific reference to the statute. *S. v. Blacknell*, 104.

20-71.1. Admission of ownership of vehicle takes issue of *respondeat superior* to jury, but when all evidence shows that driver was not agent, court should give peremptory instruction in favor of owner. *Belmary v. Overton*, 400.

20-129.1. Failure to have statutory lights is negligence *per se*. *White v. Mote*, 544.

20-138, 20-139.1. Presumption created by G.S. 20-139.1 merely authorizes but does not compel affirmative finding of intoxication. *S. v. Cooke*, 644; *S. v. Jent*, 652.

20-156(a), 20-171. Right of way to vehicle on highway must be yielded by person riding an animal as well as driving a vehicle. *Watson v. Stallings*, 187.

20-166(a)(c). Evidence of defendant's guilt of hit and run driving. *S. v. Glover*, 319.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-279.21. Policy provisions that uninsured motorist clause should constitute only excess insurance held contrary to statutory provisions in regard to liability to passenger intestate. *Moore v. Ins. Co.*, 532.

20-279.21(b)(3). Where it does not appear from complaint that insured had rejected coverage under uninsured motorist clause, demurrer on ground that insurer had statement in its file rejecting such coverage by insured does not warrant demurrer. *Wright v. Casualty Co.*, 578.

20-279.21(f)(1). Policy violations by insured do not preclude insured third party from recovering on assigned risk policy. *Jones v. Ins. Co.*, 454.

23-1, 23-2. Transfer by debtor of his property in exchange for other property of different form is not unlawful. *Estridge v. Denson*, 556.

28-175(3). Upon death of incompetent, right of action for amount incompetent's estate was decreased by failure of guardian to collect funds and right of action for wrong done incompetent in failing to provide her with reasonable comforts, survives to incompetent's personal representative. *Kuykendall v. Proctor*, 510.

33-20. Guardian may be held liable to incompetent's estate for amount the estate is reduced by failure to collect funds bequeathed for support of incompetent. *Kuykendall v. Proctor*, 510.

33-32. Sale of chattel by incompetent's guardian does not adeem bequest of such chattel in incompetent's will. *Grant v. Banks*, 473.

41-1. Under devise in this case daughter took fee tail under Rule in *Shelley's* case converted into fee simple. *Ray v. Ray*, 715.

44-38, 44-39. Claim held to show that materials were furnished under severable contract and materials were not itemized as required by statute. *Lumber Co. v. Builders*, 337.

50-16. Motion that defendant be held in contempt for failure to make payments held not demurrable. *Ring v. Ring*, 113.
Evidence held insufficient to support finding of adultery so as to deny alimony *pendente lite*. *Myers v. Myers*, 263.

55-32. Liabilities imposed by this statute upon directors of corporation are in addition to other liabilities imposed by common law. *Underwood v. Stafford*, 700.

58-42. Motion for continuance and for bill of particulars is addressed to sound discretion of Insurance Commissioner. *Elmore v. Lanier*, 674.

62-3(23). Municipality may not enforce police regulations by threatening to cut off electricity. *Dale v. Morganton*, 567.

84-14. Attorney is entitled to argue legitimate contention to jury and to read pertinent statute and decision of Supreme Court. *Wiles v. Mullinax*, 661.

90-88. Circumstantial evidence held insufficient to show that defendant had marijuana in his possession. *S. v. Chavis*, 306.

97-29. Disability as used in Compensation Act refers not to physical injury but to diminished capacity to earn money. *Burton v. Blum & Son*, 695.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

Limitations on compensation payments do not apply to payments for spinal cord and brain injuries. *Godwin v. Swift & Co.*, 690.

97-99. Valid binder for compensation insurance cannot be cancelled until after statutory notice. *Wiles v. Mullinax*, 661.

105-428; 105-294. Blue Book for Trucks may be used as guide in ascertaining truck's valuation. *In re Block Co.*, 765.

106-266.8(a)(3), G.S. 106-266.21. Evidence held not to sustain finding that defendant's chain store was selling milk below cost for purpose of creating monopoly. *Milk Comm. v. Food Stores*, 323.

136-104. Title passes upon Commission's declaration of taking and filing of deposit in court. *Highway Comm. v. Myers*, 258.

160-20.1. Desk officer may not issue warrant of arrest. *S. v. Matthews*, 35.

160-182. Municipal code substantially incorporating conditions specified in the statute as prerequisite to closing of dwelling house is valid. *Dale v. Morganton*, 567.

160-191.1. Municipality waives governmental immunity provisions under governmental insurance. *White v. Mote*, 544.

160-435.5(h). Owner of property may maintain suit against municipality to compel it to follow through on planned utilities. *Safrit v. Costlow*, 680.

160-453.6. Land owner may attack validity of annexation in accordance with statutory procedure. *Gaskill v. Costlow*, 686.

160-453.17(8). The extension of sewer lines by a city into annexed area is not condition precedent to effective annexation. *Dale v. Morganton*, 567.

160-453.19. Requirement that map of annexed territory be recorded in office of register of deeds is not condition precedent to effective annexation, *Dale v. Morganton*, 567.

160-453.23. Chapter 1009, Session Laws of 1959, has been in full force since July 1959. *Dale v. Morganton*, 567.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

I, §§ 1, 17. Requirement that insurer doing business in this State issue proportionate share of assigned risk policies is constitutional. *Jones v. Ins. Co.*, 454.

I § 11. In prosecution for aiding and abetting, admission of record showing that co-defendants had pleaded guilty to the offense deprives defendant of right of confrontation. *S. v. Jackson*, 773.

To compel defendant to reply to question after admonition that his silence as well as his statement might be used against him is unconstitutional. *S. v. Fuller*, 710.

Testimony of witness at former trial is competent when witness has left the jurisdiction after prior trial terminated at instance of defendant. *S. v. Prince*, 769.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

I, § 14. Sentence which does not exceed statutory maximum is not cruel or unusual. *S. v. LePard*, 157.

I, § 17. Attorney is not deprived of due process by having to represent indigent defendant without fee. *S. v. Davis*, 1.

II, § 29. Statute applicable to one town providing that town should not be required to extend any sewerage outfalls into area annexed by it because of unlawful pollution held void. *Gaskill v. Costlow*, 686.

IV, § 1. General Assembly may not establish any courts other than as permitted by this Article as amended. *S. v. Matthews*, 35.

IV, § 10(1). Supreme Court has power to issue any remedial writ necessary to give it control over lower courts. *S. v. Davis*, 1.

XIV, § 3. Legislative power over public purse is supreme. *S. v. Davis*, 1.

CONSTITUTION OF UNITED STATES, SECTIONS OF, CONSTRUED.

First Amendment. Freedom of speech and of press affords no protection against action for libel or slander. *Bouligny v. Steelworkers*, 160.

First Amendment, Fourteenth Amendment. First Amendment is binding on states by virtue of Fourteenth Amendment. *Bouligny v. Steelworkers*, 160.

Fourth Amendment. Formal declaration by officer of arrest is not required, it being sufficient if officer tells person apprehended to get into police car. *S. v. Tippett*, 588.

Fourth Amendment, Fourteenth Amendments. Fourth Amendment is made applicable to States by Fourteenth Amendment. *S. v. Tippett*, 588; *S. v. Matthews*, 35.

Fourteenth Amendment. Attorney is not deprived of due process by having to represent indigent defendant without fee. *S. v. Davis*, 1.

Testimony of witness at former trial is competent when witness has left the jurisdiction after prior trial terminated at instance of defendant. *S. v. Prince*, 769.

In prosecution for aiding and abetting, admission of record showing that co-defendants had pleaded guilty to the offense deprives defendant of right of confrontation. *S. v. Jackson*, 773.

Requirement that insurer doing business in this State issue proportionate share of assigned risk policies is constitutional. *Jones v. Ins. Co.*, 454.

Warrant may not be issued by police desk officer. *S. v. Matthews*, 35.